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JUDGES OF THE HIGH COURT.

JANUARY—JUNE, 1961.

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The Hon'ble Dr. P. V Rajamannar, B.A., B.L., D. LITT. (Retired on 10th May, 1961).

Officiating Chief Justice.

,, Mr. S. Ramachandra Ayyar, B.A., B.L. (From 10th May, 1961).

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The

Madras Law Journal Reports

I] JANUARY [1961

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN AND MR. JUSTICE SRINIVASAN

Chinna Sandhanam .. *Petitioner**

Madras Prohibition Act (X of 1937), *sections* 5 *and* 16 (1)—*Applicability—Rendering varnish potable and fit for human consumption as illicit liquor—Offence committed in* 1959, *after amendment of Rules Relating to the Manufacture Import, Use and Sale of Varnish* (1952)—*If punishable under section* 5 *or under section* 16 (2) —*Amendment of rule in* 1959—*Effect of.*

Where the accused, a jutka driver, was found guilty of having in his possession a bottle of varnish made palatable and potable as illicit liquor, in 1959, after the amendment of the Rules Relating to the Manufacture Import, Use and Sale of Varnish :

Held : That the accused was clearly guilty of an offence under section 5 of the Act and punishable as such, because after the deletion of rule 10 of the Rules relating to varnish in 1959, the rendering or attempting to render any spirit, or preparation containing spirit which has been denatured, fit, for human consumption, is not a breach of the Rules under section 16 of the Act, but is an offence punishable directly under section 5 of the Act.

Amir Sultan v. *State,* (1957) Mad. L.J. (Crl.) 209, distinguished.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the District Magistrate (*J*), Madurai, dated 5th November, 1959 and passed in Criminal Appeal No. 289 of 1959, preferred against the Judgment of the Court of the Sub-Magistrate No. 1, Madurai, dated 19th October, 1959 and passed in C.C. No. 1975 of 1959.

T. Sathiadev, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

When the petition first came on for hearing before him the following Order of Reference was made by

Ramaswami, J.†—This is a case of a jutka driver who had in his possession a bottle of varnish made palatable and potable as illicit liquor. The point raised by Mr. Sathiadev was also raised in the Court below, namely, whether the petitioner could not be punished for infringement of the Rules framed under section 16 or whether he should be punished under section 5 of the Madras Prohibition Act. It makes a lot of difference to the accused because if it is an infringement of the Rules, the maximum penalty is six months. If, on the other hand, it is an infringement of the Act, the minimum punishment itself is six months.

It is no doubt true that this question indirectly arose in a Bench decision of this Court reported in *Hussain Bee* v. *State*[1], and in another single Judge's decision in *Amir Sultan* v. *State*[2].

* Crl. R.C. No. 1261 of 1959. (Crl. R.P. No. 1221 of 1959.) — 11th July, 1960 (20th Asadha, 1881, Saka).

† 7th April, 1960.

1. (1955) 2 M.L.J. 285.
2. (1957) M.L.J. (Crl.) 209.

In both those cases the point arose in another fashion and not as here where an ordinary citizen who is permitted to keep a little amount of varnish probably to paint his jutka or furniture in his house has converted it into an illicit liquor making it potable by adding some substance. The considerations which weighed with the Judges in those two cases may not arise at all here.

Inasmuch as I understand that varnish drinking is on the increase, this requires an authoritative pronouncement. The papers will be placed before the learned Chief Justice for orders regarding posting it before a Bench if My Lord is so pleased.

In pursuance of the above Order of Reference the petition was posted before a Bench (*Anantanarayanan and Srinivasan, JJ.*).

G. Ramakrishnan for *T. Sathiadev, V. R. Venkatasamy* and *G. Arunachalam*, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

The Judgment of the Court was delivered by

Anantanarayanan, J.†—This is a reference by Ramaswami, J., arising from the facts of the case. The learned Judge felt that there was need for an authoritative pronouncement upon the point involved. The revision petitioner was convicted under section 5 of the Madras Prohibition Act for the alleged offence of rendering potable and fit for human consumption as illicit liquor, a bottle of varnish in his possession. The point raised was whether the revision petitioner could be convicted under section 5 of the Madras Prohibition Act, when, according to his learned counsel, the offence was strictly punishable under the Rules framed under section 16 (1) of the Act, for which the maximum penalty is provided under section 16 (2) of the Act. Ramaswami, J., felt that the decision of this Court in *Amir Sultan* v. *State*[1] which laid down the proposition that an offence committed in respect of the transport of denatured spirit contravening certain rules framed under section 16, could be dealt with only as an infringement of those rules and not under section 4 (1) (*a*) of the Act, had to be distinguished upon its facts, and did not apply to the present situation. We have now scrutinised this matter, in the light of recent amendments to the Rules, and the actual position in law appears to us to be quite clear and free from any difficulty. The position is as follows :

With reference to the Rules framed under section 16 (1) of the Act as they originally stood, rule 10 laid down that " no person shall render or attempt to render varnish fit for human consumption". Under rule 11, a breach of all or any of the Rules promulgated was liable to be punished with imprisonment which might extend to six months or with fine which might extend to Rs. 1,000 or with both. Undoubtedly, had rule 10 stood unaltered, the present offence would also fall within the ambit of that rule, and, upon the broad principle of *Amir Sultan* v. *State,*[1] referred to earlier, would be punishable only under the Rules, and not under section 5 or any other section of the Prohibition Act itself. Apparently, the authorities realised this position and were anxious that this particular infringement should be punishable under section 5 of the Act, as it directly constitutes an offence within the wording of section 5 of the Madras Prohibition Act. Consequently, the authorities eliminated the rule set forth by us earlier, and substituted therefor a note to the following effect.... "the rendering or attempting to render any spirit or preparation containing spirit which has been denatured fit for human consumption....is punishable under section 5 of the Act". Further, as these Rules amended in 1959 stand, this particular act of rendering a preparation containing spirit which has been denatured, fit for human consumption, is not a breach of the Rules, and is not punishable under the Rules *per se.*

That being so, the legal position is very clear that this act is punishable under section 5 of the Prohibition Act alone, since it is clearly an offence within the ambit of the section. The present revision petitioner would certainly have a case, if he had

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† 11th July, 1960.

1. (1957) M.L.J. (Crl.) 209.

committed the offence before the Rules were amended, and when this offence constituted a breach of the Rules punishable under those Rules. Admittedly he has not done so, and he committed the offence only after the elimination of this offence from the scope of the Rules. Consequently, the Courts below were perfectly justified in holding that the offence was punishable under section 5 of the Act alone and in dealing with the revision petitioner accordingly. The conviction must therefore be confirmed, and the sentence does not appear to us to be excessive or to merit any interference.

The conviction and sentence are confirmed, and the Revision Petition is dismissed.

P.R.N. ——— *Petition dismissed.*
Conviction and sentence confirmed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE BASHEER AHMED SAYEED.

Messrs. Standard Vacuum Oil Company at Madras represented by K. S. Rangaraj, Manager .. *Appellant**

v.

The Additional Commissioner for Workmen's Compensation, Madras and others .. *Respondents.*

Madras Shops and Establishments Act (XXXVI of 1947), *sections* 4 (1) (*a*) *and* 41 (2)—*Person employed in position of management—Test.*

Constitution of India (1950), *Article* 226—*Jurisdiction under.*

Where there is a manifest error of law which goes to the root of the jurisdiction of the tribunal *viz.*, whether a particular employee would fall within the category of persons protected by any Statute which is not a mere question of fact, but a question of law to be decided on proved facts, it is open to the Court to go into facts and decide the question and issue a writ of *certiorari* to quash the order of a tribunal if on the facts the tribunal has committed a patent error of law.

To decide whether a person employed is employed in the position of management within the meaning of section 4 (1) (*a*) of the Madras Shops and Establishments Act, 1947, the distinction between 'managerial capacity' and 'position of management' should be borne in mind. The amount of pay or salary drawn may not be an absolute test. The mere fact that the employee concerned was subject to the overall supervision of a superior officer would not by itself make the employee any the less a person employed in a position of management, if in fact he is one such having regard to the nature and scope of his duties.

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Balakrishna Ayyar, dated 1st September, 1959 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 573 of 1959 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the record relating to the order of the Additional Commissioner for Workmen's Compensation in M.S.E. No. 251 of 1958, dated 30th April, 1959 and quash the said order.

The Advocate-General (*V. K. Tiruvenkatachari*), *S. Govind Swaminathan* and *S. S. Sivaprakasa*, for Appellant.

The Additional Government Pleader (*M. M. Ismail*) and *K. K. Venugopal*, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—The facts which led up to these two appeals may be briefly stated. Prem Sagar, the contesting respondent in the two appeals, was holding a gazetted appointment with the Government of India as an Assistant Engineer.

* W.A. Nos. 139 and 140 of 1959. 18th February, 1960.
(29th Magha, 1881, Saka).

On 5th February, 1951, Messrs. Standard Vacuum Oil Company, Madras, took him into their service as a temporary Roads Engineer on a salary of Rs. 350 per mensem. On 1st June, 1952, he was promoted as an Operating Engineer on a salary of Rs. 450 per month. The designation of his post was changed to Operations Assistant in 1956. By the end of February, 1958, he was drawing a salary of Rs. 1000 per mensem. The Company alleged that, some time prior to August, 1957, his work was unsatisfactory, he was unco-operative, malingering, and generally, his productive capacity was below standard ; and he was advised that improvement would be necessary. In September, 1957, his work was again reviewed and still found unsatisfactory. In view of this, he was placed on probation for a period of six months, commencing from 1st October, 1957. In February, 1958, his progress was again reviewed, and it was found that he did not have the capacity to exercise the full responsibilities of an Operations Assistant. He was accordingly offered a position as a Senior Operations Supervisor on a salary of Rs. 900 per mensem. This decision was communicated to him on 21st February, 1958. He however, took leave till 30th April, 1958, and, therefore claimed to rejoin duty on 2nd May, 1958, as Operations Assistant. But he was prevented from doing so. Since he would not accept the employment offered to him, his services were terminated with effect from 30th April, 1958. He filed an appeal against this order, terminating his services, before the Commissioner for Workmen's Compensation, purporting to be under section 41 (2) of the Madras Shops and Establishments Act, 1947. On behalf of the Company, an objection was raised as to the maintainability of the appeal on the ground that he came within the exemption contained in section 4 (1) (*a*) of the Act. The question whether the provisions of the Act applied to him was referred to the Commissioner of Labour, Madras, under section 51 of the said Act, who, by his order dated 12th January, 1959, held that the exemption contained in section 4 (1) (*a*) of the Act would not apply to the respondent. After this decision of the Commissioner of Labour, the Additional Commissioner for Workmen's Compensation proceeded to dispose of the appeal before him after enquiry. He held that the termination of the services of the respondent was not for a reasonable cause. He therefore set aside the order of the Company. The Company thereupon filed two writ petitions, W.P. No. 521 of 1959 to quash the order of the Commissioner of Labour passed under section 51 of the Act, and W.P. No. 573 of 1959 to quash the order of the Additional Commissioner for Workmen's Compensation, setting aside the Company's order under section 41 (2).

The petitions were heard by Balakrishna Ayyar, J. After a long and exhaustive discussion of the provisions of the Madras Shops and Establishments Act, 1947, the learned Judge was inclined to hold that the respondent, Prem Sagar, was not a person who would be entitled to the benefits of the provisions of the Shops and Establishments Act. But he considered that he was precluded from so holding , because of two decisions of this Court, which, according to him, were directly applicable, namely, *Ramaswami Bank* v. *Additional Commissioner for Workmen's Compensation*[1] and *Chandra* v. *Commissioner for Workmen's Compensation.*[2] The learned Judge next discussed the question whether the respondent, Prem Sagar, would fall within the category of persons mentioned in section 4 (1) (*a*) of the Act, that is, persons employed in any establishment in a position of management. After an examination of the material evidence in the case, the learned Judge came to the conclusion that the reasons given by the Commissioner of Labour for taking the view that the respondent was not in a position of management did not appear to be correct or adequate. Nevertheless, he held that the question whether a person fell within the scope of section 4 (1) (*a*) of the Act—that is, whether a person was employed in a position of management or not was mainly a question of fact, and that, on such a question, the Commissioner of Labour and the Additional Commissioner for Workmen's Compensation were entitled to come to their own findings, and that, merely because his view happened to differ from theirs, he would not be justified in quashing their orders. The learned Judge further held that there was no manifest error of law apparent on the face of the order of the Commissioner of Labour. He thus concluded his judgment :—

1. (1956) 2 M.L.J. 254.
2. (1957) 2 M.L.J. 352.

"The most that I can say is that he (the Commissioner of Labour) has taken a view of the facts different from that which I am disposed to take. That will not justify interference."

In the result, he dismissed both the petitions. Hence these two appeals by the Standard Vacunm Oil Company.

The learned Advocate-General for the appellant-Company, in view of the above findings, had only a two fold task ; (1) to establish that the two decisions of this Court did not preclude the learned Judge from going into the question whether the respondent was or was not a person employed within the meaning of the Act, and (2) to convince us that this Court would have jurisdiction under Article 226 of the Constitution to quash the orders of the Commissioner of Labour and the Additional Commissioner for Workmen's Compensation on the ground that there was a manifest error of law, which had a direct bearing on the jurisdiction of the Tribunals. The learned Advocate-General had no difficulty so far as the first part of his task was concerned, because even the learned advocate for the respondent did not attempt to support the learned Judge's view that there was anything in the two decisions, to which we shall presently refer, which was in the nature of a binding decision on the point. We are of the same opinion. In *Ramaswami Bank* v. *Additional Commissioner for Workmen's Compensation*[1], the only question which was discussed and decided by Rajagopalan, J., was whether a given employee of an establishment was a person employed in a position of management within the meaning of section 4 (1) (*a*) of the Madras Shops and Establishments Act. At the very outset of his judgment, the learned Judge said :—

"There was no dispute before the Additional Commissioner or before me that the second respondent was a 'person employed' within the meaning of section 2 (12) of the Act".

In *Chandra* v. *Commissioner for Workmen's Compensation*[2], to which one of us was a party, we said :

"It was not contended before us that the appellant was not a 'person employed' within the meaning of section 2 (12) of the Act. The only question, therefore, which falls for decision in this appeal is whether the appellant is a person who is employed in a position of management".

If the learned Judges in the above two decisions proceeded on such concession, it cannot be said that it was intended to be impliedly laid down that a person like the respondent must be deemed to be a person employed within the meaning of the Act. We shall therefore deal with the question as if it were *res integra*. The learned Judge was evidently inclined to accept the contention of the learned Advocate-General that the respondent was not a 'person employed' within the meaning of section 2 (12) of the Act. But, as that position was not conceded by learned counsel for the respondent, the question was fully discussed by counsel on both sides. The way in which the learned Advocate-General tried to support his contention was to refer to the general scheme and the different kinds of substantive provisions in the Act to show that an employee like the respondent before us could not have been in the contemplation of the Legislature as one entitled to the benefit of the provisions of the Act. To use an expression in recent parlance, the contention of the learned Advocate-General is that an employee like the respondent would not fall within the coverage of the Act, because he would not fall within any of the classes or categories of employees, to whom several provisions of the Act are properly applicable. Reference was made to analogous provisions in the Factories Act ; but it may not be useful or permissible to determine one unknown in terms of another equally unknown. There are undoubtedly several sections in the Act, which indeed form a substantial portion of the Act, but which are singularly inappropriate to an employee like the respondent. Section 14, for instance, lays down that no person employed in any establishment shall be required or *allowed* to work for more than eight hours in any day and forty-eight hours in any week. The Proviso to this section permits such person to be allowed to work for any period in excess of the limit fixed, subject to payment of overtime wages, if the period of work, does not exceed ten hours in any day and in the aggregate fifty-four hours in any week. Under section 14 (2), no person employed in any establishment shall be required or allowed to work in such establishment for more

1. (1956) 2 M.L.J. 254. (1957) 2 M.L.J. 352.

than four hours in any day unless he has had an interval for rest of at least one hour. Section 15 prescribes a spread-over of periods of work. Chapter VI deals with holidays with wages, and Chapter VII with the payment of wages, deductions from wages and fines. Section 30 lays down that every employer shall fix periods, in respect of which the wages shall be payable. They are called wage periods, and no wage period shall exceed one month. For overtime work, the rate is fixed at twice the ordinary rate of wages (section 31). Section 32 prescribes the time for payment of wages. Section 33 expressly provides that all wages shall be paid in current coin or currency notes or in both ; that is to say, payment by cheque will not be valid. Section 35 deals with fines which may be imposed on any person employed for acts and omissions on this part such as may have been specified in the notice exhibited in the prescribed manner on the premises, in which the employment is carried on. There is, certainly great force in the contention of the Advocate-General that it would be ridiculous to apply the provisions like the above to employees like the respondent. There is also force in his contention that the Act, like the sister Acts, namely, the Payment of Wages Act and the Factories Act, is intended to apply only to employees who may be compendiously called 'wage-earners', and none of these Acts was intended to apply to persons paid at the higher income rates, who may be described as salaried employees or officers. The term 'wages' is, no doubt, defined in section 2 (18) of the Madras Shops and Establishments Act as meaning all remuneration, capable of being expressed in terms of money, which would be payable, whether conditionally upon the regular attendance, good work or conduct or other behaviour of the person employed or otherwise, to a person employed in respect of his employment or of work done in such employment. In *K. V. V. Sarma*, In re[1], a Division Bench of this Court, after an elaborate discussion of English and Indian decisions, have drawn a distinction between 'wages' and 'salary' in the following manner :

"We, have, on a construction of the present Act, already come to that conclusion. It seems to us that, in finding out whether a person employed directly or through any agency in a manufacturing process is receiving wages, the question has to be determined with regard to the period for which the amount is settled to be paid. We are definitely of opinion that, if the remuneration is to be paid daily or weekly, it can be called wages. But, where it is monthly remuneration payable on the last day of the month or after that date, and where the remuneration, considering the general standards of payment, is fairly high, then, it has to be understood as salary ".

It is certainly difficult to describe a person like the respondent, who is a qualified, engineer, drawing a salary of about Rs. 1,000 a month, as a 'wage-earner.'

The method pursued by the learned Advocate-General is undoubtedly attractive. But he should not overlook the fact that the Act itself expressly defines a person employed' thus :

'Person employed' means—

(i) in the case of a shop, a person wholly or principally employed therein in connection with the business of the shop ;

(ii) in the case of a factory or an industrial undertaking, a member of the clerical staff employed in such factory or undertaking ;

(iii) in the case of a commercial establishment other than a clerical department of a factory or an industrial undertaking, a person wholly or principally employed in connection with the business of the establishment, and includes a peon ;

(iv) in the case of a restaurant or eating-house, a person wholly or principally employed in the preparation or the serving of food or drink or in attendance on customers or in cleaning utensils used in the premises or as a clerk or cashier ;

(v) in the case of a theatre, a person employed as an operator, clerk, door-keeper, usher or in such capacity as may be specified by the (State) Government by general or special order ;

(vi) in the case of an establishment not falling under paragraphs (i) to (v) above, a person wholly or principally employed in connection with the business of the establishment, and includes a peon ;

(vii) in the case of all establishments, a person wholly or principally employed in cleaning any part of the premises ; but does not include the husband, wife, son, daughter, father, mother, brother or sister of an employer who lives with and is dependent on such employer ".

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1. (1952) 2 M.L.J. 917 at 929.

We presume that the appellant Company would fall within the category of section 2 (12) (iii), or, in any event of section 2 (12) (vi). According to this definition, the only fact to be ascertained is whether the respondent is a person wholly or principally employed in connection with the business of the establishment. We find it impossible to hold that the respondent is not such a person. He is a person wholly employed in connection with the business of the Company ; he is not a casual employee engaged to do any particular piece of work for the establishment under a specific contract. It is not denied that the employee was on the permanent staff of the establishment. It is true that the definitions contained in section 2 of the Act, would apply, "unless there is anything repugnant in the subject or context". But that saving provision cannot be relied on by the learned Advocate-General, because, according to him, employees like the respondent would not fall within the purview of the Act altogether.

Apart from employees drawing salaries and belonging to a higher class of employment, there are also other employees, like travelling inspectors, to whom, by the very nature of their work, it would be absurd to apply several of the provisions of the Act. Surely, it will be absurd to apply to a travelling inspector the provision relating to daily and weekly hours of work. He may have to travel in a train continuously for over 12 hours, while going for performing his duties. But, having regard to the remuneration paid to such employees and the kind of work which they have to perform, it may be difficult to say that they are not persons employed within the meaning of the Act.

In our opinion, the framers of the Act who, presumably, were aware of the difficulty and inappropriateness of applying the provisions of the Act to certain classes of employees, provided for exemptions to achieve the object of excluding them from the operation of the Act. Section 4 contains such exemptions. Certain of the exemptions, no doubt, have been made in the public interests ; for example, establishments under the Central and State Governments, establishments in mines and oil fields. Other exemptions are given, because of practical difficulties in applying the provisions of the Act and also because of the nature of such establishments. Instances of these are establishments in places where fairs or festivals are held only temporarily. Employees, whose work involves travelling, and persons employed as canvassers and caretakers are covered by clause (*b*) of section 4 (1). Then, we come to the class of persons described in clause (*a*) as "persons employed in any establishment in a position of management."

The question—indeed, the main question—in this case is whether the respondent is a person who would fall within this class. Was he, when his services were terminated, employed in a position of management? The learned Judge, Balakrishna Ayyar, J., was clearly of the view that the respondent did fall within this class. The correctness of this view was challenged by counsel for the respondent. The basis of the respondent's counsel's argument was that no employee would ever fall within this class, unless he is performing managerial duties. That would mean, in practice, that, for one establishment, probably, there may be only one or two, say, the General Manager and Deputy or Assistant Managers. If we accept that basis, then it would certainly follow that the decision of the Commissioner of Labour was right, because, the respondent was not one of such officers. But we think that that is not the correct legal position. There is an essential difference between "managerial capacity" and "position of management". In this connection, reference may be made to the definition of "employer" in section 2 (5) of the Act, which runs thus :—

"'employer' means a person owning, or having charge of, the business of an establishment and includes the manager, agent or other person acting in the general management or control of an establishment".

Obviously, though there may be one person acting in the general management or control of an establishment, there would be, in a large establishment, several others who would be in management or control of particular departments of the establishment, or, particular classes of manual or clerical or lower class of employees. Though such employees would not fall within the definition of 'employer', they would certainly fall within section 4 (1) (*a*) of the Act, as being persons employed in position of manage-

ment. The amount of pay or salary drawn may not be an absolute test. There may be a skilled workman drawing a larger amount as remuneration than a branch manager in a small establishment. We are in entire agreement with the reasoning of Balakrishna Ayyar, J., on this point and in his comment that the reasons given by the Commissioner of Labour are not correct or adequate. We are clearly of the opinion that the Commissioner of Labour made a mistake which went to the root of the case that no employee would fall within the class specified in section 4 (1) (*a*), if such employee was subject to the overall supervision of a superior officer. In the present case, the respondent was subject to such supervision of the Operations Manager. That fact, by itself, would not make the employee any the less a person employed in a position of management. The Operations Manager, who was examined before the Commissioner of Labour, gave an account of some of the duties of the respondent. His duty in regard to the people under him was supervision. He was responsible for carrying out construction of depots, petrol pumps, erection of tanks, and also maintenance and repair of works for the various Company's buildings and other structures. He had authority to spend to a maximum of Rs. 2,500 on budgeted jobs without reference to any body else, and authority to spend to a maximum of Rs. 1,000 even on unbudgeted items without reference to the Operations Manager. He was responsible for all the correspondence work in connection with the construction work, including correspondence with the Government. He was the officer to engage casual labour and he was responsible for taking disciplinary action against all those who were working under him. The general scheme of the staff in the central office of the Company at Madras appears to be this. There is at the head a Manager. Under him, there are four departments, each under a departmental Manager, namely, (1) Operations, (2) Sales, (3) Accounts, and (4) Employee Relations. The respondent was working as an Operations Assistant under the Operations Manager. But the Operations Assistant was in complete charge of the depots. We have no hesitation in holding that, on the evidence on record, the respondent would be a 'person employed' in a position of management within the meaning of section 4 (1) (*a*) of the Act.

Balakrishna Ayyar, J., though he practically agreed with the contentions raised on behalf of the appellant-company, yet, refused to quash the orders of the Commissioner of Labour and the Additional Commissioner for Workmen's Compensation because of two reasons : (1) that he was bound by the decisions in *Ramaswami Bank* v. *Additional Commissioner for Workmen's Compensation*[1] and *Chandra* v. *Commissioner for Workmen's Compensation*[2], and (2) that there was no manifest error apparent on the face of the record. We have already dealt with the first reason which was not supported even by learned counsel for the respondent. As regards the second reason, we are clearly of the view that there is a manifest error of law—manifest on the face of his (Labour Commissioner's) order—which would justify the issue of a writ of *certiorari* to quash the orders of the Commissioner of Labour and Additional Commissioner for Workmen's Compensation. The error of law is not merely one which relates to the merits of the dispute between the parties, namely, the validity of the termination of the services of the respondent, but it is an error of law which goes to the root of the jurisdiction of the Additional Commissioner for Workmen's Compensation. If the respondent falls within the category of persons mentioned in section 4 (1) (*a*) of the Act, then, the Act itself would not apply to such employee, and the appeal under section 41 (2) of the Shops and Establishments Act would itself be incompetent. Any order passed purporting to be under that provision, would be an order passed without jurisdiction.

Certain early decisions of the Supreme Court were cited by learned counsel for the respondent, confining within narrow limits the jurisdiction of the High Court to issue a writ of *certiorari* under Article 226 of the Constitution, as for example, the decision in *Parry & Co., Ltd.* v. *Commercial Employees' Association, Madras*[3] in which Mukerjea, J., as he then was, observed thus :

1. (1956) 2 M.L.J. 254.
2. (1957) 2 M.L.J. 352.
3. (1952) 1 M.L.J. 813 : 1952 S.C.R. 519 at 525 : A.I.R. 1952 S.C. 179 at 181.

"No *certiorari* is available to quash a decision passed with jurisdiction by an inferior tribunal on the mere ground that such decision is erroneous.... It was conceded by Mr. Isaacs that, in spite of such statutory provisions, the superior Court is not absolutely deprived of the power to issue a writ, although it can do so only on the ground of either a manifest defect of jurisdiction in the Tribunal that made the order or of a manifest fraud in the party procuring it".

It may be incidentally pointed out that, in that case, an application for the issue of a writ of *certiorari* was filed before the date of the Constitution. The same learned Judge, Mukerjea, J., observed thus in a later case—*Basappa* v. *T. Nagappa*[1]:

"*Certiorari* may and is generally granted when a Court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceeding or from the absence of some preliminary proceeding or the Court itself may not be legally constituted or suffer from certain disability by reason of extraneous circumstances (*vide* Halsbury, 2nd edition, Vol. IX, page 880). When the jurisdiction of the Court depends upon the existence of some collateral fact, it is well settled that the Court cannot by a wrong decision of the fact give it jurisdiction which it would not otherwise possess....An error in the decision or determination itself may also be amenable to a writ of *certiorari*, but it must be a manifest error apparent on the face of the proceeding, *e.g.*, when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by *certiorari*, but not a mere wrong decision".

Venkatarama Ayyar, J., dealt with the matter exhaustively in *Hari Vishnu* v. *Ahmad Ishaque*[2]. One of the four propositions, which, according to the learned Judge, emerge from the authorities, is thus laid down:

"It may therefore be taken as settled that a writ of '*certiorari*' could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record".

This statement of the law was affirmed in a recent decision in *Nagendra Nath* v. *Commissioner of Hills Division*[3], where B. P. Sinha, J., as he then was, summed up the result of the authorities thus:

"It is clear from an examination of the authorities of this Court, as also of the Courts in England, that one of the grounds on which the jurisdiction of the High Court on *certiorari* may be invoked, is an error of law apparent on the face of the record and not every error either of law or of fact, which can be corrected by a superior Court, in exercise of its statutory powers as a Court of appeal or revision".

We think that, in the present case, there is such a manifest error of law on the face of the order of the Commissioner of Labour. The error of law is this: that it is only when an employee is exercising managerial powers in relation to the Head Office of the Company where he was employed that he can be said to be employed in a position of management within the meaning of section 4 (1) (*a*) of the Act. It is because of the approach from this erroneous point of view, based on a wrong construction of section 4 (1) (*a*) of the Act, that the Commissioner of Labour held that the respondent did not fall within the scope of section 4 (1) (*a*) of the Act. In *Regina* v. *Medical Appeal Tribunal* Ex parte *Gilmore*[4], Denning, L.J., explained the scope of interference by *certiorari* on the ground of an error in law thus:—

"It is now settled that, when a tribunal comes to a conclusion which could not reasonably be entertained by them if they properly understood the relevant enactment, then, they fall into error in point of law: (See *Edwards* (*Inspector of Taxes*) v. *Bairstow*[5]. When the primary facts appear on the record, an error of this kind is sufficiently apparent for it to be regarded as an error on the face of the record such as to warrant the intervention of this Court by *certiorari*".

Balakrishna Ayyar, J., evidently thought that the question whether an employee fell within the ambit of section 4 (1) (*a*) of the Act is more a question of fact than a question of law; but, with respect to the learned Judge, we cannot agree. It is a question of law to be decided on proved facts, or, at least a question of mixed facts and law (vide *Edwards* (*Inspector of Taxes*) v. *Bairstow*[5]. This Court cannot certainly go behind the facts found by the Commissioner of Labour. But, if, on the facts, the Commissioner of Labour makes a patent error of law, and, as a resul

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1. (1955) 1 S.C.R. 250 : 1954 S.C.J. 695 at 699 : A.I.R. 1954 S.C. 440 at 444.
2. (1955) 1 M.L.J. (S.C.) 157 : A.I.R. 1955 S.C. 233 at 244 : 1955 S.C.J. 267 at 276.
3. (1958) S.C.J. 798 : 1958 S.C.R. 1240 : A.I.R. 1958 S.C. 398 at 412.
4. L.R. (1957) 1 Q.B. 574 at 582.
5. L.R. (1956) A.C. 14 : (1956) 3 All E.R. 48.

of such error, the Additional Commissioner for Workmen's Compensation entertains an appeal under section 41 (2) of the Madras Shops and Establishments Act, we hold that this Court has the power to issue writs of *certiorari* to quash their orders.

In the result, we allow the appeals and quash the aforesaid two orders of the Commissioner of Labour and the Additional Commissioner for Workmen's Compensation. In the circumstances of the case, we make no order as to costs.

R.M. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

S. Natesa Pillai .. *Petitioner**

v.

Jayammal .. *Respondent.*

Criminal Procedure Code (V of 1898), section 488—Maintenance order under—Subsequent living together of husband and wife—Effect on the order of maintenance.

Where subsequent to an order of maintenance made under section 488 of the Criminal Procedure Code the parties reunite and live as husband and wife it puts an end to the order. If the wife separated again from the husband then she has to file a fresh petition on a fresh cause of action and obtain an order on establishing that the requirements of the section are satisfied.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Additional First Class Magistrate, Trivellore, dated 22nd October, 1959 and made in Crl. M. P. No. 104 of 1959.

B. T. Sundararajan, for Petitioner.

T. Ramalingam and *A. C. Muniswami Reddy*, for Respondent.

M. Narayanamurthi for the Public Prosecutor on behalf of the State.

The Court made the following

ORDER.—This is a revision petition filed by the husband against the order of the Additional First Class Magistrate, Trivellore, who refused to set aside the order of maintenance passed in favour of the respondent and against the petitioner herein. In M.C. No. 38 of 1957 the respondent got an order of maintenance against the petitioner herein. As per that order she is getting maintenance at the rate of Rs. 20 per month. It is alleged by the petitioner that subsequently the respondent came and lived with him and then again separated. After the separation, a further attempt was made to reconcile them. In this further attempt a sale deed was also executed for the arrears of maintenance and before the Panchayatdars an agreement Exhibit P-2 was signed by both the husband and the wife stating that they will live together. The evidence of D.W. 2, who was a Panchayatdar, shows that at the Panchayat they suggested that a house must be fixed at Ayanavaram for the parties to live together. Exhibit D-1 is the letter written by D.W. 2 to the father of the respondent. That shows that a house had been fixed up, and advance rent paid and the father was asked to come with his daughter the very next day after the receipt of the letter. Exhibit D-2 is the reply of the father of the girl to this letter. In this he refers to the receipt of the letter written by D.W. 2 and points out that personally he has no objection to sending his daughter but his relations were giving him trouble, the reason being that on several previous occasions she had undergone several troubles and mediation was effected and on that account whatever might have happened he pacified them and sent her but did not get a good name and everybody was angry with him. He writes :

"What if the decree is not cancelled. What harm will be caused to him. It appears if such conduct happens, no good will result in their lives ".

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*Crl.R.C. No. 64 of 1960. 8th March, 1960.
(Crl.R.P. No. 64 of 1960). (18th Phalguna, 1881—Saka).

It is obvious that subsequent to the letter they never joined. The husband then filed a petition to cancel the order of maintenance passed against him on the ground that his wife has been living with him for some time and the resumption of cohabitation put an end to the order of maintenance. Evidence was let in on both sides. On the question whether she was living with him or not, the oral evidence in this case was conflicting. The husband and his witnesses maintained that she was living with him for some time. The wife and her witnesses maintained that she never went and lived with him. But Exhibit D-2 gives the clue to what happened. Reading the original of Exhibit D-2 in Tamil it is quite clear that the father of the girl was complaining that he had very bad name for having sent her (the daughter) on the prior occasions and that he had to pacify his relations who came and quarrelled with him for having sent his daughter and he says "What does it matter if the decree was not cancelled", apparently referring to the talk that the decree was to be cancelled. It is clear from this document that some time before the compromise, that is, before the Panchayatdars on 18th April, 1959, the wife had come and lived with him and separated. Now the question is that if the wife had come and lived with the husband even for some days whether the wife could be allowed to rely on the original order of maintenance in M.P. No. 38 of 1957 and execute the order against the petitioner. The question is covered by the decision of Yahya Ali, J., in *Kuppuswami Padayachi* v. *Jagadambal*[1]. The learned Judge refers to the decision of a Bench of this Court consisting of the Honourable Chief Justice and Mockett, J., in *Venkayya* v. *Raghavamma*[2], where my Lord the Chief Justice held following the English decisions starting with *Bateman* v. *Ross*[3], that a reconciliation after separation entirely did away with the effects of the separation. At page 27 the Honourable Chief Justice says referring to another case *Williams* v. *Williams*[4]:

> "In that case the Court had no hesitation in holding that the resumption of cohabitation put an end to the cause of complaint and therefore the power of the Justices to make an order passed away altogether".

The Honourable Chief Justice has also referred to another decision of a Bench of this Court in *Syed Saib* v. *Meeram Bee*[5], where it was held that a Magistrate was bound to refuse to enforce an order under section 488, Criminal Procedure Code, on the ground that the relationship of husband and wife had ceased to exist since the date of the order. Mockett, J., while concurring with the learned Chief Justice said at page 31 :

> ". . . . . . the decree in a case such as this, in the words of A. L. Smith, J., comes to an end from the resumption of cohabitation. I have asked the learned counsel for the respondent whether it is possible for him to distinguish a decree passed in a suit for maintenance from a decree passed under the Indian Divorce Act or an order passed under section 488 of the Code of Criminal Procedure. He has said that it is impossible to do so, so far as the basis is concerned. That must be so because the basis of all these orders is that if the husband neglects to maintain his wife, she by reason of his unlawful neglect is entitled to maintenance. That is important in this case for this reason. The parties, as my Lord has indicated, went before the Court and admitted that, shortly after the consent decree, they had lived together as husband and wife, there being a difference as to whether the period was five or seven years".

The decision in *Venkayya* v. *Raghavamma*[2], is a decision of a Bench of this Court and it is binding on me. It has been followed by Yahya, Ali, J., in *Kuppuswami Padayachi* v. *Jagadambal*[1], and I entirely agree with Yahya Ali, J. On the authority of the above decisions I must hold in this case, that there was a reunion for some time and that put an end to the order under section 488, Criminal Procedure Code. If the wife separated again from the husband, then she must file another petition, on a fresh cause of action, and obtain an order if she satisfied the Court that there is sufficient reason to leave her husband and that he neglected to maintain her.

This petition is allowed and the order of the lower Court is set aside.

R.M. ——— *Petition allowed.*

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1. (1946) 1 M.L.J. 379.
2. (1941) 2 M.L.J. 263 : I.L.R. (1942) Mad. 24.
3. 3 E.R. 684.
4. L.R. 1904 P. 145.
5. (1909) 20 M.L.J. 12.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

The Public Prosecutor .. *Appellant**

v.

The Mettur Industrials Ltd,, and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947)—Sections 17-A and 29—Award enforceable on the expiry of thirty days of the publication—Effect of—Tribunal ordering reinstatement of a dismissed employee—Failure to implement the award within thirty days of its publication—If punishable.

On a reading of section 17-A and section 29 of the Industrial Disputes Act, 1947, the expression "award being enforceable on the expiry of 30 days of its publication" in section 17-A would mean that the award of the tribunal must be given effect to by the time the award becomes enforceable, *i.e.*, within 30 days of its publication. Where an award directed the re-instatement of an employee, failure to do so within 30 days of its publication will be an offence punishable under section 29 of the Act.

As however the delay in reinstatement was due to the honest belief of the Manager that he was entitled to take steps to set aside the award and enter into negotiation with the dismissed servant for the payment of compensation, there is only a technical offence for which a mere admonition will be sufficient.

Appeal under section 417 or 417 (3) of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondents Nos. 1 to 7 (Accused Nos. 1 to 7) of offence under section 29 of the Industrial Disputes Act by the Sub-Divisional Magistrate, Sankaridrug, in C.C. No. 12 of 1958 on his file.

M. Narayanamurthi for the Public Prosecutor (*P. S. Kailasam*), for Appellant.

V. T. Rangaswami Ayyangar and *Srimthi Padmini Rāghavan*, for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by the State against the acquittal of the respondents by the Sub-Divisional Magistrate, Sankari. The appeal is now confined only to accused 1, 2, 4, 5, 8 and 9, of whom the first accused is the Mettur Industries, the second accused is the Chairman of the Board of Directors and the rest are all Directors.

One A. R. Varma, a Weaving Production Clerk in the Mettur Industries, was dismissed by its then Manager on the ground that he was found sleeping during the night shift. The said Varma preferred a complaint to the Industrial Tribunal, Coimbatore, and the Tribunal, after enquiry, passed an award directing the reinstatement of the dismissed clerk. The said award was published in the *Fort St. George Gazette* on 10th April, 1957.

Under section 17-A of the Industrial Disputes Act, the award became enforceable on the expiry of 30 days from the date of its publication *i.e.*, it became enforceable on 9th May, 1957. But even on 9th May, 1957, the dismissed servant was not reinstated. P.W. 2, the General Secretary of the National Textile Employees Union, at Mettur, which is a registered one, wrote a letter to the Manager, Mettur Industries, asking him to reinstate the dismissed employee but the reply that was received was that the Mettur Industries was contemplating an appeal to the Supreme Court. The first accused moved the Supreme Court for leave to appeal but leave was refused on 24th May, 1957. Then after 24th May, 1957, there were certain negotiations between the Union and the Manager of the Mettur Industries and finally the above said Varma was reinstated on 13th July, 1957. The prosecution case is that the said Varma was not reinstated by 9th May, 1957, the date when the award became enforceable.

The Act does not say as to when a dismissed servant is to be reinstated after the award in the dispute but section 17-A says that the award would become enforceable on the expiry of 30 days from the date of its publication under section 17. There is no dispute that the award was published on 10th April, 1957 and there is

* Crl. Appeal No. 355 of 1958.

15th April, 1960.
(26th Chaitra, 1881—Saka).

also no dispute that the award became enforceable on 9th May, 1957. Does this phrase " the award becomes enforceable on the expiry of 30 days " mean that the reinstatement must be made within that time? The language used in the case is that the award becomes enforceable on the expiry of 30 days, *i.e.*, till 30 days the terms of the award cannot be enforced, only on the expiry of 30 days, it becomes enforceable. Section 29 says that any person who commits a breach of the terms of the award shall be punishable. On a reading of the two sections I should think that the expression " the award becomes enforceable on the expiry of 30 days " means that the reinstatement, on the dismissal being found to be wrongful, must be given effect to by the time the award becomes enforceable, that is, within 30 days of the publication of the award. On this interpretation, undoubtedly the dismissed servant was not reinstated within 30 days that is by 9th May, 1957 but was reinstated only on 13th July, 1957. The first accused was taking steps to file an appeal against the award to the Supreme Court when it was entitled to do, and even after the dismissal there were negotiations between the Mettur Industries and the dismissed servant. The negotiations seemed to relate to payment of compensation to Varma in respect of the complaint. Finally by payment of back wages the said Varma was reinstated on 13th July, 1957. Thus the reinstatement was undoubtedly long after the expiry of the 30 days. Between 9th May, 1957 and 24th May, 1957 the first accused was *bona fide* taking steps to set aside the order of the Tribunal as they were not satisfied with the award and this, as pointed out earlier, they are entitled to do. Subsequently, from 24th May, 1957 there were negotiations. It is on account of these circumstances that the reinstatement became delayed. Nevertheless, according to the provisions of the Act, strictly speaking, the said Varma ought to have been reinstated on 9th May, 1957. The delay in the case is not due to any dishonesty or wilful negligence on the part of the first accused but it was due to the honest belief on the part of the Manager that he was entitled to take steps to set aside the award and to enter into negotiations with the dismissed servant for payment of compensation. In those circumstances though I hold that the first accused has violated the terms of the provisions of the Act by not reinstating the dismissed servant on 9th May, 1957, and, therefore, they are only technically guilty of the offence, I think that a mere admonition will do. I therefore administer an admonition to the first accused in the case, finding that he is guilty of an offence under section 29 of the Act. But with regard to the Directors I do not think that even such a punishment is called for. So far as they are concerned, the acquittal is fully justified and the appeal is dismissed against them (that is accused 2, 4, 5, 8 and 9). The appeal is allowed only so far as the first accused is concerned.

R.M. ——— *Appeal allowed only as against first accused.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

Jayems Engineering Co., Coimbatore .. *Appellant**

v.

Additional Commissioner for Workmen's Compensation, Madras and another .. *Respondents.*

Madras Shops and Establishments Act (XXXVI of 1947), *section* 4 (1) (*a*)—*Persons employed in position of management—Who are.*

The category of persons who would come within the class specified in section 4 (1) (*a*) of the Madras Shops and Establishments Act, *viz.*, persons employed in a position of management, is not confined only to a few persons like General Managers or Assistant Managers in an establishment, but will comprise all employees (not being however merely workmen, wage earners or members of the clerical department) who have certain amount of control of the affairs of the establishment. Where a person employed in the position of management in one branch is transferred to another branch and in

*W.A. No. 70 of 1957. 18th February, 1960. (29th Magha, 1881—Saka.)

pursuance of the order of transfer he hands over charge of the office of manager which he was holding till then, he does not *eo instanti* cease to be a person employed in the position of management.

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Rajagopalan, dated 14th February, 1956 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 561 of 1956 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to M.S.E. Case No. 118 of 1956 on the file of the Additional Commissioner for Workmen's Compensation, Madras, the 1st respondent herein, and his order, dated 1st March, 1956 and all other proceedings of the said first respondent in respect thereof and to quash the said order, dated 1st March, 1956, setting aside the order of dismissal by the petitioner of the second respondent therein.

M. K. Nambiar, K. K. Venugopal and *P. S. Raman*, for Appellant.

The Additional Government Pleader (*M. M. Ismail*), *V. Seshadri* and *K. S. Ramamurthi*, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the judgment of Rajagopalan, J. in W.P. No. 561 of 1956. The second respondent, M. A. Samtani, was employed as the Managr of the Coimbatore Branch of the appellant-firm, Jayems Engineering Co., Coimbatore, which had its Head Office at Bombay. There were also branches of the firm at Madras, Nagpur Delhi and other places. On 15th January, 1955, the second respondent received a communication from the Regional Manager of the appellant-firm, Southern India Branches, the material portion of which was as follows :

"Under instructions from Head Office, Bombay, I am issuing the following Transfer Orders in connection with transfer of charge of Coimbatore Office.

"Mr. M. A. Samtani is transferred from Coimbatore Office to either Delhi Office or Nagpur Office. Definite orders with regard to which office he is transferred will be issued on receiving necessary confirmation from the Head Office very soon.

"J. H. Radhakrishnani, Manager of Kanpur Office, who has already arrived here and reported, for duty and present in the office, is to take charge of Coimbatore with immediate effect.

"Mr. M. A. Samtani is requested to hand over the complete charge of Coimbatore Office, Accounts, Cash, Stocks, Furniture, Motor Cycle, etc., to Mr. J. H. Radhakrishnani today".

On receipt of this order, the second respondent handed over charge to Radhakrishnani. On 25th January, 1955, he received a further communication, in which he was informed that he was transferred to the Delhi Office to assist the 'Present' Manager in the sales and the other office routine. Apparently the second respondent was not willing to go to Delhi. On 10th February, 1955, the appellant intimated to the second respondent that he should arrange to leave for Delhi within a week from the date of that letter, and, that, if he did not do so, he might consider himself as dismissed from service. The second respondent then wrote to the appellant, requesting that he might be retained at Coimbatore, and that, if that was not possible, he might be paid his salary and his travelling expenses to Delhi. Neither request was complied with; and on 28th February, 1955, the appellant definitely informed the second respondent that he should consider himself, dismissed from service with effect from 17th February, 1955. On 9th March, 1955, the second respondent addressed a letter to the Labour Commissioner, Workmen's Compensation, Madras, claiming several items of relief against the employer, *i.e.*, the appellant. In terms, this letter did not purport to be an appeal against the order of dismissal preferred under section 41 (2) of the Madras Shops and Establishments Act, 1947. Objections were filed by the appellant to the demands made by the second respondent. The second respondent, then realising his mistake, applied to the Commissioner on 12th July, 1955, that he might be reinstated, because his dismissal was illegal. He gave up the other reliefs claimed by him in his earlier letter. Apparently, this letter was treated as an appeal preferred under section 41 (2) of the Act.

The appellant raised two preliminary objections to the maintainability of the petition : (1) that the appeal was barred by limitation, and (2) that the second respondent could not avail himself of the provisions of the above fact, as he was employed in a position of management. Both the objections were overruled by the Additional Commissioner for Workmen's Compensation, Madras, who dealt with the matter. He held that the appeal was not time-barred, and that, even if it was time-barred, there was sufficient cause to excuse the delay. He also held that the second respondent was not employed in a position of management. Subsequently, on 1st March, 1956, the Commissioner found that the dismissal of the second respondent was not for a reasonable cause, and he therefore set aside the order, discharging the second respondent from service. Thereupon, the appellant filed a writ petition, out of which this appeal arises, for the issue of a writ of *certiorari* to quash the order of the Additional Commissioner for Workmen's Compensation, dated 1st March, 1956.

Two contentions were raised on behalf of the appellant before Rajagopalan, J., who heard and disposed of the writ petition,—(1) that the appeal to the Commissioner for Workmen's Compensation was barred by the time and the delay should not have been excused, and (2) that the second respondent was a person employed in a position of management and therefore fell under section 4 (1) (*a*) of the Act. Neither contention was accepted by the learned Judge, and the Petition was dismissed. Hence this appeal.

Before us the contention regarding limitation was not pressed ; and the argument on behalf of the appellant was confined to the second contention. The Additional Commissioner for Workmen's Compensation held that the second respondent did not fall within section 4 (1) (*a*) of the Act, because, at the time of his discharge, he was not the Manager of the Coimbatore Branch of the appellant firm, but was only an ordinary employee. The learned Judge agreed with the Additional Commissioner. His reasoning was that, though the second respondent was admittedly the Manager of the Coimbatore Branch upto 15th January, 1955, and, therefore, occupied a position of management, he was relieved of his office of Manager on that date, and, though he still continued in the employment of the appellant, he was not holding a position of management. According to the learned Judge, the relevant period for deciding whether a given person was in a position of management within the meaning of section 4 (1) (*a*) of the Act is the period antecedent to the dismissal or termination of his service. With respect to the learned Judge, we are unable to agree with him in what we consider to be a very narrow construction of section 4 (1) (*a*) of the Act. The second respondent was admittedly holding a position of management till 15th January, 1955. On that date the appellant-firm directed his transfer to either Delhi or Nagpur. There is nothing on record to indicate that, either as a punishment or otherwise, the second respondent was demoted to a grade lower than that of a Manager. His pay was not reduced. If an employee who is the Manager of a Branch is transferred to another Branch, and, in pursuance of the order of transfer, he hands over charge of the office of Manager which he was holding, he does not *eo instanti* cease to be a person employed in a position of management. If a District and Sessions Judge is on leave or under transfer he does not cease to be District and Sessions Judge. Though he may not actually be exercising the functions of that office, while on leave so far as his status is concerned, it is certainly that of a District and Sessions Judge. Section 4 (1) (*a*) is in the following terms :—

"Nothing contained in this Act shall apply to (*a*) person employed in any establishment in a position of management."

Obviously, the second respondent was a person employed in a a position of management upto 15th January, 1955. So, till that date, nothing in the Act applied to him. What has now been held is that, from 16th January, 1955, the Act has become applicable to him. The only reason for this sudden change is that he was asked to hand over charge of his office as Manager to another employee, since it was intended to transfer him to another office. In the judgment recently

delivered in *Messrs. Standard Vacuum Oil Co.* v. *Additional Commissioner for Workmen's Compansation*[1], we have held that the category of persons who would come within section 4 (1) (*a*) of the Act is not confined to a very few employees like the General Manager or Assistant Manager of an establishment, but will comprise all employees who are not merely workmen and are in the position of wage-earners or members of a clerical department, but who have a certain amount of control of the affairs of the establishment. We hold that the order of the Additional Commissioner for Workmen's Compensation was vitiated by a manifest error of law, namely, that the person who admittedly was employed in a position of management till a particular date ceased to be such during the period when he was under orders of transfer.

The appeal is allowed, and writ will issue, quashing the order of the Additional Commissioner for Workmen's Compensation, Madras, dated 1st March, 1956. There will be no order as to costs.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Miya Hajee Ismail Sahib & Co., .. *Appellant**

v.

The Regional Director, E. S. I. Corporation .. *Respondent.*

Employees' State Insurance Act (XXXIV of 1948), section 2 (xii)—Factory—Tannery—If a factory.

Taking the definition of the term factory in section 2 (*xii*) of the Employees' State Insurance Act, 1948, along with the definition of the term 'manufacturing process' and 'power' under the Factories Act, 1948, it is plain that a tannery wherein electrical energy is used for pumping water, which is used subsequently for several of the processes concerned in finishing the raw hides and skins, will come within the definition of the term 'factory' as the very pumping and storing of the water in the tannery, will by itself amount to a 'manufacturing process' and the pumping and storing of water is connected with the tanning process itself.

Appeal against the Order of the Court of the Additional Commissioner for Workmen's Compensation, Madras, dated 9th May, 1959 and made in E.S.I. Case No. 2 of 1956.

V. N. Srinivasa Rao and *C. S. Rajappa*, for Appellant.

The Government Pleader (*K. Veeraswami*), for Respondent.

The Court delivered the following

JUDGMENT.—The appellants are the petitioners (Messrs. Miya Hajee Ismail Sahib & Co.), and the appeal is directed against the Order of the Additional Commissioner for Workmen's Compensation, Madras, in Case No. 2 of 1956, on his file. The appeal has been argued with regard to the single question, whether the Court below was right in holding that the Tannery of the Petitioners (appellants) was a factory as defined in section 2 (*xii*) of the Employees' State Insurance Act, during the period in question.

Now, in the Employees' State Insurance Act (XXXIV of 1948), 'factory' is defined in section 2 (*xii*) as follows :

"'Factory' means any premises including the precincts thereof whereon twenty or more persons are working or were working on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, but does not include a mine subject to the operation of the Indian Mines Act, 1923 or a railway running shed".

We note that two essential components of this definition are the words 'manufacturing process' and 'power'. Now, the third sub-paragraph of the same definition states :

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1. W. A. Nos. 139 and 140 of 1959. Since reported in (1960) M.L.J. (Crl.) 824.

* A.A.O. No. 198 of 1959. 9th February, 1960. (20th Magha, 1881—Saka.)

"The expressions 'manufacturing process' and 'power' shall have the meanings respectively assigned to them in the Factories Act, 1948".

When we look at the Factories Act (LXIII of 1948), we find that 'manufacturing process' is defined in section 2 (*k*) of the Act as any process for any of the operations grouped in sub-clauses (1) to (5) of section 2 (*k*). We are not, however, concerned with this particular aspect, since it is not in dispute that the establishment of the appellants is engaged in the tanning and finishing of hides and skins, and, as the Court below states :

"In the premises of the tanner, the raw and dried skins and hides undergo various processes such as soaking, lining, unhairing, fleshing and deliming, scudding, tanning, colouring, buffing, etc."

It is not in dispute before me that these processes, which last for about 45 days, do constitute a 'manufacturing process', viewed either as separate operations or integrally taken together. It is further to be observed, that for the purpose of applying the relevant provisions, these separate operations should be integrally considered as a whole. 'Power' is defined in section 2 (*g*) of the Factories Act (LXIII of 1948) as

"'power' means, electrical energy, or any other form of energy which is mechanically transmitted and is not generated by human or animal agency."

The admitted facts of the present case are that electrical power is being employed in the establishment of the appellants, for the pumping and storage of water, which is subsequently being used for several of the processes concerned in finishing the raw hides and skins. The brief argument upon this aspect can be put in the following form. This electrical power is being utilised for the pumping and storing of water, which is, of course, an essential commodity required in the 'manufacturing process'. This is not in dispute. But the power is not directly employed to transform or alter the products of the process at any stage. This, at best, only amounts to an indirect utilisation of 'power' and since there is no direct relationship between the use of the power and the manufacturing process, the argument is that the definition in section 2 (xii) of Central Act (XXXIV of 1948), already set out, is not applicable to the present facts.

This can be met upon two clear grounds, apart from other arguments with which we are not concerned immediately. The first is that the very pumping and storage of water in this establishment amounts by itself to a manufacturing process as defined in the Act. In *Kazmi* v. *K. M. Sheriff*[1], Ramachandra Iyer, J., was of the same opinion, with regard to sections 2 (*k*) and 2 (*m*) of the Factories Act, 1948. The learned Judge observed :

"It is unnecessary for the purpose of this case to consider that question, as admittedly there is an electric motor for the purpose of lifting water. The definition of the term 'manufacturing process' to which I have already made a reference, would comprehend such a case."

The present argument can also be met upon another ground. Water is required for the manufacturing process, presumably, at a particular spot and in particular flow or force. This is not merely a case of a small quantity of water being utilised in the ordinary way, for, in that event, the employer would not take the trouble to use electrical energy to pump and store water in large quantities, and at a height. But, since the use of the electrical energy enables the employer to utilise the water in such manner as is required in the manufacturing process itself, in effect he is using power for conducting a part of that process. This is hence connected as cause and effect with the process itself, and it cannot be argued that the definition does not apply.

In result, therefore, the appeal fails and is dismissed. Parties to bear their own costs.

R.M. *Appeal dismissed.*

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1. A.I.R. 1959 Mad. 542.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Kandaswami Mooppan .. *Petitioner**

v.

Angammal .. *Respondent.*

Criminal Procedure Code (V of 1898), section 488—Claim for maintenance—Considerations—Attribution of immorality to wife—Legal cruelty—Non-possession of property—Not a relevant factor—Quantum of maintenance—Interference in revision—Scope of.

A deliberate attribution of immorality to a wife has to be construed as legal cruelty entitling the wife to live separately and claim maintenance under section 488 of the Code.

The last minute offers to take back the wife are open to scepticism as they are put forward with no other object than to ward of the obligations arising in civil and criminal proceedings for supporting the wife.

The possession of property is not at all the criterion for awarding maintenance under section 488 of the Code. It is independent of possession of property. So long as a man is able-bodied and can work and earn his livelihood it is his duty to support his wife.

The High Court will not interfere in revision with the quantum of maintenance awarded by the Magistrate unless it is so manifestly perverse that it requires interference without any further argument on the subject.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Additional First Class Magistrate, Kulitalai, dated 19th October, 1959, in M.C. No. 58 of 1959.

P. Sharafuddin and *S. M. Amjad Nainar*, for Petitioner.

Respondent, not represented.

The Court made the following

ORDER.—This revision is preferred against the order made by the Additional First Class Magistrate at Kulitalai, in M.C. No. 58 of 1959.

The petitioner is the husband of the respondent, Angammal. The marriage took place about 20 years ago, and this couple have got two children, one of whom is sufficiently grown up to have the question of her marriage being taken up. It is very unfortunate that this couple have fallen out and they have been living separately. One of the many causes which seems to have divided the husband and wife is the fact that the wife wanted apparently to get her daughter married to her own brother and which the husband opposed. The marriage was not opposed on the ground that he was within the prohibited degrees, but apparently because the husband has taken a dislike of the brother-in-law proposed by the wife as his son-in-law. It is in these circumstances that this petition for maintenance was filed by the wife. The husband, first of all, stated that the wife had deserted him of her own accord, and, secondly, that he has always been willing to maintain her, and, thirdly, that the wife has left him in order to promote her illicit intimacy with one Velayudam who is living two doors off from the husband's house. The husband also pleaded that his means were straitened and that he could not give separate maintenance for the wife, as prayed for by her.

The learned Magistrate went into the matter thoroughly and came to the conclusion that the husband and wife had fallen out and that the offer by the husband to take back the wife and maintain her is not *bona fide* and that his allegation that his wife is in illicit intimacy with Velayudam constitutes legal cruelty within the meaning of section 488, Criminal Procedure Code, justifying her to live apart from her husband and claim separate maintenance. The learned Magistrate, calculating that the income of the husband would be about Rs. 700 per annum and that the

* Cr.R.C. No. 1357 of 1959 (Crl.R.P. No. 1311 of 1959). 4th December, 1959. (13th Agrahayana, 1881—Saka).

husband also was able-bodied and could work, gave the wife a maintenance of Rs. 20 per month as well as a maintenance of Rs. 5 each, for the daughter Subbammal, and the son Veluswami, till they attained majority.

The defeated husband has sought to file this revision petition. The points for determination which have been urged as grounds for the admission of this petition are three in number.

First of all, we have got to see whether this allegation made by the husband about the unchastity of his wife would constitute legal cruelty and would by itself entitle her to live separately from him and claim separate maintenance. There can be no doubt that the settled case-law now on the subject is that a deliberate attribution of immorality to a wife has to be construed as legal cruelty, entitling the wife to live separately and claim maintenance (vide *Gangalamma* v. *Venkatarami*[1], *Raman* v. *Lakshmi*[2], *Subbamma* v. *Venkata Reddi*[3]. In this case, that the husband made this allegation is not disputed and that the allegation has not been proved is the finding of the learned Magistrate. The learned Magistrate has held that the allegation was unfounded. It may well be so, because it is extremely unlikely that this elderly woman would seek to contract an immoral alliance which would bring her down in the eyes of the neighbouring public and also jeopardise the chances of her daughter being married properly. In any event, the Magistrate cannot be said to have come to the improper conclusion that this allegation would amount to legal cruelty entitling the wife to live separately and claim maintenance.

The next point taken is the offer to take back the wife. It is no doubt true that the basis for an application under section 488, Criminal Procedure Code, is that the husband refused or neglected to maintain his wife. Therefore, if the husband is always willing and ready to maintain his wife, she can get separate maintenance, only if she is able to show that she has good and sufficient grounds for living separately. But the lower Court has refused to take this offer seriously and has characterised it as not being *bona fide*. The circumstances of the case also show that it is extremely unlikely that the husband was really bent upon taking back his wife and treating her properly. He himself says that she has illicit intimacy with Velayudham and is on the lookout for continuing that liaison with him. If that were so, it is not credible that the husband would like to take back his wife and live with her. But, even assuming that he was a sufficiently complacent husband to take back his wife notwithstanding her unchastity, the other circumstances show that the rift between the husband and wife has become really irremediable. The husband has already filed an application for restitution of conjugal rights, and this is being resisted by the wife. It is possible that, having become middle-aged people with set views of their own, the differences between them cannot be bridged, especially as the husband has made unfair accusation against her. Therefore, it has been enjoined by several decisions that such last minute offers to take back the wife are open to scepticism, as they are put forward with no other object than to ward off the obligations arising in civil and criminal proceedings for supporting the wife. It is enough to cite, *Block Khan* v. *Zainib Bibi*[4], *Pritam Singh* v. *Basant Kaur*[5], *Shamsukhan* v. *Siddiquinisa*[6], *Ganesh Sao* v. *Shemmala Devi*[7], *Bibian Ludwig Decruz* v. *Alice Winifred Decruz*[8], *Rajeswariamma* v. *K. M. Viswanath*[9], and *Senapathi* v. *Deivanai Ammal*[10]. I do not find any reason to differ from the conclusion of the learned Magistrate, who had the opportunity of seeing the parties before him, that he did not consider the offer to take back the wife as a *bona fide* one.

Then it is argued that the husband is not in flourishing circumstances and that the income got by him would not justify maintenance given by the learned Magis-

1. (1950) 1 M.L.J. 75 : A.I.R. 1950 Mad. 385 : 51 Cr.L.J. 907.
2. A.I.R. 1952 Trav.-Co. 562 : 54 Cr.L.J. 72.
3. (1950) 1 M.L.J. 158 : A.I.R. 1950 Mad. 394 : 51 Cr.L.J. 931.
4. A.I.R. 1931 Lah. 561 : 32 Cr.L.J. 1251.
5. A.I.R. 1926 Lah. 353 : 27 Cr.L.J. 507.
6. A.I.R. 1953 All. 720 : 1953 Cr.L.J. 1652.
7. A.I.R. 1950 Nag. 168 : 51 Cr.L.J. 1141.
8. A.I.R. 1938 Rang. 25 : 39 Cr.L.J. 287.
9. A.I.R. 1954 Mys. 31 : 1954 Cr.L.J. 273.
10. (1949) 2 M.L.J. 820 : A.I.R. 1950 Mad. 357 : 51 Cr.L.J. 775.

trate. I must first of all point out that it is the settled practice of this High Court not to interfere in revision with the quantum of maintenance which is awarded by Magistrates unless it is so manifestly perverse that it requires interference without any further argument on the subject. Besides, the possession of property is not at all the criterion for awarding maintenance under section 488. It is independent of possession of property. So long as a man is able-bodied and can work and earn his livelihood, it is his duty to support his wife. Therefore, our Courts have gone to the extent of laying down that, notwithstanding the fact that a husband may be an insolvent or a professional beggar or a minor or is a sadhu or a monk, he must support his wife, so long as he is able-bodied and can eke out his livelihood and support his wife. In fact, in one case which was argued before the Bombay High Court, when a man pleaded that he entered the holy orders the Bombay High Court said that, in such a case, he should drop off his orange robes and get employed and earn money in order to support his wife and children. The case-law on the subject will be found in *Dhani Ram* v. *Mst. Ram Dei*[1], *Pankajakshy* v. *Dakshyani*[2], *Abdul Wahab* v. *Sugrabi*[3], In re *Muni Kantivijayaji*,[4] and *Mohomed Hussain Abdul Kadar Shaikh Bhikan* v. *Emperor*[5]. Therefore, we need not make a meticulous inventory of the assets of this husband in order to calculate the exact maintenance which has got to be awarded. In fact, even under the Hindu Law, the obligation to support the wife is a personal obligation which attaches from the moment of marriage. It is independent of possession of property (*see* Mayne's Hindu Law, 11th edition, page 818.) In this case, I have already set out the maintenance awarded by the Magistrate, and, in these days of high cost of living, it is certainly not unconscionable that an amount of Rs. 20 per month should be awarded to the wife and Rs. 5 to each of the two children of this petitioner.

Learned counsel for the petitioner finally brings to my notice that it would appear that in a petition for restitution of conjugal rights which has been filed in the Sub-Court by the husband, temporary alimony as well as costs for opposing the application has been awarded by the learned Subordinate Judge. I have not got all the facts before me. If such a course had been adopted, then, one of two courses is possible for the petitioner. He can move the Subordinate Judge by placing before him the certified copy of the maintenance order and get that order vacated or he may go to the Magistrate with the order made by the Subordinate Judge and then get the maintenance awarded either altered or modified. Therefore, the fact that the Subordinate Judge has undertaken upon himself the wholly supererogatory task of providing alimony in a suit for restitution is neither here nor there.

The net result of this analysis is that there are no grounds to interfere and this revision is dismissed.

V.S. — *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

The Public Prosecutor .. *Appellant**

v.

Sengammal .. *Respondent.*

Prevention of Food Adulteration Act (XXXVII of 1954), *section* 16 (1) (g) (i)—*Butter as defined in the Rules—If includes butter obtained from goat's milk.*

'Butter' as defined in the rules framed under the Prevention of Food Adulteration Act, 1954, means the product prepared from the milk or cream of cow or buffalo or both. Hence even if there is some admixture of butter prepared from goat's milk with other butter, such stuff will not fall within the definition of butter as defined by the rules and the sale of such stuff would not be a punishable offence under the Act.

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1. A.I.R. 1955 All. 320 : 1955 Cr.L.J. 768.
2. A.I.R. 1952 Madh. B. 96 : 1952 Cr.L.J. 868.
3. (1934) 37 Cr.L.J. 86: 159 I.C. 120 (Nag.).
4. A.I.R. 1932 Bom. 285 : 33 Cr.L.J. 625.
5. A.I.R. 1940 Bom. 344 : 42 Cr.L.J. 101.

* Crl. Appeal No. 539 of 1959.

26th July, 1960.
(4th day of Sravana, 1882—Saka).

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (Accused) of offences under section 16 (1) (*g*) (i) read with section 7 (1) of Prevention of Food Adulteration Act, 1954, by the Additional First Class Magistrate, Coimbatore, in C.C. No. 120 of 1959, on his file.

M. Narayanamurthi for the Public Prosecutor (*P. S. Kailasam*), for Appellant.

V. Venkatesan and *C. F. Louis*, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal filed by the State against the acquittal of the respondent, one Sengammal, by the learned Additional First Class Magistrate, Coimbatore, in C.C. No. 120 of 1959. The facts are very simple, and within a short compass. The respondent was prosecuted for sale of adulterated butter under section 16(1) (*g*) (i) read with section 7 (1) of the Prevention of Food Adulteration Act, 1954. The facts are not in dispute that the respondent sold three quarter pound of butter to the Food Inspector which, on analysis, was found to have been adulterated. The plea of the respondent was that she sold only goat's butter, which does not fall within the ambit of the definition in the rules of the Act and that consequently, she was not liable for any offence. I may here briefly state that the analyst's certificate shows that the sample contained 85 per cent. of fat not derived from milk or cream. According to the learned Public Prosecutor, this implies that 15 per cent. of the fat did consist of butter fat, derived from milk or cream of cow or buffalo which, would exclude the defence of a sale of goat butter. Hence, it is argued, the acquittal of the respondent by the learned Additional First Class Magistrate was unjustified.

I have now gone carefully into the matter, and I find that the State cannot, upon the facts of this particular case, at least, canvass the merits of the acquittal and succeed. For the relevant rules clearly show (Appendix B, rule A-11 (5)) that butter, as referred to in the Act, implies

"the product prepared exclusively from the milk or cream of cow or buffalo, or both."

Hence, even if there is some admixture of goat-butter with other butter, such stuff would not fall within the definition. The results of the analyst do not conclusively prove, in the present case, that the sample did not contain an admixture of goat-butter. It may be worthwhile for the authorities, who are interested in implementing the provisions of the Act, to devise some simple chemical test whereby the presence of goat-butter in any sample can be infallibly detected. If this is done, and the possibility of goat-butter being present is excluded, then such prosecutions can be conducted without the risk of the escape by the offender through this loophole. With these observations, the appeal is dismissed. A copy of the judgment will be forwarded to the Food Inspectorate Authorities for information.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiciton.)

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

The Management of Sridharan Motor Service, Attur, Salem .. *Petitioner**

v.

The Industrial Tribunal, Madras and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947)—Dismissal of workmen for misconduct—Workers resorting to illegal strike—If could be justified merely because of a provocation from the management—Concepts of social justice—Limits of applicability.

"Where the workers in an industry resorted to an illegal strike, in contravention of the provisions of the Industrial Disputes Act, such as section 22, the strike cannot be justified. What is illegal cannot

* W.P. No. 17 of 1958. 10th October, 1958
18th Asvina 1880—Saka.

be said to be justifiable. The fact that the strike was the result of a provocation from the management is no justification for the illegal act of the workers. Concepts of social justice are undefined and contentious and vary with age and clime. Courts and tribunals are concerned with the law as it is and must give effect to it. Punishment of a person for a proved misconduct cannot amount to victimisation in any sense and a tribunal is not justified in sitting on appeal over the decision of the management in matters of discipline.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Petition No. 5 of 1957 in I.D. No. 10 of 1957 on the file of the Industrial Tribunal, Madras and to quash the order dated 24th December, 1957 made therein.

K. Rajah Aiyar and *C. Ramanathan*, for Petitioner.

B. Lakshminarayana Reddy, for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition by the Management of Sridharan Motor Service, Attur in Salem District, for the issue of an appropriate writ to quash the order of the Industrial Tribunal, Madras, dated 24th December, 1957 and made in Petition No. 5 of 1957 in I.D. No. 10 of 1957.

The relevant facts are these. On 15th February, 1957, the Management of Sridharan Motor Service and the workers in that service submitted a joint petition to the Government of Madras asking that various matters mentioned in the petition be referred to adjudication. On 20th May, 1957, the Government passed an order referring those questions for adjudication to the Industrial Tribunal, Madras. On 31st May, 1957, the Management revised their time-tables in such a manner that it prejudicially affected the workers in various ways. The position that resulted is thus summarised in the order of the Industrial Tribunal:

"It will be seen from the list that in the case of some of the workers, while the working hours per day were maintained the same, the number of working days in June were increased. It will be also seen that several of the drivers and conductors, very much more than in May, were put on spare duty thereby, depriving them of their daily batta which they could claim if they were on active duty. It will further be seen that in the case of several of the employees they were given night halts at stations other than their residential places whereas under the agreement in force between parties, the night halts should be, as far as possible, in their respective residential places, It cannot, therefore, be denied that in June there was increase in the work load. Further it will be seen from that list that in the case of most of those employees the spread-over hours were much more than that fixed by the statute, namely, 10½ hours."

In consequence the workers went on strike on 5th June, 1957. The workers contended that it was a case of lock-out effected by the management. The Tribunal, however, has found that what took place was not a lock-out but a strike. The Tribunal stated its conclusions on this aspect of the matter in these terms :

"On the evidence it is clear that the trouble in the various stations on the morning of 5th June was due to the strike resorted to by the workers and not lock-out by the management. Indeed, during the arguments, the learned counsel for the Union could not seriously contend that on the evidence any other view is possible ".

The management thereupon framed charges against several individuals who had gone on strike and entrusted the enquiry to an advocate. The workers, however, withdrew from the enquiry and refused to participate in it. Thereafter the management dismissed the workers against whom charges had been framed and then filed an application under section 33 (2) (*b*) of the Industrial Disputes Act, 1947, before the Tribunal for approval of the action which it had taken. The Tribunal approved the action of the management in respect of two of the workers who had been found guilty of having collected fares from passengers without issuing tickets to them. It, however, refused to approve the action of the management as regards the other workers. The management has, therefore, come to this Court for the issue of an appropriate writ to quash the order of the Tribunal.

It seems to me that the Tribunal was in error on a number of points. It is common ground that the bus service in question is a public utility service within the meaning of section 22 (1) of the Industrial Disputes Act. So far as is here material, section 22 (1) of the Industrial Disputes Act runs as follows ;

"22 (1) No person employed in a public utility service shall go on strike in breach of contract—

(*a*) without giving to the employer notice of strike as hereinafter provided, within six weeks before striking ; or

(*b*) within fourteen days of giving such notice ; or

(*c*) before the expiry of the date of strike specified in any such notice as aforesaid ;..."

It is not denied that the requirement of this section was not complied with. The strike was therefore clearly illegal. Nevertheless, the Industrial Tribunal recorded the view that the strike was *justified.* It observed :

"The management had clearly no right to put the workers on duty so as to exceed the statutory spread-over hours. Even on that very ground, the workers would be justified in refusing to work on those terms, which they did by going on strike. The strike was one provoked by the management by the revision of the duty roster, in which they introduced the increase in the work load by increasing the number of working days and in any case by compelling them to work for more than the statutory spread-over hours. On that ground alone it must be held that the strike resorted to by the workers on the morning of the 5th June was *justified*....In other words the strike, though illegal, because of the non-compliance of the provisions of section 22, must be held to be *justified* in the circumstances of the case".

In recording this opinion the Tribunal was following the views expressed in *Punjab National Bank Ltd.* v. *Their Workmen*[1]. I find it difficult to see how anything which is illegal can be said to be justified. Provocation may mitigate or it may extenuate, but, it practically never justifies contravention of the law. I am not forgetting that in the great drama of human development situation may occur in which some men of nobler clay than the rest, may feel an irresistible moral compulsion to defy an unjust law. Such men make History ; they stand on the pinnacles of Time. But, surely, the present is not such a case. No high or transcendental moral issues were involved. The workers had an adequate remedy available to them in the Industrial Disputes Act. Under section 33-A, where an employer contravenes the provisions of section 33 during the pendency of proceedings before a Tribunal, any employee aggrieved by such contravention, may make a complaint in writing to the Tribunal and thereupon the Tribunal is required to adjudicate upon the complaint as if it were a dispute referred to it in accordance with the provisions of the Act. Of that remedy the workers did not avail themselves.

Even assuming that the action of the management in altering the conditions of work was illegal, that would not justify the workers in contravening the law themselves. One wrong never justifies another wrong. If the view of the Tribunal that provocation justifies a breach of the law or that an unlawful act committed by one party justifies the opposite party in contravening the law were right, dangerous consequences will follow. A member of Parliament may in Parliament make a speech which angers a section of the people. If the view of the Tribunal were right then these persons would be justified in marching into Parliament and beating the member up. Some railway official may behave rudely or assault a member of the travelling public; then the other members of the travelling public would be justified in storming the booking office, wrecking the train and setting fire to the station. I do not think that when it put the matter in the form it did the Tribunal fully appreciated the implication of its statement. If it had, I am certain it would not have committed itself to such a position. Mr. Lakshminarayana Reddy, the learned Counsel for the Workers, said that in the present instance the strikers did not commit any acts of violence. That is true enough ; but it does not affect the principle involved. If the Government were to issue orders altering to their disadvantage the conditions under which the Police in the State work they would be justified, if Mr. Lakshminarayana Reddy were right, in walking away from their posts of duty. They may leave the traffic posts unmanned and the treasuries and jails unguarded. On the same principle, if the conditions of service in the Army were to be altered to the disadvantage of serving personnel and they were thereby provoked, they would be justified in marching off from the frontiers they are posted to defend. I am mentioning these extreme illustrations merely to indicate how dangerous and explosive is the doctrine to which the Tribunal—I am sure in an unguarded moment—committed itself. The law permits a man to

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1. (1952) 2 L.L.J. 648 at 659.

defend himself, but it does not justify a man in contravening the law merely, because his neighbour had done so.

The Tribunal quoted the following passage from *Punjab National Bank, Ltd.* v. *Their Workmen*[1] :

"Modern concepts of social justice would be outraged if in such cases the employer could dismiss a workman for his mere absence due to his participation in such a strike."

The order of the Tribunal leaves the impression that it shared this view.

On this I would make certain comments. Concepts of social justice have varied with age and claim. What would have appeared to be indubitable social justice to a Norman or Saxon in the days of William the Conqueror will not be recognised as such in England to-day. What may appear to be incontrovertible social justice to a resident of Quebec may wear a different aspect to a resident of Peiping. If it could be possible for Confucius, Manu, Hammurabi and Solon to meet together at a conference table I doubt whether they would be able to evolve agreed formulas as to what constitutes social justice. No definition exists of "concepts of social justice", which is a very controversial field. Courts and Tribunals created by the law must guide themselves by the directions and principles embodied in the law. If the law declares that a line or course of conduct is illegal, they must give effect to that declaration. In countries with democratic forms of government public opinion and the law act and re-act on each other. Sometimes the law sets the pace and public opinion catches up with the law. In other cases where the law lags behind public opinion, the pressure of opinion brings about a change in the law. But, so far as Courts and Tribunals are concerned, the important thing is that they are bound by the law as it stands and must give effect to it. They cannot ignore the law by rhetorical appeals to undefined and contentious concepts.

After expressing the view that the strike, though illegal was justified, the Tribunal went on to say,

"That being so, the dismissal of the workers would not be justified, as it would amount to victimisation."

Here too I think the Tribunal made a mistake. If you punish a man for a wrong which some one else has committed, it would be right to say that you are victimising him ; because then you are literally making a scapegoat of him. Again if you punish a man for something which he has done in another context which has no relation to or bearing on the charge which has been framed against him, the charge and enquiry being only a pretext to punish him for something he has done somewhere else, then also it would be right to say that you are victimising him. But, if you punish a man for something which he has himself done and the offence found to have been committed and the punishment awarded in respect of it are directly related to each other, I do not see how it can be said there has been any victimisation. I would illustrate my meaning. *X* is a leader of labour. He gives considerable trouble to the management. *Y* is a son or friend of his, employed by the management. The management can find no chance to punish *X*. Therefore, they proceed to punish *Y*. That would be a case of victimisation. Or again, *X* makes himself active on behalf of the employees in various siuations. The management is annoyed by it. He reports to work a minute or two late. He may have good cause for being late but the management want to get rid of him because of his other activities and they seize upon this occasion, to frame a charge against him and dismiss him. That would be a case of victimisation. But, if *X* wilfully destroys some piece of machinery and the management were to frame a charge against him finding the offence proved dismisses him, it is difficult to see how it can be said that he has been victimised.

It must be remembered, a fact too frequently forgotten, that the final responsibility for maintaining standards of conduct and discipline inside an establishment rest solely on the management. In this matter the position of a labour Court or an Industrial Tribunal *vis-a-vis* the management is not analogous to that of a Court of

1. (1952) 2 Lab. L.J. 648 at 659.

appeal in relation to a Court of first instance. There are a number of decisions on the point and I shall refer to some of them.

In *Automobile Products of India* v. *Rukmaji Bala*[1], the Supreme Court had to consider an application which the management had made to the Labour Appellate Tribunal to retrench some of its workers. The Labour Appellate Tribunal granted the permission but subject only to various conditions. On appeal the Supreme Court ruled :

"This also indicates that those sections only impose a ban on the right of the employer and the only thing that the authority is called upon to do is to grant or withhold the permission... Imposition of conditions is wholly collateral to this purpose and the authority cannot impose any condition."

In *L. D. Sugar Mills* v. *Pt. Ram Sarup*[2]. Bhagwati, J., observed:

"The Tribunal before whom such an application for permission is made under section 22 of the Act would not be entitled to sit in judgment on the action of the employer if once it came to the conclusion that a *prima facie* case had been made out for dealing out the punishment to the workman. It would not be concerned with the measure of the punishment nor with the harshness or otherwise of the action proposed to be taken by the employer except perhaps to the extent that it might bear on the question whether the action of the management was *bona fide* or was actuated by the motive of victimisation. If on the materials before it the Tribunal came to the conclusion that a fair enquiry was held by the management in the circumstances of the case and it had *bona fide* come to the conclusion that the workman was guilty of misconduct with which he had been charged a *prima facie* case would be made out by the employer and the Tribunal would under these circumstances be bound to give the requisite permission to the employer to deal out the punishment to the workman. If the punishment was harsh or excessive or was not such as should be dealt out by the employer having regard to all the circumstances of the case, dealing out of such punishment after such permission was granted would be the subject-matter of an industrial dispute to be raised by the workman and to be dealt with as aforesaid. The Tribunal, however, would have no jurisdiction to go into that question and the only function of the Tribunal under section 22 of the Act would be to either grant the permission or to refuse it."

This statement of the law was reiterated in *Caltex (India) Ltd.* v. *E. Fernandez*[3].

The Industrial Disputes Act, however, was amended in 1956. The question has therefore to be considered how far the amendment has affected the decisions which the Supreme Court had given earlier. Rajagopala Ayyangar, J., had occasion to examine the matter in *Gordon Woodroffe & Co., Ltd.* v. *Venugopal*[4]. The learned Judge then summarised and analysed the changes that had been made in the Industrial Disputes Act by the amendments made in 1950 and 1956, and, later in the judgment recorded this view :

"The reasoning contained in the judgment of the Supreme Court in the decisions referred to above appear to me to apply with equal force to the construction of section 33 as it now stands. The broad distinction between the powers of a Tribunal in dealing with industrial disputes and when exercisting jurisdiction to grant permission still prevails and there is in this connection no material difference between the powers of the Tribunal under the three sub-sections of section 33.

The expression used, 'approved' in section 33 now under consideration has, in my opinion, to be construed similarly. The power of the Tribunal is to "approve" or "not to approve" the action of the employer and it does not extend to its adding conditions to its approval.

....

In the light of these considerations I have reached the conclusion that the power of the Tribunal under section 33 (2) is of the same type and nature as under section 33 (1) or section 33 (3) as interpreted by the Supreme Court, and that the different expressions "approval" used in sub-section (2) or the words "as it deems fit" in sub-section (5) do not affect any change in the scope of this power. When once the Tribunal negatived *mala fides* on the part of the employer or any intention to victimise the worker for his participation in the industrial dispute, the Tribunal is in my judgment bound to accord its approval to the action of the employer, leaving the propriety of the quantum of punishment for being agitated in other appropriate proceedings open under the Industrial Disputes Act."

With these views I am in respectful agreement.

In *Indian Iron & Steel Co.* v. *Their Workmen*[5], the position was re-stated in these terms :

"Unfortunately, the management of a concern has power to direct its own internal administration and discipline ; but the power is not unlimited and when a dispute arises, Industrial Tribunals have been given the power to see whether the termination of service of a workman is justified and to

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1. (1955) S.C.J. 253 : (1955) 1 M.L.J. (S.C.) 148.
2. (1957) S.C.J. 47 : (1956) S.C.R. 916 : A.I.R. 1957 S.C. 82.
3. A.I.R. 1957 S.C. 326.
4. (1958) 1 M.L.J. 164.
5. (1958) S.C.J. 285.

give appropriate relief. In cases of dismissal on misconduct, the Tribunal does not, however, act as a Court of Appeal and substitute its own judgment for that of the management. It will interfere (i) when there is a want of good faith, (ii) when there is victimisation or unfair labour practice, (iii) when the management has been guilty of a basic error or violation of a principle of natural justice, and (iv) when on the materials the finding is completely baseless or perverse."

Mr. Lakshminarayana Reddi, the learned Advocate for the workmen, sought to support the decision of the Tribunal on other grounds. The management in the present case entrusted the enquiry to an Advocate, who, he said, had appeared for the management in earlier legal proceedings. Mr. Lakshminarayana Reddi also said that subsequently too the same Advocate appeared for the management in other proceedings and that in consequence the enquiry held by the management was wholly bad.

The Industrial Tribunal refused to accept this view, and I think quite properly. It cannot be doubted that if the management had a full time salaried manager and the enquiry had been held by him the workers could not have complained. In most large establishments enquiries into allegations of misconduct by a member of the subordinate staff is held by some one placed above him, and, so long as the principles of natural justice are not violated, the person against whom the enquiry is being conducted will not be heard to say that the enquiry is being held by a person in the employment of the management. If a full time salaried manager will not be disqualified I do not see how an Advocate, who, relatively speaking is an outsider can be said to be disqualified. Very often the results of enquiries conducted by a management have been held to be vitiated because the principles of natural justice had not been conformed to. The oridinary businessman has very often no clear or firm ideas as to what constitutes principles of natural justice, and, if he were a prudent person, he would entrust the enquiry to some one who can be trusted to know what these principles are. I do not think that the workmen are entitled to complain because in the present case a lawyer was engaged to hold the enquiry. Besides, it does not appear from any part of the record shown to me that they objected to this particular gentleman holding the enquiry. In fact, what they did was to "non-co-operate" at the enquiry. In these circumstances, I do not consider that they can be heard to complain that the enquiry was held by a particular individual.

Mr. Lakshminarayana Reddi next said that under section 33 of the Industrial Disputes Act as amended in 1956 an employer is prohibited from altering to the prejudice of the workmen concerned the conditions of service applicable to them during the pendency of proceedings before a Labour Tribunal in regard to any matter connected with the dispute and that when the management revised the time tables on 31st June, 1957, it did so alter the conditions of service and that, as it had thus transgressed the law, it has placed itself in the wrong. I am unable to agree that the management altered the conditions of service in regard to any matter that had been referred to the Tribunal. The annexure to G.O. Ms. No. 1775, dated 20th May, 1957, reads as below:

"1. Fixation of basic scales of pay for all categories of workers with provision for service weightage, while fitting the existing workers in the new scales of pay.

2. Fixation of dearness allowance.

3. Fixation of house-rent allowance.

4. Fixation of bonus for the year 1955-56.

5. Whether the termination of service of the following workers, is justified and whether they are entitled to any relief including reinstatement: (i) Conductor Logaguru, (ii) Conductor Bengarusami, (iii) Cleaner Pandarinathan, (iv) Cleaner Alla Baksh."

So far as I can see the revision of time tables which the management sought to effect on 31st May, 1957, did not touch any of these matters. Mr. Lakshminarayana Reddi, however, argued that item 1 in the annexure relates to fixation of basic scale of pay, that the result of the alteration of timings was to increase the hours of work and that therefore the matter comes under item 1. The argument overlooks the fact that the first item in the annexure relates only to the fixation of *basic* scales of pay. That is independent of the hours of work. The questions relating to the hours of work and the rate of payment for over-time work were not referred to

the Tribunal at all by the G.O. in question. I do not therefore consider the matter can be brought within the scope of section 33 of the Industrial Disputes Act.

Mr. Lakshminarayana Reddi argued that section 56 of the Factories Act provides that the periods of work of an adult worker in a factory shall be so arranged that inclusive of his intervals for rest they shall not spread over more than ten and a half hours in any day. The resut of the changes in the time tables which the management sought to effect on 31st May, 1957, was to spread the work over a longer period and that therefore this was illegal.

In infer that such an argument was advanced before the Tribunal because it observed in its order :

"Further it will be seen from that list that in the case of most of these employees the spread-over hours were much more than that fixed by the statute, namely 10½ hours."

I have difficulty in appreciating this argument. The Factories Act applies only to factories and a factory is defined as meaning any premises wherein a manufacturing process is being carried on. I do not see how a bus service can be said to be a factory as defined in the Factories Act.

Mr. Lakshminarayana Reddi advanced certain arguments on the basis of Rule 24 of the Rules framed by the Government of Madras under the Minimum Wages Act (Central Act XI of 1948) and these must now be considered.

The rule in question, so far as it is here relevant, runs as follows :

" 24. *Number of hours of work which shall constitute a normal working day.*—(1) The number of hours which shall constitute a normal working day shall be—

(*a*) in the case of an adult, 9 hours,

(*b*) in the case of a child, 4½ hours.

(2) The period of work of an adult worker each day shall be so fixed that no period shall exceed five hours and that no worker shall work for more than five hours before he had had an interval for rest of at least half an hour.

(3) The periods of work of an adult worker in a scheduled employment other than employment in any plantation shall be so arranged that inclusive of his intervals for rest under sub-rule (2), they shall not spread-over more than ten and a half hours in any day :

Provided that the Inspector may, for reasons to be specified in writing, increase the spread-over to twelve hours."

Mr. Lakshminarayana Reddi argued : By reason of this rule the spread-over of the work of an employee must be limited to ten and a half hours a day unless the permission of the Inspector has been obtained. No permission was obtained in the present case. When the management so altered the duty roaster that the spread-over of work was increased to more than ten and a half hours, in effect it was issuing an illegal order to its employees. Nobody is bound to obey an illegal order and a person cannot be punished for not obeying an illegal order. The workers concerned in the present case could not have been lawfully punished and so the order of the Tribunal is right.

Attractive as this reasoning looks at first sight it really proceeds on an initial misconception. Rule 24 has been framed in exercise of the powers conferred by section 13 of the Act which runs as follows :—

" 13. *Fixing hours for a normal working day, etc.*—In regard to any scheduled employment minimum rates of wages in repect of which have been fixed under this Act, the appropriate Government may—

(*a*) fix the number of hours of work which shall constitute a normal working day, inclusive of one or more specified intervals ;

(*b*) provide for a day of rest in every period of seven days which shall be allowed to all employees or to any specified class of employees and for the payment of remuneration in respect o such days of rest ;

(*c*) provide for payment for work on a day of rest at a rate not less than the overtime rate."

What rule 24 does is in effect to define a normal working day. The rule does not say that the hours of work which are to be regarded as equivalent to a normal

working day shall be the maximum number of hours during which a person can be required to work. Section 14 of the Act provides for overtime work and rule 26 provides for wages for overtime work. These provisions make it plain that it is not illegal to require an employee to work overtime. The only thing is that if he is required to work overtime he must be paid extra wages and this extra will be computed at one and a half times the ordinary rate of wages in the case of agricultural and plantation labour and at a double the ordinary rate in every other case. The foundation for this argument of Mr. Lakshminarayana Reddi, therefore, disappears.

Mr. Lakshminarayana Reddi next said that an employer has no right in law to call on an employee to work overtime when other workers are available. In support of this contention I was shown no authority, and, I do not think that it is the law. If it were so some astonishing results would follow. An irrigation channel breaches and the work of repairing is started by a contractor. In many cases work of this nature once started must be continued without interruption till a particular stage is reached. Otherwise all the work done may be undone by the action of water, and, sometimes this may have very disastrous consequences, particularly when the breach affects a chain of irrigation tanks. In such cases when one tank higher up in the series breaches, there is a real risk of that breach affecting the tanks lower down in the chain. Now, if Mr. Lakshminarayana Reddi were right, the moment the clock shows that the end of the normal working day has arrived, the workers would be entitled to walk away from the site of their work and the contractor or other employer cannot require them to stay on even for half an hour. Apparently the person entrusted with the execution of the work must be able to compute exactly what stage would be reached in the execution of the work when the clock strikes and he must have other employees on hand ready to take the place of the individuals who have computed their normal working day. More often than not this requirement will be found to be impracticable, if not impossible.

Again take an industry in which a long series of interlocking processes are involved from say cooking the alloy to the end of the operation line. Very often something or other happens and there is delay at one stage or other in the chain of operations. This naturally leads to delay at every subsequent stage. Now, if Mr. Lakshminarayana Reddi were right, on the stroke of the clock the employees would be entitled to walk away leaving the operations unfinished though the result might be ruinous waste. I shall give one more illustration. An express train pulls out from the Central on its way to Mangalore. The Railway administration has so adjusted the time table of work that the driver leaving Central will be relieved at Salem Junction. Now, I presume the railway administration has engine drivers who can be called up to do relief duty. That being so, and, if Mr. Lakshminarayana Reddi were right, the driver who takes out the train from Central would not be bound to take the train to Salem where his relief awaits him if his normal working day ends when the train is between Salem and Jalarpet. He will be entitled to stop the train the moment the end of his normal working day has arrived, and, walk away. I put this illustration in a slightly different form to Mr. Lakshminarayana Reddi, and then, he replied that no engine driver would act in so irresponsible a manner. That may well be so. But the point is, if the argument of Mr. Lakshminarayana Reddi were right the driver would be legally entitled to do so.

I can see no warrant for this contention in any of the Statutes placed before me, and the illustrations I have given furnish a sufficient commentary on the untenability of the argument.

Mr. Lakshminarayana Reddi next said that the result of the revision of the time tables by the management was to increase the number of days in a month on which the employees were required to work. The maximum number of days during which a person can be required to work in a week has been fixed by section 13 of the Act as six days in seven. If any particular person is required to work on the seventh day then the section provides that such work shall be treated as overtime work and that it shall be paid for at the rates prescribed for overtime work. This makes it

clear that it is not unlawful to require a person to work more than six days a week. The only thing is that if he is required to work on the seventh day also he must be paid extra on the over time scale. It has not been shown to me that the duty roaster fixed by the management contravenes section 13 of the Act.

One other comment must be made. Assuming that the order issued by the management to a particular worker was illegal in that he was required to work longer than the law permits the employer to require him to work he may possibly be justified in disobeying the order. But, that would not justify the others in striking and thus violating section 22 of the Industrial Disputes Act. If they wanted to go on strike they should have given the notice required by that section. Alternatively, they should have availed themselves of the remedies provided by the Act, for an industrial dispute.

Mr. Rajah Ayyar said that the alteration of the time-tables which the management tried to effect on 31st May, 1957 did not, so far as it related to hours of work, materially alter the conditions that obtained in April and May. This, however, is controverted by Mr. Lakshminarayana Reddi, and so it becomes an issue of fact. The only comment I need make is that if Mr. Rajah Ayyar is right in this respect the employees would have had even less excuse for striking than was sought to be made out.

The liability to be called upon to work overtime is an incident of various kinds of employment and an order is not illegal merely because it requires an employee to work overtime. When that happens the employee is entitled to extra payment at certain enhanced rates. But, he cannot refuse to work. It will be appreciated that the requirement of the law that overtime work should be paid for at higher rates is itself bound to deter the management from calling on its employees to do overtime work. In controversies of this kind it is as well to remember that the rights and obligations between the employer and the employee are mutual and reciprocal : the obligations are not all on one side and the rights on the other. Managements have to bear in mind that labour is not a commodity like so many sacks of oats. On the other hand, labour has to remember equally distinctly that the management is not a sponge to be squeezed dry. The goose lays no eggs that is killed. Both labour and management have to remember that the general public are also affected by their internecine disputes.

The last argument of Mr. Lakshminarayana Reddi which I need deal with is based on section 9-A of the Industrial Disputes Act. The relevant portion of that section runs :

"No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change,—

(*a*) without giving to the workmen likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected ; or

(*b*) within twenty-one days of giving such notice :

. . . ."

Item 4 in the Fourth Schedule reads "Hours of work and rest intervals". The argument was that the revision of time-tables which the management attempted to effect on 31st May, 1957, affected the hours of work and rest intervals of the workmen concerned, that the attempted revision was therefore illegal and that therefore the subsequent action of the management in dismissing the workers should not be approved.

I entirely agree that if a management contravenes the law it cannot obtain the support either of the Courts or the Tribunals to uphold it in its contravention, however indirectly or obliquely such support may be sought. But at the same time I want to make it perfectly plain that this does not mean that the management thereby becomes an outlaw and that it is not entitled to the protection of the State in every other respect. In the present case the management asked for the approval of the Industrial Tribunal under section 33 (5) of the Act. If the result of according such approval would be to enable the management to successfully violate the law

and reap the benefits of such violation, the Tribunal would be justified in refusing to accord its approval. That would be a contingency not contemplated or provided for in the decisions which the Supreme Court has so far rendered.

The first reply of Mr. Rajah Iyer to this last contention of Mr. Lakshminarayana Reddi based on section 9-A of the Industrial Disputes Act was that the point was not taken before the Tribunal. This, however, is a matter I am prepared to overlook. But, I cannot do that in respect of the second point which M. Rajah Iyer made, *viz.*, that there exist anterior understandings, arrangements and awards within the framework of which the management was entitled to effect the changes it notified on 31st May, 1957. That is a question of fact which I cannot investigate. Nor, as the point was not taken before it, was the requisite material placed before the Tribunal. The Tribunal would have to go into this matter.

The position then comes to this. The order of the Tribunal mus be set aside because of the mistakes it has committed and to which I have already referred to. Naturally it would have to dispose of the matter afresh. Both the parties will be at liberty to place any additional or relevant material before the Tribunal. Rule made absolute. There will be no order as to costs.

R.M. *Rule made absolute.*
Matter remitted.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Srinivasan (Minor) by guardian and mother Krishnaveni Ammal *alias* Venu Ammal .. *Appellant**

v.

Kumarappa Chettiar and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 48—Limitation under—Effect of in cases where execution of decrees was stayed by special enactments like Madras Act V of 1954 or I of 1955.

Section 48 of the Civil Procedure Code fixes a period of limitation for purposes of execution of decrees and it has to be read with other saving provisions as to limitation under special enactments like the Madras Act I of 1955 or the enactments that preceded it. It will be unreasonable to let section 48 of the Code to have a free play so as to destroy the beneficent effect of the special enactments relating to agriculturists. The total period of time by which execution of decrees was stayed by such enactments have to be excluded from the period of limitation prescribed under section 48 of the Code.

Appeal against the Order of the District Court of Tiruchirapalli, dated 31st March, 1959 and made in A.S. No. 48 of 1959, (Order of Sub-Court, Pudukottah, dated 19th November, 1958, in E.P. No. 6 of 1958 in O.S. No. 64 of 1947 (Chief Court, Pudukottah).

D. Ramaswami Ayyangar and *P. R. Varadarajan*, for Appellant.

R. Viswanathan, for Respondent.

The Court delivered the following

JUDGMENT.—The above Civil Miscellaneous Second Appeal arises out of proceedings in execution and involves for determination an interesting question of limitation.

One Ramanathan Chettiar filed a suit O.S. No. 64 of 1937 on the file of the Chief Court, Pudukottah impleading one Venkatrama Rowth as the 1st defendant and Ramaswami Rowth as the 2nd defendant, and sought to recover a sum of money. A money decree was passed against the 1st defendant alone on 28th October, 1939, by the trial Court with a charge on a half share of the plaint A and B Schedule properties, but the 2nd defendant was exonerated. The plaintiff preferred an appeal seeking to have a decree against the 2nd defendant also but that was dismissed by by the appellate Court on 19th January, 1943.

*A.A.A.O. No. 81 of 1959. 22nd January, 1960.
(2nd Magha, 1881—Saka).

The plaintiff decree-holder filed the first execution petition on 6th February, 1943, but that was dismissed on 9th December, 1945. The next execution petition was M.P. No. 568 of 1945, which was presented on 21st October, 1945, in the Chief Court of Pudukottah. During the pendency of the said execution petition the territory of Pudukottah became integrated with the Madras State and the execution petition pending on the file of the Chief Court, Pudukottah was transferred to the District Munsiff's Court of Pudukottah. On 9th March, 1950, that execution petition was dismissed. The next execution petition was filed on 19th June, 1951, in the District Munsiff's Court of Pudukottah but was returned for presentation to the proper Court on 2nd July, 1951. On 9th July, 1951, the execution petition was presented to the Sub-Court, Pudukottah and was taken on file and numbered as E.P. No. 488 of 1951. On 15th December, 1953 the execution petition was dismissed by the advent of Madras Ordinance V of 1952 which put an embargo on proceedings against the judgment-debtor who was an agriculturist. The next execution petition was E.P. No. 6 of 1958 presented on 26th September, 1955, to the Sub-Court of Pudukottah. The persons now executing the decree are the legal representatives of the deceased decree-holder Ramanathan Chettiar and the person resisting the execution is the legal representative of the deceased 1st defendant, judgment-debtor.

The contention of the judgment-debtor raised in the Courts below and now forming the subject-matter of the Civil Miscellaneous Second Appeal is that the execution petition E.P. No. 6 of 1958 is barred by limitation. The whole of the plea rests upon section 48, Civil Procedure Code. The date of the decree is 19th January, 1934, E.P. No. 6 of 1958 was presented on 26th September, 1955 and being a fresh application for execution presented after the expiration of twelve years from the date of the decree sought to be executed, so the argument ran, was barred by the terms of section 48, Civil Procedure Code. The learned Sub-Judge overruled the plea on the ground that the order passed by the Munsiff's Court on 9th March, 1950, was passed without jurisdiction and that therefore E.P. No. 568 of 1945 must be deemd to be still pending and that no final orders had been passed in that execution petition and that E.P. No. 6 of 1958 presented on 26th September 1955, must be deemed to be in continuation of E.P. No. 568 of 1945 and not a fresh application caught by section 48, Civil Procedure Code. In this view he held that the present execution petition is not barred by limitation.

On the appeal by the judgment-debtor to the District Court of Tiruchirapalli the learned District Judge confirmed the decision of the executing Court on other grounds. He held that the provisions of section 48, Civil Procedure Code, pleaded by the judgment-debtor may not avail, in view of the saving provisions of Madras Ordinance V of 1955, Madras Act V of 1954 and Madras Act I of 1955 which together grant a respite of one year, six months and twenty-six days for the purpose of computing the period of limitation for suits and execution proceedings. He also held that under section 4 (7) of Madras Act I of 1955 the provisions of section 4 (1) of that Act will be deemed to be a subsequent order within the meaning of section 48 (1), Civil Procedure Code.

The judgment-debtor has preferred the above Civil Miscellaneous Second Appeal and challanges the decision of the Courts below overruling the plea of limitation. Mr. D. Ramaswami Ayyangar appearing for the appellant contended that section 48 of the Civil Procedure Code prescribing the outer limit of a period of 12 years does not constitute a period of limitation, that the saving provisions of the enactments referred to, Ordinance V of 1955, Act V of 1954 and Act I of 1955, which dealt with only exemption from the period of limitation, cannot therefore be attracted and engrafted upon section 48, Civil Procedure Code. He contended that section 48, Civil Procedure Code, must be treated as fixing the statutory limit of 12 years for execution of decrees from the *terminus a quo* in clauses (*a*) and (*b*) of sub-section (1) of the said section and cannot constitute strictly what may be called the period of limitation, as the Civil Procedure Code was not concerned with fixation of the period of limitation. However attractive the argument may be,

it is not sustainable in view of the decision of the Full Bench of this Court in *Kandaswami* v. *Kannappa*[1], which considered the applicability of section 48 of the Civil Procedure Code in a context of orders of stay having prevented a decree-holder from executing the decree, who would otherwise have availed himself of the provisions of section 15 of the Indian Limitation Act. The question raised was whether section 48, Civil Procedure Code, is controlled by section 15 (1) of the Indian Limitation Act. One of the questions considered by the Full Bench was whether the period of 12 years mentioned in section 48, Civil Procedure Code, was a period of limitation within the meaning of section 15 of the Limitation Act. After reviewing elaborately all the prior decisions on the point Their Lordships held that it was well established that the Limitation Act and the Code were to be read together, because both were statutes relating to procedure and they were in *pari materia* and therefore to be taken and construed together as one system, as explanatory of each other. The following extracts from the judgment of the Full Bench at page 442 has a bearing on the question now to be decided :

"I venture to think further that even if it be understood in the strictest sense, the period fixed by section 48 of the Code must be deemed to have become a part of the Limitation Act by a process of incorporation in Articles 181 and 182. Column (1) of the Article 181 speaks of an application for which no period of limitation is provided elsewhere in this Schedule or in section 48 of the Code of Civil Procedure, 1908. Whether the word 'prescribed' in section 15 (1) would apply to periods of limitation provided by other statutes or not, it is clearly indicated by Article 181 that the period fixed by section 48 is in *pari materia* with the period of limitation provided in the Schedule to the Limitation Act."

At page 444 there is another observation which may also be usefully referred to :

"If by an act of Court over which the decree-holder has no control, he is prevented from recovering the fruits of his decree during the full period of twelve years, it appears to me to be highly unreasonable that by the mere lapse of twelve years from the date of the decree, his rights should become extinct, rights which he was prevented from enforcing for a part at least of the period of twelve years."

The saving provisions under the special enactments referred to above are almost of a pattern resembling the provisions enacted under section 15 of the Indian Limitation Act. To quote section 8 of the last enactment (Madras Act I of 1955), it prescribes that :

"in computing the period of limitation for a suit for recovery of a debt or an application for the execution of a decree in respect of a debt, the time during which the institution of the suit or the making of the application was barred under section 3 shall be excluded."

It will be unreasonable to let section 48, Civil Procedure Code, have a free play so as to destroy the beneficent effect of the special enactment relating to agriculturists. If section 48, Civil Procedure Code, is really a fixation of the period of limitation as held by the Full Bench in *Kandaswami* v. *Kannappa*[1], there cannot be any difficulty in holding that section 8 of Act I of 1955 and the other enactments which preceded it will have to be given their full effect by making them govern section 48, Civil Procedure Code. The total period of 1 year, 6 months and 26 days has to be excluded from the period of limitation prescribed under section 48, Civil Procedure Code. The period of one year, six months and 26 days is the total period occupied by the ban under the three enactments, Ordinance V of 1953, Act V of 1954 and Act I of 1955.

Other High Courts have also taken the view that the twelve years in section 48, Civil Procedure Code, is only a period of limitation; *Durgapal* v. *Panchan*[2], *Ramgopal* v. *Sidram*[3]. In *Sinnaru Thevan* v. *Nachiappa Chettiar*[4], the decision of the Full Bench in *Kandaswami* v. *Kannappa*[1], is followed.

I am of opinion that the principle laid down in *Kandaswami* v. *Kannappa*[1], sufficiently repels the appellant's contention and the Courts below were right in holding that the last execution petition E.P. No. 6 of 1958 presented on 26th September,

1. I.L.R. (1952) Mad. 421 : (1951) 2 M.L.J. 668 (F.B.).
2. A.I.R. 1939 All. 403 (F.B.).
3. A.I.R. 1943 Bom. 164.
4. (1955) 1 M.L.J. 51.

1955, though beyond 12 years from 19th January, 1943, was yet in time by the application of the saving provisions of the enactments referred to above. In this view of the matter it is really unnecessary to consider whether the other point decided by the learned District Judge regarding the applicability of section 4 (7) of Act I of 1955 is well founded or not. In the result this Civil Miscellaneous Second Appeal fails and is dismissed with costs.

No leave.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE GANAPATIA PILLAI.

Unnamalai Ammai Ammal .. *Appellant**

v.

Sithapathi Reddiar .. *Respondent.*

Will—Proof of execution—Evidence impeaching genuineness of a negative character—Value of—Positive evidence of execution by testator by reliable witnesses—Evidence Act (I of 1872), *section* 45*—Genuineness of signature—Value of evidence of handwriting expert—Hindu Women's Right to Property Act (XVIII of* 1937, *as amended by Act XI of* 1938), *sections* 3 (1) *and* 3 (2)—" *Separate property* "—" *An interest in joint family property* "*—Meaning of—Property taken by Hindu father on partition between him and his son—Character of—Succession to—Right of widow to succeed to the exclusion of divided son—Appeal—New plea—Question of law.*

Where in attempting to impeach the genuineness of a will and of the due execution thereof, a party examines a number of witnesses to show that some of them were continuously in the company of the testator during the last 3 days of his illness and to their knowledge no will was executed by him, such negative evidence is, in the very nature of things, of little value, when there is positive evidence of the execution of the will by the testator in the shape of testimony of reliable witnesses produced by the party setting up the will.

In evaluating the evidence of a handwriting expert on the question of genuineness of the signature alleged to be that of the testator, the Court must keep in view the following considerations :—

Firstly, very few people always sign in the same manner on all occasions ;

Secondly, the opinion of an expert as to the genuineness of a signature should be received with great eaution, especially in a case where there is positive evidence of persons who saw the testator sign the will ;

Thirdly, all the tests evolved by experts in the matter of comparison of handwriting and signature are merely tentative in character ; and lastly, opinion evidence is usually very weak evidence.

The Hindu Women's Right to Property Act was intended as a beneficent piece of legislation to give Hindu women better rights in property and the object of the legislation was to modify the ordinary rule of Hindu Law which excluded a widow from taking any benefit in the separate properties of her husband in the presence of a son, grandson or great grandson, or any share in his joint family property in the presence of any co-parcener of her husband.

" Separate property " in section 3 (1) of the Act should be understood in a restricted sense and can be properly applied only to such property in respect of which the son of the last surviving coparcener would not be entitled to claim coparcenary rights but only a right of inheritance by succession at the moment of his father's death if he survived him. Every other class of property of a male known to Hindu Law must come under the category of joint property or an interest in joint family property mentioned in section 3 (2). " Separate property " would include property taken by a member of the joint family at a partition of family properties.

Umayal Achi's case, (1945) 1 M.L.J. 108: (1945) F.L.J. 8 : 1945 F.C.R. 1 (F.C.) ; *Subramanian v. Kalyanarama,* (1957) 1 M.L.J. 250 : I.L.R. (1957) Mad. 565 : A.I.R. 1957 Mad. 456, followed.

The true effect of section 3 (2) is to exclude a divided son of the last surviving coparcener from taking any share in the properties obtained by the last surviving coparcener at a partition between him and his son and left by him even if he died intestate, and his widow will be solely entitled to succeed to that property to the exclusion of the divided son. The expression " an interest in joint family property " in section 3 (2) would cover an interest partitioned or unpartitioned.

Manjanatha v. *Narayana,* (1882) I.L.R. 5 Mad. 362; *Narayana Sah* v. *Sankar Sah,* (1929) 57 M.L.J. 685 : I.L.R. 53 Mad. 1 (F.B.), referred to.

Visalamma v. *Jagannadha Rao,* A.I.R. 1955 Orissa 160, relied on.

A new point of law not adverted to in the Court below or mentioned in the memorandum of appeal may be permitted to be raised at the time of the hearing of the appeal.

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*Appeal No. 669 of 1953 and C.M.P. No. 2142 of 1957. 24th September, 1957.

Appeal against the decree of the District Court of South Arcot, dated 11th March, 1953, in O.S. No. 61 of 1951.

M. S. Venkatarama Ayyar, for Appellant.

R. Ramamurthi Ayyar, for Respondent.

The Judgment of the Court was delivered by

Ganapatia Pillai, J.—The appellant in this case was the second wife and now widow of one Duraiswami Reddiar, who died on 10th August, 1951, aged about 68 years. By his first wife, Kamalakshi Ammal, who died in 1936, Doraiswami Reddiar has a son called Sithapathi Reddiar, who is the respondent in this appeal. The appellant was married to Doraiswami in 1938. By O.S. No. 33 of 1945, which was a suit for partition instituted by Sithapathi, the respondent, there was a division of all the family properties between Doraiswami and his only son Sithapathi, It is admitted that though only a preliminary decree for partition was passed in that case, by agreement of parties all the family properties were divided and since 1945 the father Doraiswami and his son Sithapathi had been in separate enjoyment of the properties which fell to their respective shares in this partition. The suit out of which this appeal arises was instituted by the respondent for partition of the properties mentioned in Schedules A to C to the plaint, which admittedly belong to his father, at the time of his death in 1951.

The case of the respondent in the plaint was that his father Doraiswami died intestate, and he (the respondent) was entitled to a half share in Doraisami's properties, the other half going to the appellant.

This claim was met by the appellant by propounding the will, Exhibit B-1, alleged to have been executed by Doraiswami on 9th August, 1951. According to the terms of this will Doraiswami left all the properties, which he had obtained by partition, to his second wife the appellant absolutely. Regarding outstandings and moveables comprised in Schedules B and C of the plaint, the appellant raised a contest by denial of existence of some of them. It is not necessary for the purpose of this appeal to take any more notice of this contest.

The respondent attacked the will of Doraiswami as a forgery. His case was that his father was unconscious continuously for 3 days prior to the date of the will, and that the will Exhibit B-1 was really fabricated by the appellant with the assistance of her two brothers, and after Doraiswami had died.

The learned District Judge, who tried the suit, came to the conclusion that though Doraiswami was conscious on 9th August, 1951, when he is said to have executed the will, it was not genuine in the sense that the proof adduced of execution of it by Doraiswami was not sufficient to carry conviction to his mind. However the learned District Judge was satisfied that if execution of the will by Doraiswami was proved by the evidence on the record, it should be held that he executed it in a sound disposing state of mind. The main question for consideration in the appeal, therefore, is whether Exhibit B-1 has been proved to be the last will and testament of Doraiswami executed by him when he was in a sound disposing state of mind.

* * * * * *

[After discussing the evidence His Lordship continued]:

We have little difficulty in agreeing with the conclusion of the learned trial Judge that Doraisami was conscious for the last 3 days before his death. The evidence of D.W. 3, the Villupuram doctor, who attended upon Doraiswami both on the 8th day and on the 9th day of August, 1951, has not been impaired in cross-examination. This taken along with the evidence of D.W. 1, the defendant herself, and D.W. 8 her brother amply establishes the falsity of case of the respondent, namely, that his father was unconscious continuously for three days before his death. A number of witnesses were examined on the side of the plaintiff (respondent) to show that some of them were continuously in the company of Doraiswami during the last three days of his illness and to their knowledge no will was executed by Doraiswami. In the very nature of things, such negative evidence is of a little value, when there is positive evidence of the execution of the will by Doraisami in the shape of the testimony of D.Ws. 2, 5, 6 and 7.

The next question for consideration is whether the signature of Doraisami in Exhibit B-1 can be taken to be proved as his genuine signature on the strength of the evidence of these witnesses, especially in the face of the evidence given by the hand-writing expert, P.W. 1. The purport of the evidence of this expert was that the signature of Doraiswami found in Exhibit B-1 was a forgery by tracing. The learned Judge in the Court below was himself of the opinion that the reasons given by the expert were inconclusive, and there was ground for difference of opinion about the validity of those reasons. Before examining the evidence of this expert we would point out the consideration which must be kept in view in evaluating the evidence of such witnesses.

The first consideration is that very few people always sign in the same manner on all occasions. The second consideration is that the opinion of an expert as to the genuineness of a signature should be received with great caution, especially in a case where there is postive evidence of persons who saw the testator sign the will in question. Thirdly all the tests evolved by the experts in the matter of comparison of hand-writing and signatures are merely tentative in character. Lastly opinion evidence is usually very weak evidence.

* * * * *

After discussing the evidence in detail His Lordship proceeded :—

Under the circumstances the finding of the lower Court as regards the genuineness of the will, Exhibit B-1, as shown from the following passage, is almost a halting one :

"In the circumstances of the case it is not possible to say that the will is genuine and it was executed by Doraisami. Perhaps, as suggested by the expert, the signature has been traced. If however the will was genuine in the sense that it was executed by Doraisami, it must be held that it was executed while he was in a sound and disposing state of mind. The fact that the defendant would have influenced him to leave the entire properties to her will not be an infirmity so as to affect the disposing state of mind. But I hold the genuineness of the will has not been proved satisfactorily"

In our opinion, this conclusion is neither warranted by the evidence in the case nor by the facts proved regarding the circumstances under which the will was executed.

We are satisfied on the scrutiny of the evidence that even three weeks prior to the date of his death Doraisami had contemplated execution of a will, and in fact attempted to execute Exhibit A-4, but this attempt proved infructuous, that Doraisami was anxious that after his lifetime his property should go to his second wife, and that he should execute an instrument to see that his divided son put no obstacles in the way of his widow enjoying his properties, and he actually carried out the object by executing Exhibit B-1 in a sound disposing state of mind. Disagreeing with the learned District Judge we hold that Exhibit B-1 has been proved to be the last will and testament of Doraisami by acceptable evidence.

We permitted Mr. M. S. Venkatarama Ayyar, learned counsel for appellant to raise an additional ground not mentioned in the memorandum of appeal. It relates to the questions of law, whether even if the will Exhibit B-1 was not genuine, and Doraisami be deemed to have died intestate, his widow, the appellant would not be entitled to the properties in suit, by reason of the provisions of the Hindu Women's Rights to Property Act. A decision of this question may be unnecessary in this appeal, in view of our finding as to the genuineness of the will. However, as the question was fully argued by both learned counsel appearing in that case, we would indicate our opinion on this point.

Section 3 of the Hindu Women's Rights to Property Act (XVIII of 1937), as amended by Act XI of 1938, provides for succession to the separate and joint family properties of a Hindu governed by any school of Hindu Law, or by customary law when he dies intestate leaving his widow or the widow of a predeceased coparcener. According to clause (1) of section 3 of the Act the widow would be entitled to take a share in the separate property just as a son along with other heirs of the propositus. Clause (2) of section 3 provides for succession to interest in

joint family properties in the case of a Hindu governed by any school of law, other than the Dayabaga or by customary law and enacts that in such a case the widow of the propositus shall have the same interest in the property which he was possessed of at the time of his death as he himself had. Clause (3) of section 3 provides that in the case of the succession either under clause (1) or clause (2) of that section the estate inherited by the widow shall be analogous to the women's estate known to the Hindu Law, except for the difference that in the case of succession under the Hindu Women's Rights to Property Act, the widow would be entitled to claim partition just like a male coparcener. This Act was intended as a beneficent piece of legislation to give Hindu women better rights in property. To construe the provisions of such an Act, it would be proper to look to the previous state of the law which it was intended to modify. Before this Act no Hindu widow governed by the Mitakshara school of law could have claimed any share in the separate property of her husband in the presence of a son, grandson or great grandson or any share in his joint family property in the presence of any coparcener of her husband.

The Federal Court in *Umayal Achi's case*[1], had to consider the effect of clause (1) of section 3. In that case one Arunachalam Chettiar died leaving his two widows and the widow of a predeceased son. The widow of the pre-deceased son claimed a share in the properties left by Arunachala, who was the last surviving coparcener of a joint family. She based her right under section 3 (1) of the Hindu Women's Rights to Property Act. In considering the question whether property held by the last surviving coparcener of a joint family could be called his separate property, the Federal Court ruled that the term ' separate property ' used in section 3 (1) of the Act should be understood in a restricted sense, and could be properly applied only to such property in respects of which the son of the last surviving coparcener would not be entitled to claim coparcenary rights but only a right of inheritance by succession at the moment of his father's death if he survived him.

The next step in the argument of the learned counsel for the appellant was that every other class of property of a male known to Hindu Law must come under the category of joint family property or an interest in joint family property mentioned in clause (2) of section 3. This argument found favour with a Bench of this Court presided over by the learned Chief Justice and Ramaswami, J., in *Subramanian* v. *Kalyanarama*[2].

There a widow claimed a share in the property of her husband who had become divided fom his two sons sometime before his death. Krshnaswami Nayudu, J., against whose judgment that L.P.A. had been preferred had held that the ruling of the Federal Court in *Umayal Achi's case*[1], should be confined to the properties obtained by a sole surviving coparcener, and should not be extended to the property obtained by the last male holder in a partition of family properties. The Bench in *Subramania's case*[2] was of the view that the principle of the Federal Court decision would equally apply to property taken by a member of the joint family at a partition of family properties. This seems to be warranted by the reasoning found in the judgment of Varadachariar J., who delivered the leading judgment in *Umayal Achi's case*[1].

If the property obtained by Doraisami at the family partition of 1945 is not separate property, within the meaning of section 3 (1) of the Act, we agree with Mr. Venkatarama Ayyar, that it must be deemed to be an interest in Hindu joint family property within the meaning of section 3 (2) of the Act. With respect, we concur with the Bench in *Subramanian* v. *Kalyanarama*[2], in their opinion on this matter. However this does not dispose of the impediment in the way of the appellant getting all the properties of Doraisami disposed of under the will.

In *Subramanian* v. *Kalyanarama*[2], the widow was given a third share in the properties of her husband by the decree of the trial Court But she had not appealed

1. (1945) 1 M.L.J. 108: (1945)F.L.J. 8 : (1945) F.C.R. 1 (F.C.).
2. (1957) 1 M.L.J. 240: I.L.R. (1957) Mad. 565: A.I.R. 1957 Mad. 456.

against that decree. Therefore the question as to what would be the quantum of the interest of the widow under section 3 (3) of the Act, was, left open in that case, at it did not arise for decision.

The learned counsel for the appellant drew our attention to the Full Bench decision in *Narayan Sah* v. *Sankar Sah*[1], which ,following the ruling in *Manjanatha* v. *Narayana*[2], upheld the principle of equality of shares in partitions among coparceners governed by the Mitakshara School of Hindu Law. He particularly drew our attention to the passage in the judgment of Wallace, J., in that decision, wherein the learned Judge mentions three points on which the decision in *Manjanatha's case*[2]. rested. The second of these points was that to allow a coparcener, who had already taken his share in a prior partition to take a further share in the properties in a partition which takes place subsequently would be to defeat the principle of equality in partition both among branches of a family and among members of the same branch. By analogy he argued that the respondent having already taken away his share of the family properties in the partition of 1945 would have no right to claim any share again in the properties left by Doraisami. The rule laid down in the Full Bench decision above mentioned does not in our opinion directly apply to the facts of the present case. But the analogy is very striking. If the property, which Doraisami left is to be deemed to be joint family properties. then sub-section (2) of section 3 provides that his widow shall stand in the shoes of her husband in respect of this property and shall have in that property the same interest which he himself had. Even if the fiction of a notional partition at the time of Doraisami's death is to be assumed the argument was that the rule in the Full Bench case would prevent the respondent from taking any further share in the properties now in dispute.

But it is not really necessary to invoke the rule in *Narayana Sah* v. *Sankar Sah*[1], because the very object of the legislation, Hindu Women's Right to Property Act, was to modify the ordinary rule of Hindu Law, by which a widow like the appellant before us would be excluded from taking any benefit in the properties of her husband, which he obtained in a joint family partition in the presence of her step-son. Therefore the true effect of sub-clause (2) of section 3 of the Act would be to exclude the respondent from taking any share in the properties in suit left by his father, even if he had died intestate. The phrase "an interest in joint family property" in section 3 (2) will in our opinion, cover an interest *partitioned* as well as *unpartitioned.*

A similar view was taken by a Bench of the Orissa High Court in *Visalamma* v. *Jagannadha Rao*[3].

In our opinion even if the will Exhibit B-1 is not genuine, the claim of the respondent for a share in the properties left by his father should be negatived.

In the result, the appeal is allowed. The decree of the lower Court is set aside and the suit of the respondent is dismissed with full costs of the defendant regarding the suit and half the costs of the defendant regarding the appeal, as we allowed the defendant to raise a new point in the appeal not adverted to in the Court below.

P.R.N. *Appeal allowed.*

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1. (1929) 57 M.L.J. 685 : I.L.R. 53 Mad. 1 (F.B.).
2. (1882) 5 Mad. 362.
3. A.I.R. 1955 Orissa 160.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Madura Mills Co., Ltd., by its Managers, M/s. A & F Harvey, Ltd. .. *Petitioner**

v.

The State of Madras represented by the Deputy Commercial Tax Officer, Madurai-V, Madurai .. *Respondent.*

Madras General Sales Tax Turnover and Assessment Rules, 1939, *rule* 4-*A—Applicability and validity.*

Rule 4-A (iv) of the Madras General Sales Tax Assessment and Turnover Rules, 1939, is not ambiguous in any way and the single point levy prescribed under the rule will apply to all sales of cotton to a spinning mill in the State without reference to any question of licensing of the dealer. The rule is *intra vires* and enforceable.

Petitions under section 12-B (1) of the Madras General Sales Tax Act IX of 1939 and rule 13-C (1) (*a*) of the Madras General Sales Tax Rules praying the High Court to revise the Orders of the Sales Tax Appellate Tribunal, Madras, dated 23rd November, 1956 and made in T.A. Nos. 978 and 979 of 1955 and 222 of 1956 preferred against the Order of the Deputy Commissioner for Commercial Taxes, Madurai Division in his S.M.R. No. 17 of 1954-55 dated 30th June, 1955 in T.A. No. 978 of 1955 and in *suo moto* revision order of the Commercial Tax Officer, Madurai (South) in his S.M.R.P. No. 16 of 1954-55 dated 30th June, 1955 and S.M.R.P. No. 7 of 1955-56 dated 21st January, 1956 in T.A. Nos. 979 of 1955 and 222 of 1956 relating to the assessment years 1949-50, 1952-53 and 1951-52 respectively.

K. V. Venkatasubramania Iyer for M/s. King and Partridge, for Petitioner.

The Government Pleader (*K. Veeraswami*), on behalf of the Respondent.

The Order of the Court was pronounced by

Rajagopalan, J.—The petitioner, a spinning mill with its headquarters at Madurai, assessed to sales tax on its purchase turnover in cotton, applied under section 12-B of the Sales Tax Act to set aside the order of the Appellate Tribunal which confirmed the assessment on a turnover of (1) Rs. 3,54,152-9-9 in the assessment year 1949-50 (the transactions were between 26th January, 1950 and 31st March, 1950 (T.R.C. No. 21 of 1957) ; (2) Rs. 4,51,24,232-7-3 in the assessment year 1952-53 (T.R.C. No. 22 of 1957) ; and (3) Rs. 6,70,57,555-5-3 in the assessment year 1951-52 (T.R. C. No. 23 of 1957)). The main ground on which the petitioner-assessee claimed that these items of its turnover were not assessable to sales tax is the same in all the three assessment years, and we find it convenient to dispose of all the three petitions together, even as the Tribunal disposed of the appeals, by a single judgment.

The petitioner-assessee was a dealer, and in the relevant assessment years the assessee obtained a license in conformity with rule 5 of the Sales Tax Rules. The Tribunal found that the turnover, the taxability of which was in issue was that of purchases of cotton from persons or firms resident outside the State of Madras, which the petitioner effected through its buying agent, Messrs. Comorin Investment and Trading Company, Ltd. The Tribunal recorded :

"It is also clear. . . . . that Messrs. Comorin Investment and Trading Co., Ltd., was used as an agent by the appellants for effecting the purchases and they were paid a small commission by the appellants for the purpose. There is evidence to show that Messrs. Comorin Investment and Trading Co., Ltd., clearly informed the foreign sellers about their capacity as the agents of the appellants for the purpose of settling the transactions. The property in the goods passed directly from the seller to the appellants and the price was paid by the appellants to the sellers."

The Tribunal further found :

" There is no doubt that the cotton was despatched by the seller to the buyer directly using either the railway or the steamer for conveyance."

* T.R.C. Nos. 21 to 23 of 1957. 14th December, 1959. (23rd Agrahayana, 1881—Saka.)

The Tribunal sustained the claim of the Department, that these transactions came within the scope of the *Explanation* to Article 286 (1) (*a*) of the Constitution as the cotton was delivered to the assessee as purchaser for consumption within the State of Madras, and that, as the transactions had to be assessed to sales tax at the point of purchase by spinner, the assessee was liable to be taxed on the turnover. It should be convenient to refer to the transactions that fell within the scope of the *Explanation* to Article 286 (1) (*a*) of the Constitution as "Explanation sales", a phrase coined for convenience of use even in the earlier decisions of this and other Courts.

The assessee did not challenge the stand taken by the Department all through, that these were all explanation sales, that is, sales in the course of inter-State trade, which however came within the scope of the *Explanation* to Article 286 (1) (*a*) of the Constitution. That, in the case of the explanation sales, where the delivery is within the State of Madras, that State has a right to tax the transactions to sales tax cannot be challenged. Section 22 of the Sales Tax Act provided the statutory basis for the levy of sales tax on such transactions, read with section 3 of the Act and the other relevant statutory provisions and rules. That was what was laid down in *Mettur Industries, Ltd.* v. *State of Madras*[1], and that principle was approved of by the Supreme Court in *Sundararama Ayyar & Co.* v. *State of Andhra Pradesh*[2]. Section 22 of the Act came into play when, after the decision of the Supreme Court in *Bengal Immunity Co., Ltd.* v. *State of Bihar*[3]. Parliament lifted the ban on the rights of the States to tax inter-State sales during the specified period by enacting the Sales Tax Law Validation Act VII of 1956.

Transactions in cotton were, however, subject to tax only at a single point to be prescribed by the Rules. Section 5 (ii) of the Act made that clear. Rule 4-A (iv) prescribed the points for levy of sales tax on transactions in cotton. The contentions of the learned counsel for the assessee-petitioner in the main were (1) there was no valid and enforceable prescription of a single point for the levy of sales tax on transactions in cotton, and (2) even if rule 4-A (iv) of the Turnover Rules amounted to a valid prescription of a single point required by section 5 (ii) of the Act, purchase of cotton by a licensed dealer from an unlicensed dealer did not come within the purview of that rule. It was common ground that the petitioner was a licensed dealer, and that the purchases made by the petitioner were from unlicensed dealers. The dealers who sold the cotton were outside the State of Madras, and they were obviously in the position of unlicensed dealers, that is, dealers not licensed under the Madras General Sales Tax Act.

We shall deal first with the second of these contentions based on the learned counsel's interpretation of the relevant rules.

Section 3 of the Act, which is the general charging provision is itself subject, in the case of cotton, to section 5 (ii) of the Act, which provides for a single point levy on transactions in cotton. As pointed out in *Noor Mohammad & Co.* v. *State of Madras*[4], the exemption granted by section 5 (ii) of the Act is to the commodity, that is, to the cotton, and is of an impersonal character, which is not dependent on any restrictions to which the dealer in cotton may be subjected by the rules, for example, rule 5 of the Sales Tax Rules. Section 5 (ii) required :

> " Subject to such restrictions and conditions as may be prescribed, including conditions as to licences and licence fees........
>
> the sale of cotton (including kapas). . . . . shall be liable to tax under section 3, sub-section (1), only at such single point in the series of sales by successive dealers as may be prescribed, and only at the rate of one half of one per cent. of the turnover at that point."

The prescription of a single point in the case of cotton was by rule 4-A (iv) of the Turnover Rules. Rule 4 (2) prescribed :

1. (1957) 1 M.L.J. 356 : 7 S.T.C. 691.
2. (1958) 1 M.L.J. (S.C.) 179 : (1958) S.C.J. 459 : (1958) 1 An.W.R. (S.C.) 179 : (1958) 9 S.T.C. 298.
3. (1955) 2 M.L.J. 168 : (1955) S.C.J. 672 : (1955) 2 S.C.R. 603 : 6 S.T.C. 446 (S.C.).
4. (1956) 2 M.L.J. 374 : 7 S.T.C. 792 (at page 805.)

"In the case of the undermentioned goods the gross turnover of a dealer for the purposes of these rules shall be the amount for which the goods are bought by the dealer—

* * * * * *

(b) . . . . cotton (including kapas) bought by spinning mill or by dealer who exports outside the State."

This is a rule which complied with the requirements of section 3 (5) of the Act to prescribe whether it was the seller or the purchaser in a given transaction that should be taxed. Rule 4 (2) (b) was not by itself the rule prescribing a single point for the levy required by sections 5 (ii) of the Act. If for example, section 5 (ii) of the Act had not directed that transactions in cotton should be subject to sales tax only at a single point the position would have been thus :

Under rule 4 (2) (b) it would be the purchaser that would be liable to pay the tax if the purchase was (1) by a spinning mill, or (2) by a dealer who exported the cotton outside the State. In all other cases the transactions would have fallen under the scope of rule 4 (1), under which it is the seller that would be liable to pay the tax on the turnover of the sales. Under rule 4 of the Turnover Rules by itself no question could have arisen whether the seller or purchaser was licensed or not. We have explained this position at this stage only to emphasise that rule 4 of the Turnover Rules carried out the mandate in section 3 (5) of the Act and was not concerned with prescribing the single point required by section 5 (ii) of the Act.

We have already referred to rule 5 of the Sales Tax Rules, which it may not be necessary to set out in full. It should be taken as well settled now that the benefit of the single point levy conferred in the case of cotton by section 5 (ii) of the Act cannot be confined to licensed dealers alone. In *Noor Mohammad & Co.* v. *State of Madras*[1], it was laid down:

" . . . . . it would be clear that the frame of rule 5 of the General Sales Tax Rule which restricts the benefit of the single point taxation to those who take out licences is contrary to the provisions of section 5 (vi) which do not contemplate such a condition being imposed and would appear to forbid the imposition of such restricting condition."

It is against this background that we have to decide the scope of rule 4-A (iv) of the Turnover Rules. Rule 4-A (iv) directs :

"Subject to the provisions of section 5—

* * * * * *

(iv) in the case of cotton (including kapas) the tax under section 3 (1) shall be levied in accordance with the following provisions :—

(a) in the case of all cotton (including kapas) sold to a spinning mill in the State, the tax shall be levied from the spinning mill on the amount for which it is bought by it ;

(b) in the case of all cotton (including kapas) which is exported outside the State, the tax shall be levied from the dealer who buys it in the State and is the last dealer not exempt from taxation under section 3 (3) on the amount for which the cotton is bought by him ;

(c) all other sales of cotton (including kapas) by licensed dealers in cotton shall be exempted from taxation :

Provided that the burden of proving that a transaction is not liable to taxation under this clause shall be on the dealer."

It should be obvious that there is no express reference either in clause (a) or in clause (b) to the dealer who sells the cotton. Nor is there any express requirement in either of these clauses that either the dealer who sells or the dealer who purchases the cotton should be a licensed dealer. The contention of Mr. Venkatasubramania Ayyar, learned counsel for the assessee, was as follows : All the three clauses (a), (b) and (c) of rule 4-A (iv) should be considered together, and that too against the background of rule 5 of the Sales Tax Rules to gather what the rule-making authority intended when it promulgated rule 4-A (iv). Despite any express reference to licensed dealers, what the rule-making authority intended to prescribe and did prescribe in clauses (a) and (b) was a single point in the series of transactions between licensed

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1. (1956) 2 M.L.J. 374 : 7 S.T.C. 792 (at page 806).

dealers both the seller and the buyer being licensed dealers. The rule-making authority was obviously of the view, that the benefit of the single point levy granted by section 5 (ii) of the Act should be confined only to licensed dealers, with the result that in the case of unlicensed dealers the rule making authority was of the view, that there was no obligation to prescribe a single point. None was prescribed. Except in the cases referred to in rule 4 (2) (*b*) of the Turnover Rules, transactions by unlicensed dealers would fall within the scope of rule 4 (1). They would be outside the scope of rule 4-A (iv). The result would be that in the case of unlicensed dealers they would be liable to tax on every transaction, and except in the cases for which provision was made by rule 4 (2) (*b*), the tax would fall on the seller under rule 4 (1). It is the correctness of the contention that clauses (*a*) and (*b*) of rule 4-A (iv) should be confined to transactions between licensed dealers that we have now to examine.

Clause (*c*) of rule 4-A (iv) it should be remembered runs :

"all other sales of cotton (including kapas) by licensed dealers in cotton shall be exempted from taxation."

The learned counsel for the assessee pointed out that the use of the expression 'other' could only have relation to the class of sales specified earlier in clauses (*a*) and (*b*) of rule 4-A (iv). The further contention was that, when the rule directed that all other sales of cotton should be exempted the further qualification that these sales should be by licensed dealers, obviously implied that clauses (*a*) and (*b*) also referred only to transactions between licensed dealers. In further support of this interpretation the learned counsel pointed out that rule 5 of the Sales Tax Rules, as it was promulgated, expressly confined the benefit of the single point levy only to licensed dealers. Plausible as the argument sounds, we are unable to accept it. The intention of the rule-making authority has to be gathered primarily from the words of the rule itself. The real test is what does the rule say, and not so much what was it the rule-making authority intended to say. Whatever might have been the intention of the rule-making authority, if that intention was not brought out by the words of of the rule, it is the words of the rule that should decide the issue, what was it that was taxable under clauses (*a*) and (*b*) of rule 4-A (iv).

We have already pointed out that there is no express requirement either in clause (*a*) or in clause (*b*) that the transactions should be between licensed dealers. At one stage the learned counsel for the assessee invited us to consider the position, that ultimately resulted from the decisions of this Court on the scope of rule 16 of the Turnover Rules, which prescribed a single point for transactions in hides and skins. Even independent of rule 16 (5), which was struck down as *ultra vires*, the position was that there was prescription of a single point only in the series of transactions between licensed dealers. But that was specifically based on the language of rule 15 as well as rule 16, which expressly referred to licensed dealers. But the language of rule 4-A (iv) is not identical with that of rules 15 and 16, and we have to construe the scope of clauses (*a*) and (*b*) of rule 4-A (iv) on the wording of these sub-clauses and not on the analogy of what applied to hides and skins under rules 15 and 16 of the Turnover Rules.

We have pointed out that the use of the expression 'other sales' with the qualification by 'licensed dealers' in clause (*c*) furnished the basis for the argument addressed to us by the learned counsel for the assessee, that clauses (*a*) and (*b*) also of rule 4-A (iv) could refer only to transactions between licensed dealers. We have to consider the scope of rule 4-A (iv) (*a*) with reference to the language employed therein. Rule 4-A (iv) (*a*) purports to apply to cases of all cotton sold to a spinning mill in the State : that could be paraphrased, in the case of all sales of cotton sold to a spinning mill in the State. It was a similar language that was employed in clause (*b*) and so we can leave that out of further account. If clause (*a*) expressly refers to cases of all sales of cotton, the only requirement being that these sales should be to a spinning mill, we see no scope for importing a further restricting factor, that all those sales should be only those by licensed dealers and to licensed dealers. No doubt one cardinal rule of interpretation of a rule is, if there is any ambiguity in a taxing enactment

the ambiguity should be resolved in favour of the taxpayer and not the State. We are however unable to hold that there is any ambiguity about rule 4-A (iv) as it stands, when it expressly directs that all sales of cotton sold to a spinning mill should be dealt with under that clause. That clause would apply, and prescribe a single point for the levy of tax, and it has no reference to the fact of licensing ; that is, whether the seller or buyer or both are unlicensed may not be relevant in applying clause (*a*) of rule 4-A (iv).

No doubt clause (*c*) restricts the exemption of transactions to sales by licensed dealers in the case of cotton sold to a spinning mill and cotton sold to a dealer who exports the cotton outside the State. It should be remembered the seller is not made liable to tax at all, because under rule 4 (2) (*b*) it is the purchaser that has to pay the tax and not the seller. Where there was no tax liability at all, it may not be quite accurate to say that there was exemption from tax liability. So the cases of sales to a spinning mill and to an exporter would not be taxable in the hands of a seller, even if sub-clause (*c*) had not been enacted. Sub-clause (*c*) provided for an exemption, and confined that exemption to licensed dealers, obviously in conformity with rule 5 of the Sales Tax Rules. We have already pointed out that the rule-making authority had not the authority to confine the scope of section 5 (ii) of the Act only to licensed dealers under a rule. Whether because of clause (*c*) of rule 4-A (iv) dealers other than licensed dealers would be liable to tax under rule 4 (1) of the Turnover Rules does not arise for determination in this case. But, if it did arise, the position would be that rule 4 did not concern itself with prescribing a single point required by section 5 (ii). Only two points were prescribed by rule 4-A (iv). It is the absence of a valid prescription that would make other transactions non-taxable. The exemption that clause (*c*) of rule 4-A (iv) purported to grant would therefore be really illussory. But that, in our opinion, is not enough to import the requirement, that the transactions referred to in clauses (*a*) and (*b*) should be only between licensed dealers and that conclusion we have reached on the express language employed in rule 4-A (iv). Therefore the fact that the assessee purchased the cotton in question from unlicensed dealers did not take these transactions outside the scope of the taxing provision, rule 4-A (iv) read with section 5 (ii) and section 3 of the Act.

The next question is, whether rule 4-A (iv) is valid. The learned counsel for the assessee pointed out that what section 5 (ii) required the rule-making authority to prescribe was a single point in a series of sales in relation to a given commodity, cotton. The learned counsel urged that if only two points were prescribed sale to a spinner and sale to an exporter, the prescription would not be complete. Independent of that was the further argument based upon his earlier set of contentions, that rule 4-A (iv) was promulgated only with reference to transactions between licensed dealers. Even independent of that, the learned counsel urged that the prescription was not complete and therefore the prescription was not valid. That other transactions might possibly escape taxation is not enough to invalidate either clause (*a*) or clause (*b*) of rule 4-A (iv), if they satisfied the requirements of section 5 (ii). They did. Other transactions would not be liable to tax because without the prescription of a single point, the tax liability declared by section 3 and controlled by section 5 (ii) could not come into play. It should be remembered that in the case of hides and skins, even when rule 16 (5) was struck down as *ultra vires*, the tax liability declared by the other clauses was left unaffected. Similarly the tax liability declared by clauses (*a*) and (*b*) of rule 4-A (iv), without any reference to the question whether the transactions were between licensed or unlicensed dealers, would be enforceable even though the rule-making authority failed to discharge its statutory obligation to prescribe a single point for other types of transactions in cotton. Rule 4-A (iv) is in our opinion, *intra vires* and enforceable.

The result is that the turnover in 1951-52 and 1952-53 was assessable under rule 4-A (iv) and T.R.C. No. 22 of 1957 and T.R.C. No. 23 of 1957 have to be dismissed.

Independent of what we have stated above, another question arises in T.R.C. No. 21 of 1957, which relates to the assessment year 1949-50. The transactions were,

as we pointed out, between 26th January, 1950 and 31st March, 1950, that is, after the Constitution came into force. The position after the Constitution came into force was that the explanation sales became taxable only under section 22 of the Act, and that taxing provision came into play only after 26th January, 1950. Act VII of 1956 did not cover this period, and that Act could not therefore validate the levy of sales tax. We have pointed out that these were explanation sales, that is, inter-State sales which however fell within the scope of the *Explanation* to Article 286 (1)(*a*). The President's Order which was in operation during this period could validate a levy only if there had been a levy. It did not validate a levy made after the Constitution came into force. Since, as we have pointed out, the levy in this case was a post-Constitution levy under section 22 of the Act, the President's Continuance Order did not validate the levy under section 22. It was outside the scope of Act VII of 1956. Therefore, even though section 22 was there, since the other bans imposed by Article 286 of the Constitution were in force during the period, the tax liability under section 22 was unenforceable. It is on this ground that we have to allow T.R.C. No. 21 of 1957 and direct that the turnover of Rs. 3,54,152-9-9 be excluded from the taxable turnover of the assessee.

Since neither party has wholly succeeded in this batch, we direct the parties to bear their respective costs.

The learned Government Pleader urged with reference to T.R.C. No. 21 of 1957 that an opportunity should be given to the Department to establish, if it could, that the transactions between 26th January, 1950 and 31st March, 1950 came within the scope of the taxing provisions other than section 22. We see no justification for complying with that request; as we pointed out all along both the Department and the assessee proceeded on the basis that these were explanation sales which became taxable only under section 22 of the Act.

R.M. ——— *T. R. C. No.* 21 *of* 1957 *allowed and T.R.C. Nos.* 22 *and* 23 *of* 1957 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

Present :—Mr. P. V. Rajamannar, *Chief Justice* and Mr. Justice Jagadisan.

M. Thangavelu .. *Appellant**

v.

The Tiruchirapalli City Co-operative Bank Ltd., and another. *Respondents.*

Madras Shops and Establishments Act (XXXVI of 1947), *sections* 6 *and* 41 (2)—*Jurisdiction of Commissioner—Exemption of an establishment from the provisions of the Act subject to certain conditions—When affects jurisdiction of the Commissioner.*

Where the State Government by virtue of the powers under section 6 of the Madras Shops and Establishments Act exempts any establishment from the provisions of the Act, subject to the condition that the establishment concerned incorporates the provisions of Chapters II, III, V and VII of the Act in their by-laws, the result would be that section 41 of the Act which occurs in Chapter VII of the Act would apply in any event to such establishments as the same would be part of its by-laws. Or if such a condition has not been complied with the exemption would not be effective. A right of appeal under section 41 (2) of a discharged workman would be preserved under the by-laws in such circumstances even though the provisions of the Act as such may have no application by virtue of the exemption order.

Appeal under Clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Rajagopalan, dated 17th January, 1957 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 165 of 1956 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in M.S.E. Case No. 152 of 1955 on the file of the Additional Commissioner,

*W.A. No. 84 of 1957. 21st January, 1960. (1st Magha, 1881—Saka).

Workmen's Compensation, Madras and the orders therein dated 31st October, 1955 and 11th January, 1956 and quash the same.

S. Mohan Kumaramangalam, for Appellant.

K. S. Desikan and *K. Raman*, for 1st Respondent.

R. G. Rajan for The Additional Government Pleader (*M. M. Ismail*) for 2nd Respondent.

The Court delivered the following

JUDGMENT.—This appeal against the judgment of Rajagopalan, J., in W.P. No. 165 of 1956 must be allowed, though on a ground which was not placed before the learned Judge, as learned counsel apparently overlooked a very material fact, to which we shall advert later on in this judgment, but which concludes the matter. The appellant was a Clerk in the employment of the first respondent, the Tiruchirapalli City Co-operative Bank, Limited, in Puthur Tiruchirapalli, from about 1942. He was discharged from service on 14th May, 1955. He thereupon preferred an appeal under section 41 of the Madras Shops and Establishments Act (XXXVI of 1947) to the prescribed authority who was the Additional Commissioner for Workmen's Compensation. At the hearing before the said Tribunal, the Bank raised a preliminary objection that the provisions of the Act did not apply to the Bank, because the Bank had been exempted from all the provisions of the Act by a notification issued by the Government. That objection was overruled, and, eventually, by his order dated 11th January, 1956, the Additional Commissioner for Workmen's Compensation passed an order, setting aside the order of the Management of the Bank, terminating the appellant's services. The result of the order was that the appellant must be deemed to have continued in the services of the Bank. It is to quash this order of the Additional Commissioner that the Writ Petition, out of which this appeal arises, was filed by the Bank.

Before Rajagopalan, J., who heard the writ petition, the preliminary objection raised before the Additional Commissioner for Workmen's Compensation was again pressed. The contention of the Bank was based upon a notification issued by the Government on 29th August, 1953 in exercise of the powers conferred by section 6 of the Madras Shops and Establishments Act, 1947, which runs thus :

"The State Government may, by notification, exempt, either permanently or for a specified period, any establishment or class of establishments, or person or class of persons, from all or any of the provisions of this Act, subject to such conditions as the State Government may deem fit."

By this notification, the Government exempted for a period of one year from the date of its publication all societies registered under section 4 of the Madras Co-operative Societies Act from the provisions of the Act, subject to the following conditions, namely, that the societies in which non-members are employed, amend their respective by-laws on the line of the special by-laws relating to service conditions of persons employed in societies appended to this notification and also include the provisions of Chapters II, III, V and VII of the Madras Shops and Establishments Act, 1947 (XXXVI of 1947) in their Standing Orders and exhibit them in their premises. The by-laws were amended by the petitioner-Bank on 29th July, 1955, and the by-laws were duly registered by the Registrar of Co-operative Societies on 15th November, 1955. It was not disputed before Rajagopalan, J., nor before us, that the conditions laid down in the notification were satisfied. The exemption, therefore, became operative from 15th November, 1955. On these facts, the learned Judge held that though the Additional Commissioner for Workmen's Compensation had jurisdiction to entertain an appeal under section 41 (2) of the Act, on the date when the appellant filed his appeal, before he could pass any final order on the appeal, the provisions of the Act had ceased to apply to the Bank and the employee who was the appellant before him, and consequently, the Additional Commissioner lost his jurisdiction and could no longer exercise the powers conferred on him, and all proceedings taken by him subsequent to 15th November, 1955 when the statutory exemption under section 6 of the Act came into play, were without

jurisdiction. It followed that, on 11th January, 1956, the Additional Commissioner had no jurisdiction to pass the order that he did, and it was accordingly quashed.

Learned counsel for the appellant challenged the correctness of the view taken by the learned Judge that the appeal filed by him, which was competent on the date it was filed, could not be heard and disposed of by the Additional Commissioner, because the Bank had been exempted under section 6 of the Act from 15th November, 1955. He contended that any order of exemption passed after the appeal had been filed would not take away the right of the appellant to have his appeal heard and disposed of by the Tribunal, which was competent to entertain his appeal. He relied on the general principles laid down in the well-known case, *The Colonial Sugar Refining Company* v. *Irving*[1], and the provisions of section 8 of the General Clauses Act. It is not necessary to deal with these contentions, because of the discovery that we made in the course of the arguments, which is this. The entire argument on behalf of the Bank was founded on the exemption granted by the Government. The exemption notification expressly declared that the exemption would operate, subject to certain conditions, namely, that the by-laws should be amended and that the provisions of Chapters II, III, V and VII of the Madras Shops and Establishments Act, 1947, should be included in the Standing Orders of the Bank and exhibited in their premises. Section 41 occurs in Chapter VII of the Act. The result would be that either the conditions have been fulfilled, in which case section 41 of the Act would automatically apply, because that provision should be deemed to have been included in the Standing Orders, or, the condition was not satisfied, in which case the notification would not have the effect of exempting the respondent-Bank from the provisions of the Act. To ascertain the correct facts, we asked learned counsel for the Bank to place before us the amended by-laws of the Bank. We find that one of the amendments runs thus:

> " *Vide* also the provisions of Chapters II, III, V and VII of the Madras Shops and Establishments Act, 1947 (XXXVI of 1947), which should be read as part and parcel of these by-laws."

Though, by virtue of the exemption, the provisions of the Act as such may have no application, nevertheless because the provisions of Chapter VII, *inter alia*, have been made applicable to the employees of the Bank, the result would be that the right of appeal under section 41 (2) of the Act would be preserved to a discharged employee of the Bank. Learned counsel for the Bank, very rightly, did not contest this position. It follows from this that the Additional Commissioner for Workmen's Compensation never lost jurisdiction to deal with and dispose of the appeal filed by the appellant before us.

In this view, it is not necessary to deal with the other ground, on which the learned Judge set aside the order of the Additional Commissioner for Workmen's Compensation. We must, however, not be understood as agreeing with the reasoning of the learned Judge as regards the effect of the notification on pending proceedings.

The appeal is allowed, and the Writ Petition filed by the respondent-Bank is dismissed. There will be no order as to costs.

R.M. *Appeal allowed.*

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1. L.R. (1905) A.C. 369.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

B. Varadarajulu Chettiar .. *Appellant**

v.

The State of Madras represented by the Secretary to Government, Home Department, Fort St. George, Madras .. *Respondent.*

Constitution of India (1950), *Article* 311 (2)—*Procedure—Disciplinary proceedings—Opportunity to show cause against proposed punishment—Opportunity of commenting on advice given by Public Services Commission—Duty of Government to give—Order based in part on erroneous assumption of fact—Interference—Power of High Court to quash—Adequacy of punishment—High Court's power to go into.*

There is no rule which makes it incumbent on the Government to issue a notice to the Government servant, against whom disciplinary action is proposed to be taken under Article 311 of the Constitution, to give him an opportunity of commenting on the advice given by the Public Services Commission. Article 320 (3) only requires that the State Public Services Commission shall be consulted on all disciplinary matters affecting a person serving under the Government of the State in a civil capacity. It is on the basis of the report of the requiring officer after inquiry, that the Government issues notice to show cause why a particular punishment shall not be imposed. Once the Government servant is given this opportunity the requirement of Article 311 (2) is satisfied.

An order by the Government on an assumption which, in fact, is found to be not correct cannot be allowed to stand. It is not for the High Court in proceedings under Article 226, to delete the erroneous portion of the order of the Government and to come to a conclusion on the balance of the material available that the punishment actually awarded by the Government was adequate and appropriate. It is not for the High Court to say what would be the proper or adequate punishment on proof of particular charges. It is a matter entirely for the Government. When the matter relates to the punishment of a Government servant, the High Court should exercise its jurisdiction under Article 226 to quash the order of the Government which is based in part at least on an erroneous assumption of fact.

Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Rajagopalan dated 8th November, 1955 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 785 of 1954, presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in G.O. M. S. No. 1683, dated 11th June, 1954 on the file of the Government of Madras, Home Department, and quash the order therein.

S. Mohan Kumaramangalam, for Appellant.

The Additional Government Pleader (*M. M. Ismail*), for Respondent.

The Order of the Court was pronounced by

Rajamannar, C.J.—This is an appeal against the judgment of Rajagopalan, J., dismissing the petition filed by the appellant under Article 226 of the Constitution for the issue of a writ of *certiorari* to quash the order of the Government of Madras, namely, G.O.M.S. 1683 (Home Department) dated 11th June, 1954. In and by that order, the Government directed that the appellant be dismissed from service with effect from 20th March, 1953.

The appellant was the Official Receiver, Coimbatore. He also held other offices, namely, the office of the Additional Judge of the Court of Small Causes and the office of Rent Controller. Several charges were framed against him, relating to discharge of his functions as Official Receiver. The Additional District Judge of Coimbatore conducted the enquiry and he submitted a report, holding that two of the charges had been fully proved and two others had been proved in part. Subsequently, three further charges were framed by the District Judge, one of which related to his work as Rent Controller. The District Judge himself held the enquiry into these charges and found that all the three charges had been proved. After receipt of the reports of the learned Additional District Judge and the learned District Judge, the Government issued a notice on 30th September, 1953 to the peti-

* W.A. No. 46 of 1956 in W.P. No. 785 of 1954. 5th November, 1959.

tioner to show cause why he should not be dismissed from service. Along with this notice, copies of the findings embodied in the reports of the Additional District Judge and the District Judge were also furnished to the appellant. The appellant submitted his representation on 19th October, 1953. Meanwhile, the Government consulted the Public Service Commission in the matter, as required by Article 320 (3) of the Constitution. The Public Service Commission sent their views to the Government in their communication dated 15th March, 1954. Subsequently, on 11th June, 1954, after taking into consideration the opinion of the Public Service Commission the Government passed the order dismissing the appellant from service.

Two grounds which were raised before Rajagopalan, J., who heard and disposed of the Writ Petition, and which did not find favour with him, were again pressed before us by learned counsel for the appellant. The first ground urged was that the provisions of Article 311 (2) were not complied with in this case, as the appellant was not given a reasonable opportunity of showing cause against the action proposed to be taken against him, because the opinion of the Public Service Commission was not communicated to him. In other words, the argument was that the notice issued to the appellant to show cause against the action proposed to be taken against him should have been issued after the expression of opinion by the Public Service Commission. We do not see any substance in this ground. Article 320 (3) of the Constitution provides *inter alia* that the State Public Service Commission shall be consulted on all disciplinary matters affecting a person serving under the Government of the State in a civil capacity and it shall be the duty of the Public Service Commission to advice on any matter so referred to them. It was not contended that the advice tendered by the Public Service Commission should invariably be accepted by the Government. Admittedly, there is no rule which makes it incumbent on the Government to issue a notice to the Government servant, against whom disciplinary action is proposed to be taken, to give him an opportunity of commenting on the advice given by the Public Service Commission. The enquiry into the charges is made by a judicial officer or Head of the Department, and it is on the basis of the report after such enquiry that the Government issue the notice to show cause why a particular punishment should not be imposed. The fact that a particular punishment is proposed does not certainly preclude the Government from imposing a lesser punishment. This may be because of the explanation or representation submitted by the Government servant, or it may be because of the advice tendered by the Public Service Commission. In any event, what the Government servant has got to meet is the findings submitted by the enquiring officer. Of course, he can also submit that the proposed punishment is more drastic than necessary. Once the Government servant is given this opportunity, we think that the requirement of Article 311 (2) is satisfied. We agree with the learned Judge, Rajagopalan, J., that there was no violation of the guarantee provided by Article 311 (2) of the Constitution.

There is, however, substance in the second ground pressed upon us. It is clear from the order of the Government that the basic foundation of their ultimate decision is the fact that, of the 12 charges enquired into by the Additional District Judge, four were established and the charges so established we find set out expressly by the Government in their order. It is true that, besides these four, the Government also referred to three other charges which were found to have been proved by the District Judge, Coimbatore. It cannot be denied that the Government erred in assuming that all the four charges set out by them in their order, that is, four of the charges enquired into by the Additional District Judge, were established. Two of them were certainly established; but the other two were established only in part. Rajagopalan, J., himself says that learned counsel for the petitioner (Appellant) was well founded in his contention that the Government set out two items which were at variance with the findings recorded by the Additional District Judge. The question then is whether the order passed by the Government on an assumption, which, in part, is found to be not correct can be allowed to stand. We agree with

the learned Judge that it is not for this Court to delete the erroneous portion of the order of the Government and come to a conclusion on the balance of the material available that the punishment actually awarded by the Government was adequate and appropriate. The learned Judge, however, refused to interfere, because, apart from the charges held proved by the Additional District Judge as regards which the Government made a mistake, there were other charges which were held to have been proved by the learned District Judge, and those charges of dishonesty would be sufficient to support the order of dismissal passed by the Government. As we have already said—and Rajagopalan, J., does not hold a different view—it is not for this Court to say what would be the proper or adequate punishment on proof of particular charges. It is a matter entirely for the Government. It may be that the Government might have come to the same conclusion as to punishment even if they had not made the error pointed above. Equally it may be that the Government might have imposed a lesser punishment. This is not a matter for discussion by this Court. As the matter relates to the punishment of a Government servant, we think that we should exercise our jurisdiction under Article 226 of the Constitution to quash the order of the Government which is based in part at least on an erroneous assumption of fact. We allow the appeal and quash the order of the Government dated 11th June, 1954. Of course, this order of ours will not prevent the Government from taking further disciplinary proceedings against the appellant.

There will be no order as to costs.

P.R.N. *Appeal allowed; Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

A. Gajapathi Naidu, Madras .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 10—Assessee supplying bread to Government hospital under contract—Rates found to be uneconomic—Assessee maintaining accounts on mercantile basis—Government making ex gratia *payment in subsequent year to compensate loss sustained by the assessee—Amount if liable to assessment to income-tax in the year in which the amount was received.*

During the year of account ending with 31st March, 1949 (corresponding assessment year 1949-50) the assessee entered into a contract with the Government for supply of bread to a Government hospital at certain rates. Those rates were however found to be uneconomical. Representations were made to the Government after the close of the year for relieving the contractor (assessee) from loss sustained in the supply of bread. The Government acceded to the request and directed payment for loss sustained in 1948-1949. The assessee received Rs. 12,447 during the year of account corresponding to the year of assessment 1951-1952. The assessee maintained his accounts on the mercantile basis. This amount was sought to be included in the assessment in 1951-1952. The assessee contended that (1) it was in the nature of a windfall and (2) that it being a receipt in respect of a contract performed in the year relating to assessment year 1949-1950, it could not be included in the year 1951-1952. The contentions were negatived by the Department and the Tribunal. On a reference

Held : (1) The payment was no doubt an act of grace on the part of the Government, but it was directly related to the business of the assessee ; the receipt by the assessee would be one arising out of his business and not a receipt of a casual nature.

(2) As the assessee maintained his accounts on the mercantile basis, the amount cannot be included for the assessment in the year 1951-1952. The amount was paid expressly for the loss incurred in connection with the supply of bread during the year 1948-1949. The receipt would be analogous to a trading receipt of the year 1948-1949. The account of that year could be reopened for the purpose of assessment. Being a receipt of an earlier year the amount could not be included in the assessment for the year 1951-1952.

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* Case Referred No. 87 of 1955. 15th March, 1960. (25th Phalguna, 1881,—Saka.)

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), in R.A. No. 80 of 1955-56 (I.T.A. No. 3490 of 1954-55-Assessment year 1951-1952) on its file for decision on the following questions of law, *viz* :—

"(1) Whether the sum of Rs. 12,447 is assessable to income-tax ?"

"(2) If so, whether it has been rightly assessed in the assessment year 1951-1952 ?"

P. R. Ranganathan, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax on behalf of Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—The following questions have been referred under section 66 (1) of the Indian Income-tax Act :

"1. Whether the sum of Rs. 12,447 is assessable to income-tax ?

2. If so, whether it has been rightly assessed in the assessment year 1951-1952 ?"

The assessee owns a bakery and a provision shop and he runs also a restaurant. He also takes contracts for the supply of bread or other provisions to institutions like a hospital. The assessee's year of account ends with the financial year, namely, 31st of March. During the year of account ending with 31st March, 1949 (corresponding assessment year 1949-50) the assessee entered into a contract with the Government for the supply of bread to the Stanley Hospital, Madras, at certain rates. Those rates were, however, found to be uneconomical. Representations were made to the Government, it is said, after the close of the year for relieving the contractor from the loss sustained in the supply of bread. The Government acceded to the request and passed G.O. No. Mis. 4005, Home, dated 24th November, 1950, directing payment of compensation for the loss sustained by the contractor in the supply of bread in the year 1948-49. The assessee submitted a bill on 27th December, 1950, and received a payment of Rs. 12,447 during the year of account, corresponding to the year of assessment 1951-52. In the assessment of the income-tax for that year, namely, 1951-52, the Officer included the sum of Rs. 12,447. The assessee contested the inclusion on two grounds, (1) that it was in the nature of a wind fall, and (2) that it being a receipt in respect of a contract performed in the year relating to the assessment year 1949-50, it could not be included in the assessment for the year 1951-52. The contentions were overruled, and the amount was brought to tax. An appeal to the Appellate Assistant Commissioner and a further appeal to the Tribunal met with no success.

The first question, which relates to the contention that the receipt was of a casual nature, presents little difficulty. The payment was, no doubt, an act of grace on the part of the Government, but it was directly related to the business of the assessee : the receipt by the assessee would be one arising out of his business. The G.O. purported to increase the rate originally agreed to, and the excess on the basis of the increased rate was paid to the assessee. Further, the assessee was actually doing the same business in the year of account. The receipt will be a trade receipt and will be liable to tax.

But the more important question is the next one, namely, whether that amount can be included for the assessment in the year 1951-52. The assessee maintained his accounts on the mercantile basis. Under that system, profits or gains are treated as arising or accruing on the date of the transaction, notwithstanding the fact that they are not received or deemed to be received, the book profits being taken for the purpose of assessment to tax. For ascertaining such profits, sums which were due to the business are entered on the credit side of the account immediately they are due, and before they are actually received. Similarly, the expenses are entered the moment the legal liability to pay arises, and before the actual disbursement. The income made, therefore, accrues to an assessee under that system without its actual receipt, because it can be said to accrue to him once the assessee acquires a right to receive.

it, though it may be received later. In *Sassoon & Co., Ltd.* v. *Commissioner of Income-tax, Bombay*,[1] the Supreme Court, considering the scope of an accrued income, observed at page 51 :

" It is clear, therefore that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him, though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed *debitum in praesenti, solvendum in futuro*..........Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him."

The mercantile system of accounting, under which what is legally due is brought into credit, whether it be received or not, and what is payable, that is, that to which a legal liability attaches is brought into the debit side, whether paid or not, has been explained in the decision of the Supreme Court in *Keshav Mills* v. *Commissioner of Income-tax Bombay*.[2] The observations of the Supreme Court extracted above establish that, in the mercantile system of accounting, an income could be said to be accrued, even though it had not been ascertained on the date of the transaction, the requirement for the accrual being the right existing in the person at the time.

In the present case, the only right of the assessee on the date, when he supplied the bread, was to debit the Government the contract rate. He was entitled to nothing further. The G.O. which raised the rates, came into existence long after : payment thereunder was *ex gratia* and not on the basis of a right. Therefore, the amount of Rs. 12,447 was not, and indeed could not have been debited in the books of the assessee for the year, when the supply of bread was made to the hospital, namely: 1948-49. These accounts have been closed.

It, therefore, becomes a matter for consideration whether, on principles of accounting, the receipt, which undoubtedly relates to the transactions of 1948-49, should be treated as a receipt in the year of its actual receipt, where there was no transaction, out of which it could be said to have accrued, or whether the accounts of 1948-49 should be re-opened and the receipt added to the book results therein. The re-opening of accounts in such cases is not under any of the familiar legal grounds, on which closed accounts are re-opened, *e.g.*, mistake, fraud, etc. None of these elements are present here. The account correctly represented the position when it was made up. Something has happened subsequently, which shows that what was shown as income then was really more. The normal rule in the mercantile system of accounts is that the receipts are to be brought into account in the year of its accrual. The basis of accrual is, as we pointed out, the existence of a legal right or title to the amount. If such a right arises afterwards, does it relate back to the year of the transaction, to which the subsequent receipt relates ? If so, can the closed accounts of the year of the transaction be re-opened ? If the accounts could be re-opened, the subsequently ascertained amount (*e.g.*, the price as subsequently fixed) will have to be inserted in the place of the original amount, and the resultant profit would be liable to tax for that year. It is, therefore, necessary to examine in what cases the accounts can be re-opened.

In Simon's Income-tax, 2nd volume, 2nd edition, in Article 179 at page 158, the general rule as to the re-opening of the accounts is stated thus :—

" In certain circumstances a profit and loss account which has been accepted as the basis of the assessment for a past year of assessment may in effect be re-opened at a subsequent date. The effect of such a procedure is that, if an addition is made to the profit shown by the account, an additional assessment for the relevant tax year can be made ; while, if the effect of the re-opening of the account is to reduce the amount of profit there shown, it may be possible to maintain a claim in respect of error or mistake, and in that way obtain a re-payment of tax in respect of the relevant tax year....

The principle to be applied is to ascertain whether the right or liability in question was established in the past accounting period, leaving the final amount of the item still to be calculated, or whether the right or liability did not arise until a later period."

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1. (1954) S.C.J. 771 : (1955) 1 S.C.R. 313 : (1954) 26 I.T.R. 27.

2. (1953) S.C.J. 243 : (1953) S.C.R. 950 : (1953) 23 I.T.R. 230.

As the illustrative cases mentioned by the learned author would show, the right or liability, the existence of which in the past is a pre-requisite for the jurisdiction to re-open, may be one which exists or is deemed to have existed. A simple case is one, in which a receipt can be added to the profit and loss account of the past period, if title to that sum arose in that period, notwithstanding the fact that the precise amount was not ascertained till a latter period.

In *Commissioners of Inland Revenue* v. *Newcastle Breweries, Ltd.*,[1] the assessee carried on the business of brewers and wine, and in the course of their business, kept large stocks of rum which was reduced and blended before sale. A portion of the assessee's stock of rum was requisitioned by the Admiralty in January, 1918, and payment therefor at a specified rate was accepted by the company without prejudice to a claim for a larger payment. Litigation followed in regard to the actual amount due, and pending the litigation, legislation was passed, providing for a method of compensation in similar cases. The amount due was so ascertained. In November, 1921, a sum of money was paid to the assessee, in addition to what was paid originally towards the price of the rum requisitioned by the Government. It was held that the receipt in question must be included for excess profit duty for the accounting period ending on the 30th October, 1918, in which the rum was taken over, as it was attributable to the requisition in that year, though the amount was ascertained later. Warrington, L.J., observed at page 948 thus :

> "Treating the transaction, as I think we ought to do, as a commercial transaction, the property in the goods passed by delivery during the accounting period and the money then became payable, although, owing to a dispute as to the amount, it was not ascertained or paid in full until some years later, and if this be so then the whole amount, and not merely that part of it which was paid on account would, in my opinion, be properly dealt with in ascertaining the profits for the accounting period."

In an ordinary case of sale of goods between two parties, the price is agreed upon between the parties, though it may be that in certain cases the actual amount has to be ascertained later. In the case cited above, there was no such agreement. The assessee was, however, entitled to receive the proper price for the goods taken over by the Government which could be said to have accrued or was earned on the date of the requisition. The transaction was treated as a commercial transaction. The amount ultimately ascertained was deemed to have become payable, even when the goods were taken over.

In *Commissioners of Inland Revenue* v. *Gardner Mountain & D'Ambrumenil, Ltd.*[2], the underwriting commission was earned in a year : under the agreement the commission was to be settled and it became payable only two years thereafter. On the question, in which year the income by way of commission accrued, it was held that the accrual was on the date of the transaction, although the ascertainment of the amount was postponed by two years and it was only then it could be known what the amount was. But that circumstance could not take away the character of the amount that was ultimately paid as one towards a trade debt.

The principle underlying these cases is not so much one of law as to re-opening of closed accounts, but of a sound commercial system of accounting, whereby, if a transaction takes place, all that has accrued in respect of it is on the date of the transaction itself. If, for instance, there has been a sale of goods, the entire price, having been earned by virtue of that sale, should be credited as on that date : if the price is not ascertainable till after the close of the year, the accounts are re-opened for the purpose. This, aspect of the matter is summed by up Lord President Cooper in *James Spencer & Co.* v. *Commissioners of Inland Revenue*[3]:—

> "From an examination of the numerous cases conveniently summarised in Simon on Income-tax II, 128, the broad working rule which emerges as a guide to the crediting or debiting in a tax computation of subsequently maturing credits or debits is to enquire in which accounting period the right or liability was established and to carry the item into the account in the year. I use the vague word "established" advisedly, for we are now in the region of proper commercial and accountancy practice rather than of systematic jurisprudence. In the case of credit items, such cases as *Newcastle Breweries*[1] and *Isac Holden & Sons*[4] indicate that, if the title to the sum arose in one

1. (1927) 12 T.C. 927.
2. (1947) 29 T.C. 69.
3. (1950) 32 T.C. 111 at 116.
4. (1924) 12 T.C. 768.

accounting period, the fact that the precise amount of credit was not fixed until latter will not prevent the eventual receipt being credited in the earlier year. So too in the case of expenses, as is illustrated by *Ford*[1] and *Bernhard.*[2] In *Bernhard*[2] (page 741), Lord Hansworth, M.R. put the matter thus :—" If there is a liability which is subsequently determined, but which is none the less to be a liability existing at a particular date, the fact that it is, subsequently to that date, determined and ascertained does not prevent that liability belonging historically to its right place in the accounts. The quantum of it is ascertained at a later date ; but the payment is to be made as at the date when it rightly occurs in the accounts, even if the quantum of it cannot be fixed at that moment ".

The case *Isac Holden & Sons*[3], referred to by the Lord President is an interesting one, in that, on the date when the work was done, there was no contractual or other obligation on the part of the Government to pay what was subsequently paid. In that case, a firm of wool-combers was engaged on commission basis during the time when the wool-combing industry was controlled by the Government. A rate of commission was fixed in 1917. Again in 1918, a provisional increase of 10 per cent. was made, to be effective from 1st January of that year, and that was made subject to the adjustment of the accounts at the end of the year. In the next year, a total increase of 20 per cent. was allowed as final settlement of the firm's claim against the Government. In submitting the accounts up to the end of January, 1918, to the Income-tax authorities, the company showed in the books the full cost of the work done, but included on the credit side only the original scale of commission *plus* 10 per cent. that was current in that year. It was held that the accounts of that period should be re-opened, so as to bring in full the additional 20 per cent. and profits ascertained for the purpose of computing the company's liability to the excess profit tax. Rowlatt, J., observed at page 772 :

> " These wool-combers had done a certain amount of work by June, 1918, and they were paid the 1917 tariff plus 10 per cent. up to June, 1918. It was uncertain whether they ever would receive more at that time : they certainly had no right to demand more. It was uncertain that they ever would receive more, and it might be that they would receive less the next half year. That is quite clear, but in the result what happened ? They were paid 20 per cent., that is to say, 10 per cent. more, in respect of the whole of 1918 ; pound for pound of their work they earned another 10 per cent. beyond what had been paid to them in June, 1918 ; if they did more work they got more ; if they did less work they got less. It was paid to them as the Solicitor-General says, in respect of work in 1918, including the half year. Looking at it merely on those facts, what have I to say? Did not that arise from the work that they did in their trade in the first half of 1918 ? If not, what did it arise from ? Could it be said that it arose at all from the charity of the Government? I cannot see what it arose from, unless it arose from the trade in the first half year........I cannot see any sensible way of looking at the facts other than that which leads me to say that these profits arose from the business in the accounting period ; and, therefore, that the decision of the Commissioner was right. As the fact which shows that the books were wrong has occurred after they have been closed, I do not see any difficulty in re-opening them and putting them right."

Wherever an increased price was paid at a later date, such increase being the result of reservation made at the time of supply of the goods, the case would be one of a trade debt, whether the extent of the debt was ascertained on the date of the transaction or later. But where the increased price was the result of a gratuitous act on the part of the Government who purchased the goods, no question of accrual can arise on the date of the transaction. When the increase, however, came in, it undoubtedly arose out of the transaction, as but for it, the seller would not have got it. Such as case was treated as one equivalent or analogous to a trade debt, and the accounts were re-opened, in order to bring the increase into the profits of the assessee in the year of the transaction. The decision in *Isac Holden & Sons, Ltd.* v. *The Commissioners of Inland Revenue*[3], recognised that the accounts could be re-opened even when the price was increased later without there being any contractual obligation but purely by a voluntary act of the purchaser. In *Johnson (H. M. Inspector of Taxes)* v. *W. S. Try, Ltd.*[4], Lord Greene, M. R., referring to the decision in *Isac Holden & Sons, Ltd.* v. *Commissioners of Inland Revenue*[3], observed that the actual amount payable for the work done under the contract in respect of a particular year was finally settled some time after that year had expired, but that there again it was something which was quite clearly referable to a trading contract, and it could be fairly regarded as analogous to a trade debt, and that the circumstance that the

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1. (1927) 12 T.C. 997.
2. (1928) 13 T.C. 723.
3. (1924) 12 T.C. 768.
4. (1946) 27 T.C. 167.

amount of remuneration was only fixed at a later date did not alter the fact that the remuneration was in respect of trading operation of the earlier year.

The principle of these decisions was extended still further in *Severne (H. M. Inspector of Taxes)* v. *Dadswell*[1]. The assessee in that case was granted a licence to mill flour subsequent to the outbreak of the war. The millers who were doing the business before the outbreak of the war, had combined themselves into a pool company, in order to be able to negotiate favourable terms of remuneration to the members thereof. The assessee was not a member of the pool. The milling industry had come under the control of the Government during the period of war, thereby the flour manufactured by the millers was supplied to the Government at a particular rate fixed by it. This rate was found to be uneconomical, having regard to the price of wheat then prevailing. The Government sought to relieve the millers by allowing certain rebates based on the quantity of the flour milled and supplied, the purpose of the rebate being to compensate the miller for the price he had to pay for the wheat. The millers, who were members of the pool company, had entered into an agreement with the Government which allowed them a special rate of remuneration, in addition to the usual rebates. The assessee, not being a member of the pool, was not entitled to the remuneration given to the pool millers. It appears that he was not even aware of the way in which the pool millers were remunerated. In 1942, he was asked to fill certain forms and forward them to the ministry. Towards the end of 1943, he was informed that the basis of the remuneration for non-pool millers was under the consideration of the Government. In 1949, sometime after the assessee had sold his business, the assessee was paid a compensation for the flour milled by him during the period ending 30th October, 1945. A question arose whether the receipt was a trading receipt, and if so, in which year it had to be included. Roxburgh, J., observed that the relevant question to be considered in such cases was, whether any work had been done in the course of trade in respect of which the reward had not been finally settled, or, in other words, anything outstanding in the nature of, or analogous to a book debt. After a consideration of the relevant cases, the learned Judge observed :

> " that if it can be said at the moment of discontinuance that the payment for some work already done has not been finally settled, even though there is no legal claim for any more, then if a further payment is made afterwards, even though it is wholly gratuitous, the account can be re-opened so as to let in what is analogous to a trade debt at the figure actually received. If, on the other hand, the item is not analogous to a trade debt, or if there has been a final settlement, the account has been finally closed."

In the present case, the payment was made with the specific object of compensating the loss which the assessee sustained in the supply of bread in the year 1948-49. The relief itself was assessed on the basis of the quantity supplied by increasing the rate per loaf of bread. There is no doubt that the relief was referable to a trading contract. The result of the order of the Government was to increase the price of the bread supplied. That payment was however not the result of any contract, but the outcome of an unilateral act of Government *ex gratia*. Nevertheless, it would be analogous to the payment of a trade debt, and on the principle of the decision of *Severne* v. *Dadswell*[1], the receipt should be credited in the accounts of 1948-49 by re-opening the same.

Mr. Rama Rao Sahib, appearing for the Department, raised a two fold contention: (1) that the principle of re-opening of a closed account would only apply where something was outstanding, *e.g.*, a question of ascertainment on the date of the transaction, and not to cases where there was nothing which could legitimately be said to be outstanding: the learned counsel sought to distinguish the *Wool Comber's case*[2], and *Dadswell's case*[1], on the footing, that there existed something in those cases before the closing of the year's accounts which ultimately was the cause of the receipt in the later years, but that in the present case there was none ; and (2) that *Dadswell's case*,[1] was wrongly decided.

1. (1954) 35 T.C. 649. 2. (1924) 12 T.C. 768.

Taking up the first contention, we are of opinion that there is no proper basis for the distinction. It is clear from the statement of facts contained in *Dadswell's case*[1], that the assessee was not aware during the year of account that he was at all going to be compensated. Indeed, it is specifically stated in the judgment of the learned Judge that even on the date when the assessee sold his business, neither he nor his accountant expected that any payment would be made beyond the usual rebates. The ratio of the case is not that there was any hope left in the assessee to be able to get an increased payment for the goods supplied, but that the payment that was ultimately made, after the year of account, was towards a trading debt or one analogous to a trading debt. That was the principle adopted in *Isac Holden & Sons, Ltd.* v. *The Commissioners of Inland Revenue*[2]. In both the cases, there was neither a legal right in the seller nor even any binding understanding between the parties to give any increased price. The payments that were ultimately made were purely voluntary. It may be that in the *Wool Combers' case*[2], there was a hope that the Government might give more, but the decision was based on the fact that the payment arose out of the work done or sale effected, and therefore was analogous to a trade debt; and that it should be treated as a payment towards a trade debt for the purpose of re-opening the accounts.

It was next contended that *Dadswell's case*[1], was not correctly decided, inasmuch as it was not in conformity with certain earlier decisions. The first of the cases referred to in this connection was *J. P. Hall & Co., Ltd.* v. *The Commissioners of Inland Revenue*[3]. In that case, the company contracted in the year 1914 to supply electric motors with control gear between the 1st of July, 1914 and 30th of September, 1915, it being stipulated that payment should be made one month after delivery. The company then entered into a sub-contract for the supply of the control gear, but owing to the war, there was a delay in the delivery thereof till July, 1916. The company credited the sale price of the control gear as and when the gear was delivered, but took up the plea (when assessment was made to excess profits duty) that its profits from the purchase and sale of the control gear should be treated as arising in the year of account, in which contracts were made. This contention was rejected, and it was held that the profits in the purchase and sale of the control gear arose only when it was delivered, on the ground that the profits were neither ascertained nor made at the time when the contracts were concluded. In *Gray (H. M. Inspector of Taxes)* v. *Lord Penrhyn*[4], the officials employed in the firm of the assessee misappropriated monies. The auditors, by reason of their negligence, were not able to discover the fraud in time. Later, however, they admitted negligence on the part of their staff, and paid as compensation a sum equal to the amount misappropriated. It was held that the sum received from the auditors was trading receipt properly assessable to tax, and liable to be brought into the account only in the year in which it was received. Finlay, J., also held that the accounts of the earlier years could be re-opened, if necessary, and the amount credited. As pointed out in Simon's Income-tax, 2nd Volume, 2nd edition, in Article 180, the decision should be taken as one rendered in the special circumstances of the case. In our opinion, the case is not one of a trade debt or analogous to it, but a payment by the auditors by way of damages for their negligence.

Incidentally Mr. Rama Rao Sahib relied on this for the further proposition, *viz.*, that the Department had an option either to include the amount in the year of the transaction or the year of its receipt. We cannot however agree. Once it is held that the receipt was for a trade debt, it should properly go only with the accounts of the year of the transaction. To allow the Department to include it in the year of its receipt, would be tantamount to changing the basis of account from the mercantile to the cash system.

In *New Conveyor Co., Ltd.* v. *Dodd (Inspector of Taxes)*[5], the assessee was a sub-contractor supplying doors to two other companies, each of which had a contract with

1. (1954) 35 T.C. 649.
2. (1924) 12 T.C. 768.
3. (1921) 12 T.C. 382.
4. (1937) 21 T.C. 252.
5. (1945) 27 T.C. 11.

the Government. The prices for the doors were agreed as the cost of manufacture plus a fixed percentage for profit. It was agreed by the sub-contractor, namely, the assessee company, that it was to receive whatever sum was received by the principal contractor as the price from the Government when the doors were delivered. There was a subsequent change in the calculation of the cost of manufacture, and the amount to be paid. The further sums paid in pursuance of the revised method of calculation were treated as trading receipts in the year in which the doors were delivered. It was held that the amounts would be attributable to the earliest contract, and should be allocated to the years in which the deliveries were made. These decisions should be considered as based on the special circumstances existing in them.

Dadswell's case[1], has been considered by this Court more than once. The correctness of the decision therein has never been doubted.

The rule as to the re-opening of closed accounts and the limits thereof was considered by this Court in *Madalai Nadar & Co.* v. *Commissioner of Income-tax and Excess Profit Tax*[2], where an attempt to extend it to cases other than trade debts, and those analogous to it was discountenanced. In that case, excise duty was paid by the assessee on quantities of the arecanuts imported from the former Travancore State. The Government however revised their policy, and issued instructions which directed the Excise Authorities not to enforce payment. Those instructions were purely executive instructions, and were not acted upon : the assessee himself was not aware of the same at the time when he made the payments. During the following year, the assessee obtained refund from the Government of the amount which he had paid as excise duty. In the assessment of the assessee for the year in which the excise duty was paid, the Department sought to include the receipt of the later year. It will be noticed that the excise duty levied and collected was lawful in that it was in accordance with law as the payment of duty was made under a statute; the remission thereof a year later was the result of an independent act of the Government. No commercial element is involved in the case. It cannot be equated to a case of payment made for work done or goods supplied by the assessee. In short, it had no resemblance to a trade debt. The judgment in that case was delivered by one of us, and considering *Dadswell's case*[1], it was observed at page 200 :—

> " We have already pointed out that it could not be called a debt payable by the Government to the assessee. Nor could it be treated as something analogous to a trade debt. No doubt the tax was imposed originally in the year of account on the basis of the trade activities of the assessee. But it is equally true that it was for a tax that was eventually remitted and paid to the assessee, paid not in the year of account but in the succeeding years of account. But it was not payment by way of remuneration, as in the case of Mr. Dadswell, for anything done by the assessee in the course of his trading activities in the year of account. Once again, we have to point out that the tax was lawfully levied and lawfully collected. The Government decided to remit the tax, and payment was made much later. It is difficult to find any basis for bringing the assessee's receipt of Rs. 36,094 within the scope of the ruling in *Severne* v. *Dadswell*,[1] and treat it as income to which he was entitled in the relevant year of account."

The principle of the decision in *Dadswell's case*[1] was again sought to be applied in regard to a liability which the assessee incurred in a subsequent year in *Senthi Kumara Nadar & Sons* v. *Commissioner of Income-tax*[3]. The assessee in that case had entered into contracts with the India Coffee Board for the purchase of coffee for export outside India, but he contravened the terms of the contract by selling a portion of the export quota within the Indian territory. Under the terms of the contract, the Coffee Board would have a right to levy liquidated damages or to restore the *status quo* in any one of the three alternative ways mentioned in the agreement. Three years subsequent to the year of account, the Coffee Board assessed damages which was paid by the assessee. The assessee claimed the amount paid as deduction in the year of account, when the sales contravening the terms of the

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1. (1954) 35 T.C. 649.
2. (1956) 2 M.L.J. 320 : I.L.R. (1957) Mad. 106.
3. (1957) 2 M.L.J. 309 : I.L.R. (1957) Mad 865 : 32 I.T.R. 138.

contract were made. It was held that, until the Coffee Board made clear which of the alternatives it chose, the liability of the assessee was only a contingent liability in the year in which the sales were made, and, even if the assessee had debited itself in that year, the debit would have represented only a reserve provided against enforcement in future of what was a contingent liability: the liability could, therefore, arise only in the year when the claim for damages was made and ascertained. A contingent liability cannot be expenditure coming within section 10 (2) (xv) and there was no scope for applying the principle in *Dadswell's case*[1]. Whether *Dadswell's case*[1] was rightly decided, did not therefore arise for consideration in either of the two cases mentioned. In both of them, it was assumed to be correct, but the principle contained therein was held inapplicable to cases, where no question of a receipt analogous to that of a trade receipt arose. It was also held inapplicable to a liability which was purely contingent, having regard to the provisions of section 10 (2) (xv) of the Act. But where a receipt is correlated to and arises out of a commercial transaction between the parties, we are of opinion that the rule laid down by Roxbrough, J., in *Dadswell case*,[1] should apply. The principle that the accounts should be re-opened even in respect of voluntary payments, has been laid down even earlier, in *Isac Holden & Sons, Ltd.* v. *Commissioners of Inland Revenue*[2]. In such cases, the right or liability should be deemed to have been established in the past accounting period. That principle as indicated before is not on any theory of accrual, because there was no legal right existing then : but being correlated to the transaction, it should properly belong to it, and the account should be re-opened when the payment came in. To hold otherwise, would lead perhaps to inconvenient results. Take for instance a case where in the year of the receipt of such a voluntary payment, the assessee had no business, as in the *Dadswell's case*[1]. If the year of receipt is taken as deciding the liability, the assessee might well say that it is not business income, but a casual one. This, however, is not correct. The rule however has its own limitations. It will only apply to receipts in respect of trade debts and those equivalent or analogous to them. The question whether a particular receipt belongs to that category, would depend on the further question, for what it was paid; that it was paid under a contract or *ex gratia*, would make no difference. Nor is it necessary that something should exist in the year of account which ultimately led to the receipt to enable the re-opening of the account.

In the present case, the amount of Rs. 12,447, was paid expressly for the loss incurred in connection with the supply of bread during the year 1948-49. The receipt would be analogous to a trading receipt of the year 1948-49. The account of that year could be re-opened for the purpose of assessment. Being a receipt of an earlier year, the amount could not be included in the assessment for the year 1951-52.

In the result, we answer question No. 1 in the affirmative and against the assessee ; the amount is assessable for the year 1948-49 in the assessment year 1949-50 by re-opening the account ; question, No. 2 in the negative and in favour of the the assessee. As the assessee has succeeded only on one of the two questions referred, there will be no order as to costs.

K.L.B. *Reference answered.*

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1. (1954) 35 T.C. 649. 2. (1924) 12 T.C. 768.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE JAGADISAN.

R. Sarangapani and another .. *Petitioners**

v.

The Port Trust of Madras, represented by its Chairman and the Board of Trustees, Madras .. *Respondent.*

Madras Port Trust Act (II of 1905), *sections* 39 *and* 95 (4)—*Scope and effect of—Power of Board of Trustees to undertake operations of clearing and forwarding agents inside the Port and exclude others from performing the said operations—Resolution by Board to* " *take over cargo and do the landing on shore* "—" *If* ultra vires—*Constitution of India* (1950), *Article* 19 (1) (g) *and* (6)—*Scope of*—" *State* "—*If includes Port Trust*—" *Local Authority* "—*Articles* 12 *and* 367—*General Clauses Act,* 1897, *section* 3 (3-*l*)—*Sea Customs Act* (*VIII of* 1878)—*Scope of.*

One of the main objects of the Madras Port Trust Act, 1905, was that the Harbour Trust Board, which was constituted under the earlier Harbour Trust Act of 1886, and which was invested with all powers to maintain and administer all matters relating to the Harbour and, *inter alia,* to levy tolls, to execute works and make contracts, should be constituted as Port Trust Board. Another object of the Act was to invest the Trust Board with additional powers and privileges in respect of the landing and shipping of goods, pilotage and towing of vessels, provision of pilot boats and tugs, use of docks and piers and other like matters.

Section 39 of the Port Trust Act of 1905 expressly confers on the Board power to undertake certain services, and one class of service is described in clause (*b*) of the section, namely, receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises. Clause (*a*) of the section refers to the services necessary for landing, shipping or transhipping goods between vessels in the Port and the wharves, piers, quays or docks in possession of the Board. Section 39 (2) enjoins on the Board the duty to perform in respect of goods all or any of the services mentioned, *inter alia* in clauses (*a*) and (*b*) of section 39 (1). The Board is also given power under section 39 (3) to take charge of the goods for the purpose of performing the services. The Board has thus every power to understake the services mentioned in clauses (*a*) to (*d*) of section 39 (1) of the Act, although the Board may relinquish any service to forwarding and clearing agents under section 41-A (1) (*a*) of the Act.

Section 95 confers on the Board the power to make bye-laws, *inter alia,* for the reception, portering, storage and removal of goods brought within the premises of the Board and for the exclusive conduct of those opera tions by the Board or persons employed by the Board.

When the Boar d decides upon taking over the services which had been relinquished to forwarding and clearing agents, and passes a resolution to take over export cargo and do the handling on the shore ", the Board is perfectly within its powers and rights, and it cannot be impeached on the ground that it gives the Board a monopoly or that it violates the provisions of Article 19 (1) (*g*) of the Constitution.

Section 95 (4) of the Madras Port Trust Act expressly confers on the Board power to make bye-laws for the exclusive conduct of the operations mentioned therein. In the face of the express and specific provisions of sections 39 and 95 (4), it cannot be denied that the Board has full power to undertake the services which till then had been performed by the forwarding and clearing agents, so far as the operations within the premises of the Port are concerned. It is of course in the discretion of the Board to permit other persons also to carry on these operations or to undertake the conduct of these operations only in respect of certain goods. There is nothing in section 95 (4) which is inconsistent or in conflict with any of the provisions of the Act, including section 39. No one can claim as of right access to the premises of the harbour or the Port, to carry on any business. The Board has power under the Act not only to undertake such services but also, if they so choose, to exclude other persons from rendering such services. Section 95 (4) is a statutory recognition of the object as being within the scope of the Act.

L. & N.E. Ry. Co. v. *British Trawlers Federation, Ltd.,* L.R. (1934) A.C. 279; *Pigott & Son* v. *Waterways Executive,* (1953) 1 All E.R. 22, distinguished and explained.

Earl Fitzwilliams Wentworth Estates Co. v. *Minister of Housing & Local Government,* L.R. (1952) A.C. 362 and *Padmanabhan* v. *State of Madras,* (1956) 1 M.L.J. 179 : I.L.R. (1956) Mad. 1272, applied.

Perth General Station Committee v. *Ross,* L.R. (1897) A.C. 479, referred to.

Article 19 (1) (*g*), no doubt, confers on all citizens the right to practise any profession or to carry on any occupation, trade or business, but that right cannot entitle a citizen to carry on his occupation, trade or business on the premises of another person or body. *Nagalinga Servai* v. *State of Madras,* W.P. No. 648 of 1951, relied on.

* W.P. Nos. 1224 of 1959 and 4 of 1960. 26th February, 1960.

Assuming that Article 19 (1) (*g*) confers a right, Article 19 (6) of the Constitution, as amended by the Constitution (First Amendment) Act, 1951, is a complete answer, as it saves the Port Trust, the latter being a " State " within the meaning of Article 19 (6), and it would be a "Local Authority" too, as defined by Article 12 of the Constitution and section 3 (31) of the General Clauses Act, 1897, The General Clauses Act, 1897, would apply for the interpretation of the Constitution by reason of the provisions of Article 367.

Such a resolution excluding the forwarding and clearing agents would not also in any way conflict with the provisions of the Sea Customs Act of 1878, even assuming that that Act has any bearing on the question. But the Sea Customs Act is an Act relating to the levy of the Sea Customs only and its scope is entirely different from the scope of the Madras Port Trust Act.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *mandamus* directing the Chairman of the Board of the Port Trust, Madras, the respondent in both the petitions to forbear from giving effect to the Resolution No. 109, dated 29th May, 1959.

R. Gopalaswamy Ayyangar and *K. N. Balasubramaniam,* for Petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*) and *V. V. Raghavan,* for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These two petitions filed under Article 226 of the Constitution were heard together, as they raise common questions of law. They originally came on before one of us Jagadisan, J., who directed them to be posted before a Division Bench, having regard to the importance of the questions raised. The prayer in both the petitions is for the issue of a writ of *mandamus* or such other writ as this Court may think fit to the Board of Trustees of the Port Trust, Madras, calling upon them to forbear giving effect to a resolution passed by the Board on 29th May, 1959. The resolution runs thus :

" Resolved that the Trust take over export cargo other than ores, vegetable oils, molasses and any other cargo in bulk and do the handling on shore from a date to be fixed by the Chairman, Mr. A. R. Liddiard, and Saravashri A. M. Kothandarama Reddi, J. R. Nayak, C. K. Duraivelan and B. Ramalinga Reddi, dissented.

" Resolved also that Mr. A. R. Liddiard, Shri Jasjit Singh or his nominee and Shri U. S. As Gaffoor, Officiating Traffic Manager, re-examine item (ii) in paragraph 1 above and report early what modifications are required."

The petitioner in W.P. No. 1224 of 1959, is a clearing and shipping agent, carrying on business in Madras and holding a licence for acting as such from the Collector of Customs at Madras. He is also the Secretary of the Madras Clearing and Shipping Agents' Association at Madras. The petitioner in W.P. No. 4 of 1960 is a merchant and exporter of hides and skins, carrying on business in Madras. To understand the contentions of the parties, it is necessary at the outset to mention the facts and circumstances which led up to the passing of the above resolution.

The Madras Harbour was constructed in or about 1886. In that year, an Act known as the Harbour Trust Act was passed, because it was considered necessary that there should be in existence a body of persons well acquainted with the affairs of the harbour, in whom may be vested all powers, to maintain and administer all matters relating to the harbour, and, *inter alia*, to levy tolls, to execute works and make contracts. In 1905, the Madras Port Trust Act replaced the Harbour Trust Act, which was repealed. One of the main reasons for the passing of this Act was that the Harbour Trust Board should be constituted a Port Trust Board. Another object of the Act was to invest the Trust Board with additional powers and privileges in respect of the landing and shipping of goods, pilotage and towing of vessels, provision of pilot boats and tugs, use of docks and piers and other like matters. The Preamble to the Act is as follows :—

" Whereas it is expedient to amend and consolidate the law relating to the regulations, conservancy and improvement of the Port of Madras. . . . . . ."

Under section 6 of this Act, the duty of carrying out the provisions of the Act is vested in a Board called " The Trustees of the Port of Madras ", which is a body

corporate with perpetual succession and a common seal. From and after the coming into force of the Act, the immovable properties specified in Schedule II and all movable property held by or in trust for the previous Board of Trustees of the Harbour of Madras shall vest in the Board, subject to all charges and liabilities affecting the same (section 31). Schedule II comprises what may be called compendiously " The Madras Harbour ", including land, buildings, structures and appliances thereon, and the sea space occupied by and enclosed in the north and south groynes of the harbour together with the moorings therein laid down. The Board is given power for the purpose of the Act to acquire and hold immovable or movable property, whether within or without the limits of the port, and to lease or sell any immovable or movable property which may have become vested in or acquired by it with the consent of the Central Government. The Board may execute such works and provide such appliances as the Board may determine to be necessary or expedient for the purpose of the port (section 35). Section 36 enumerates generally such works and appliances, though the list is not intended to be exhaustive. Section 39 is the section most material for the disposal of these petitions. It is in the following terms :—

" 39. (1) The Board shall, according to its powers, provide all reasonable facilities for and shal have power to undertake the following services :

(*a*) landing, shipping or transhipping passengers and goods between vessels in the port and the wharves, piers, quays or docks in possession of the Board ;

(*b*) receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises ;

(*c*) carrying passengers by rail, tramway or otherwise within the limits of the port, subject to such restrictions and conditions as the (Central Government) may see fit to impose ; and

(*d*) receiving and delivering, transporting and booking and despatching goods originating in the vessels " in the port and intended for carriage by the neighbouring railways or *vice versa* as a railway company or administration under the Indian Railways Act, 1890.

(2) The Board shall, if so required by any owner, perform in respect of goods all or any of the services mentioned in clauses (*a*), (*b*) and (*d*) of sub-section (1), provided that the Board shall not be bound to perform any service which it has relinquished under the provisions of clause (*a*) of sub-section (1) of section 41-A.

(3) The Board shall, if required, take charge of the goods for the purpose of performing the service and shall give a receipt in the form and to the effect prescribed from time to time by the Central Government.

After any goods have been taken charge of and a receipt given for them under this section, no liability for any loss or damage which may occur to them shall attach to any person to whom a receipt shall have been given or to the master or the owner of the vessel from which the goods have been landed or transhipped ".

Section 40 defines the responsibility of the Board for the loss, destruction or deteioration of goods, of which it has taken charge, section 41-A provides, for the relinquishment by the Board, subject to the sanction of the Central Government and to such conditions as the Central Government may prescribe, of the performance of any of the services specified in clauses (*a*) and (*b*) of sub-section (1) of section 39 to an approved person. Such person, however, shall not charge or recover for such service any sum in excess of the amount leviable according to the scale framed under section 42, 43 or section 43-A, if such service were performed by the Board. Notwithstanding such relinquishment, the Board may charge dues according to the scales laid down in the aforesaid sections for the use of its works or appliances or for other services connected with that which has been relinquished. Section 41 enjoins on the person to whom any or all of the services under clauses (*a*) and (*b*) of sub-section (1) of section 39 has or have been relinquished under section 41-A the duty to perform, if so required by the owner, any of the services so relinquished, and, for that purpose, take charge of the goods and give a receipt in the prescribed form. Chapter VI (sections 42, etc.) provides for imposition and recovery of rates and other miscellaneous matters. Section 95 confers on the Board the power to make bye-laws not inconsistent with the provisions of the Act or of the Indian Ports Act, 1908, *inter alia* " for the reception, porterage, storage and removal of goods

brought within the premises of the Board and for the exclusive conduct of these operations by the Board or persons employed by the Board ". No bye-law shall have effect until the same is approved by the Central Government.

Before the passing of the impugned resolution, the arrangement relating to the handling of the cargo was as follows. Landing from the ship to the quayside and loading from the quayside to the ship is done by stevedores under arrangements with ship owners. Import cargo is taken charge of by the Port Trust at the quayside and shifted to the storage point and deliveries are effected by the Fort Trust to the consignee. For the import cargo taken charge of at the quayside, the Port Trust issues receipts and undertakes responsibility for storing the goods and delivering them to the consignee. To carry out this work, the Port Trust maintains a large labour force. With reference to the export cargo, till now, the Port Trust has not handled it. The shippers engage forwarding agents, that is, clearing and shipping agents who are licensed by the Collector of Customs. One of the functions of these agents is to attend to customs formalities. It cannot be denied that the resolution of the Board, which is the subject-matter of these petitions prevents the clearing and forwarding agents from handling the cargo.

The action of the Board was impeached on several grounds. But the main grounds were (1) that the Port Trust had no jurisdiction to exercise a monopoly in the mater of rendering their services in the handling of export, which they have no right to do under the provisions of the statute, and (2) that the resolution of the Board violates the provisions of Article 19 (1) (*g*) of the Constitution of India, as it unduly restricts the rights of the shipping agents to carry on their business and the rights of the owners to carry on their trade.

We are unable to appreciate the contention of Mr. R. Gopalaswami Ayyangar, learned counsel for the petitioner, that the Board of Trustees had no power under the statute to decide on the course indicated in the impugned resolution. Section 95 (4) of the Madras Port Trust Act expressly confers power on the Board to make bye-laws for the *exclusive* conduct of the operations of reception, porterage, storage and removal of goods brought within the premises of the Board. If we understood learned counsel right, his argument was that this provision enabling the Board to *exclusively* conduct these operations went beyond the substantive provisions of the Act. The material section is undoubtedly section 39. The language of that section makes it clear that the Board shall have power to undertake certain services and one class of service is described in clause (*b*), namely, receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises. Clause (*a*) refers to the services necessary for landing, shipping or transhipping goods between vessels in the Port and the wharves, piers quays or docks in possession of the Board. After conferring power on the Board to undertake the said services, sub-section (2) of section 39 enjoins on the Board the duty to perform in respect of goods all or any of the services mentioned, *inter alia* in clauses (*a*) and (*b*) of sub-section (1). The only circumstance which relieves the Board of such duty is when it has relinquished any service under the provisions of clause (*a*) of sub-section (1) of section 41-A to which reference has been made earlier in this judgment. To enable the Board to perform the aforesaid services, the Board shall take charge of the goods for the purpose of performing the service and shall give a receipt for the goods. Once the goods have been taken charge of and a receipt given for them, no liability for any loss or damages which may occur to them shall attach to any person, to whom a receipt shall have been given or to the master or owner of the vessel, from which the goods have been landed or transhipped. In the face of these specific provisions, it is impossible to hold that the Board has no power to undertake the services which are being performed by the forwarding and clearing agents, so far as the operations within the premises of the Port are concerned. Of course, these provisions will not confer power on the Board to insist on the owners bringing their goods to the harbour in vehicles owned or employed by them. The Board will not have the power to insist that the Board alone should carry out the customs formalities

for such remuneration as they may fix. But within the Port's premises, the Board, in our opinion, has every power to undertake the services mentioned in clauses (*a*) to (*d*) of section 39 (1) of the Act.

The next question is whether the Board, besides undertaking the aforesaid services can also exclude other persons or bodies from performing those services. It will of course be in the discretion of the Board to permit other persons also to carry on these operations, or, as it has done by the impugned resolution, undertake the conduct of these operations only in respect of certain goods. We see nothing in section 95 (4), which is inconsistent or in conflict with any of the other provisions of the Act including section 39.

The real question arising in this case appears to us to be whether any person or body other than the Board can claim as of right to undertake the above-mentioned services. If they can, then, the Port Trust Board will have no power to affect their rights adversely ; if they cannot, then, the impugned resolution will be perfectly valid. Mr. Gopalaswami Ayyangar relied on two dicisions of the English Courts in support of his contention that the Board cannot have, as it were, a monopoly of undertaking the aforesaid services. One is the decision of the House of Lords in *L. & N. E. Ry. Co.* v. *British Trawlers Federation, Ltd.*[1], in which the material facts were under and by virtue of various statutes one of which incorporated the Harbours, Docks, and Piers Clauses Act, 1847, a railway company became the owners of a habour, docks and quays, a statutory market for fish and a railway in connection therewith. Section 33 of that Act ran as follows :—

"Upon payment of the rates made payable by this and the special Act and subject to the other provisions thereof, the harbour, dock and pier shall be open to all persons for the shipping and unshipping o f goods, and the embarking and landing of passengers".

Section 83 of that Act ran thus :

" The undertakers may from time to time make such bye-laws as they shall think fit for all or any of the following purposes ; (that is to say), For regulating the shipping and unshipping, landing, warehousing, stowing, depositing and removing of all goods within the limits of the harbour, dock or pier, and thc premises of the undertakers ".

Formerly, the Company's railway answered all the requirements of fish merchants and owners of trawlers ; but, latterly, the merchants brought to the market motor vehicles which carried fish to far distant places formerly served by the railway, to the serious loss of the Company's undertaking. The Company thereupon refused to admit to their dock premises any vehicle for the conveyance of fish without a licence which provided *inter alia* that the vehicle should not be used for the transport of fish beyond the boundaries of the company's fish docks except for fish consigned for transmit by railway or for sale and consumption within a radius of 12 miles from the docks, and that no fish transported by the vehicle should be transferred directly or indirectly to or from any other road vehicles for conveyance to any other place beyond a radius of 12 miles from the fish docks. It was held by the House of Lords that the company were not entitled to impose those conditions upon the removal of fish from their premises, for the marketing of fish, when landed, must be regarded as part of the process of shipping and unshipping within the meaning of section 33 of the Act and that access to the docks must include access with such a vehicle as the party seeking access deems necessary, subject to the power of the company under section 83 to regulate such access by means of a valid and operative bye-law. From the speeches of the Noble Lords, it is abundantly clear that their decision turned almost entirely on the provisions of section 33 of the Act. The decision is valuable only for this, namely, that in their opinion, the words ' shipping and unshipping ' in section 33 of the Act should not be confined to the narrow operation of lifting goods from the quay to the ship or from the ship to the quay, and that the access, under that section, cannot be limited to access in person without any vehicle. Lord Macmillan summed up the position in the following words :

1. L.R. (1934) A.C. 279.

"The answer is that the right of access conferred by section 33 of the Harbours, Docks and Piers Clauses Act includes, by virtue of the definition in section 2, access to the authorised works connected with the harbour, and the fish markets are among the harbour works which Parliament has authorised".

This construction of section 32 of the Harbours, Docks and Piers Clauses Act, 1847, was followed by Sellers J., in *Pigott & Son* v. *Waterways Executive*[1]. This case related to Immingham Dock, Grimsby, which was vested in Docks and Inland Waterways Executive. The plaintiffs were tug-owners. The Waterways Executive threatened to exclude the plaintiffs' tugs from providing the tug services for vessels entering and leaving the dock and to restrict the necessary towage services to tugs belonging to, or hired by, them. The plaintiffs sought and obtained declaration to establish their rights to continue to Provide tug services in the dock. The learned Judge held that, under section 33 of the Harbours, Docks and Piers Clauses Act, 1847, the tug-owner, like the carrier who brought the goods to the dock for shipment or removed them when they had been unshipped, or the owner of the ship which carried the goods, performed services without which goods could not be shipped or unshipped by vessels using the port, and by the Proviso to section 70 of the Act of 1901, in pursuance of which the dock had been constructed, the defendants were expressly prohibited from compelling ships to use their tugs, and, therefore, there was no power by virtue of which the defendants were entitled to exclude the plaintiffs from providing towage services to vessels shipping or unshipping goods in the dock. Being a statutory body, their power was such as was limited by the Act of 1901, and they would be precluded from exercising the more extensive rights which they might have by virtue of the ownership of property. The discussion in respect of the power of the defendants to exclude the plaintiff's tugs centered round the Proviso to section 70 of the Act of 1901, which was as follows:

"Provided always that nothing in this Act contained shall be deemed or construed to authorise the company to require any owner, agent, master, consignee or other person having charge of any vessel lighter or river craft to employ hire or use any such steamer tug lighter or other ship or boat."

In both the decisions, the earlier decision of the House of Lords in *Perth General Station Committee* v. *Ross*[2], was distinguished. There, it was held that a railway company have the right of excluding from their stations all persons except those using or desirous of using the railway and may impose upon the rest of the public any terms which they think proper as the conditions of admittance.

It will be seen that, in both the cases cited by Mr. Gopalaswami Ayyangar, the decision depended upon the construction of particular provisions of the relevant Acts. These two decisions cannot apply to the present case, because there is no provision in the Madras Port Trust Act, corresponding to section 33 of the Harbours, Docks and Piers Clauses Act, 1847. It follows that no one can claim as of right access to the premises of the harbour or the port to carry on any business.

Far from there being anything in the provisions of the Madras Post Trust Act which confers an absolute right on private persons or bodies to carry on the operations which have till now been carried on by the shipping and forwarding agents within the premises of the harbour and the port, there are provisions which clearly confer power on the Board to undertake such services, and, if they so choose, to exclude other persons from rendering such services. Under section 42 of the Act, the Board shall frame a scale of rates at which and a statement of the conditions under which any of the services specified therein shall be performed by itself or by a person to whom any service has been relinquished under section 41-A or partly by one and partly by the other. The services include transhipping of goods between vessels in the harbour, landing and shipping of goods from or to such vessels to or from any wharf, quay, pier, dock, land or building in the possession or occupation of the Board or at any place within the limit of the port, cranage or porterage of goods on any such place, wharfage, storage or demurrage of goods on any such place and any other service in respect of goods excepting the services in respect of vessels for which fees are chargeable under the Indian Ports Act. The specified services are therefore con-

1. (1953) 1 All E.R. 22.

2. L.R. (1897) A.C. 479.

templated to be performed either by the Board or by a person to whom any service has been relinquished by the Board, but not by any other person or body.

A similar provision for excluding private persons from carrying on a particular work within the precincts of a dock can be found in sections 81 and 82 of the Harbour, Docks and Piers Clauses Act, 1847, itself. In *Dick* v. *Badart*[1], Cave, J., as he then was, while holding that, having regard to section 33 of the Act, a bye-law that no lumpers shall be allowed to work on board any vessel in the docks or on the wharves or premises of the Company, but such as are authorised by the Company and that only the servants of the Company should be allowed to work within the dock premises, was in excess of the power conferred upon the dock Company, referred to sections 81 and 82 of the Act, which did confer the power to exclude meters and weighers who were not licensed. The learned Judge said at page 393 thus :

"Again, the clause by which the company are empowered to regulate the conduct of all meters and weighers appointed by them bears out my view. The special Act authorises the Company to appoint their own meters and weighers, and by the general Act (sections 81 and 82) where under the special Act the undertakers shall have the appointment of meters and weighers, they may license a sufficient number of persons to be meters and weighers within the limits of the deck, and fix reasonable rates of remuneration to be paid to them, and none but the licensed meters and weighers are to be employed to weigh goods in the dock. If it had been intended to limit the class of persons who might remove cargo to persons employed by the Company only, one would have expected to find similar provisions with respect to those persons."

Section 95 (4) of the Madras Port Trust Act, we have seen, expressly empowers the Board to frame a bye-law for the *exclusive conduct* of the operations of reception, porterage, storage and removal of goods brought within its premises by the Board or persons employed by the Board. That provision is a statutory recognition of the object as being within the scope of the Act. This rule of interpretation was enunciated by Lord MacDermott in *Earl Fitzwilliam's Wentworth Estates, Co.* v. *Minister of Housing & Local Government*[2] :

"(3) The second limb gives an instance of the power conferred by the first, but in terms which amount to a statutory recognition of the purpose described in the second limb as being within the scope of the first. Accordingly, if the case comes within the wording of the second limb (the word 'so' being read as connoting acquisition by agreement and with the approval of the Minister) there is no need, in order to perfect the power it purports to confer, to trace a connection between the purpose therein mentioned and the performance of some function of the Board."

That rule was applied by Rajagopalan, J., in *Padmanabhan* v. *State of Madras*[3]. In that case, it was contended that rule 160-B of the Motor Vehicles Rules was *ultra vires*, as it was beyond the rule-making power conferred on the Government by section 68 of the Act. In dealing with this question, the learned Judge adverted to section 68 of the Motor Vehicles Act, which contains two sub-sections. The first sub-section is in general terms, namely, a State Government may make rules for the purpose of carrying into effect the provisions of this Chapter (Chapter IV.) Sub-section (2) ran :—

"Without prejudice to the generality of the foregoing power, rules under this section may be made with respect, to all or any of the following matters, namely, ..."

Then follows a list of items. The contention was that the carriage of mails was not one of the enumerated items in section 68 (2) of the Act. But the contention was overruled on the ground that section 68 (2) does not exhaust the scope of section 68 (1). The effect of a provision like section 68 (2) enumerating certain items is thus described by the learned Judge :

"The effect of section 68 (2) is that, with reference to the items included in sub-clause (2), it is not necessary for the Court to examine further whether any of these items comes within the scope of the general provision in clause (1) of section 68."

Certain provisions of the Sea Customs Act were referred to by Mr. Gopalaswami Ayyangar, learned counsel for the petitioners ; but they do not appear to have any material bearing on the question that has to be decided, namely, whether the peti-

1. 10 Q.B.D. 387 at 393.
2. L.R. (1952) A.C. 362 at 383.
3. (1956) 1 M.L.J. 179 : I.L.R. (1956) Mad. 1272.

tioners have a right to insist that private clearing and shipping agents should be allowed to carry on their occupation within the precincts of the Madras Harbour and Port. The Sea Customs Act is an Act relating to the levy of Sea Customs Duty. The scope of this Act is so entirely different from the scope of the Madras Port Trust Act that the provisions of one Act cannot be called in aid of the construction of the provisions of the other Act. Sections 11, 14, 15 and 16 of the Sea Customs Act, which provide for appointment of wharves and warehouses, are intended for affording the Customs Authority, facilities to collect customs dues. Section 196 imposes on the owner of goods the expense incidental to compliance with customs-law. Section 202 (1) was particularly relied on by the petitioners' learned counsel. That only lays down that no person shall act as an agent for the transaction of any business relating to the entrance or clearance of any vessel or the import or export of goods or baggage in any Custom-house, unless such person holds a licence granted in this behalf in accordance with the rules made under sub-section (2). These agents, as the marginal note indicates, are merely Custom-house agents. The impugned resolution does not in any way conflict with any of the provisions of the Sea Customs Act. It does not prevent the owners of goods to appoint agents for Custom-house transactions.

Having regard to our conclusion on the first point, the second point really does not arise. It is true that Article 19 (1) (*g*) confers on all citizens the right to practise any profession, or to carry on any occupation, trade or business. But, obviously, this right cannot entitle a citizen to carry on his occupation, trade or business on the premises of another person or body. A citizen may have a right to carry on the business of selling fruits and vegetables ; but he has no right to carry on his business in the compound of a private person, except, of course, with his leave and consent. The decision of this Court in *Nagalinga Servai and others* v. *State of Madras*[1], furnishes an analogous instance. It was held in that case that no fundamental right was infringed, because certain persons who had been for a long number of years vending various articles on the platform of the Madura Junction with the permission of the South Indian Railway Co., Ltd., were not allowed to continue to carry on their business.

Even assuming that Article 19 (1) (*g*) confers a right on the petitioners, Article 19 (6) of the Constitution, as amended by the Constitution (First Amendment) Act, 1951, is a complete answer to the contention based on Article 19 (1) (*g*). That clause *inter alia* provides that nothing in sub-clause (*g*) of Article 19 (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, the carrying on by the State or by a Corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion complete or partial of citizens or otherwise. Article 12 defines "the State" as including the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. "Law" includes any bye-law, rule, regulation, notification, having the force of law (Article 13 (3)). There can be no doubt that the Port Trust will fall within the meaning of the term "State" in Article 19 (6). It is a corporation certainly controlled by the State. Even otherwise "the Port Trust" would fall within the extended definition of "the State" under Article 12, because it would be a local authority. Article 367 of the Constitution provides that the General Clauses Act, 1897, shall apply for the interpretation of the Constitution. So, it is permissible to go to that Act for a definition of 'Local Authority'. In section 3 (31) 'Local Authority' is thus defined :

> "Local Authority shall mean a Municipal Committee, District Board, body of Port Commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund."

We are clearly of opinion that the resolution in question cannot be impugned on the basis of any of the provisions of the Constitution of India. This would be so, as regards both the petitioners, that is, the shipping agent as well as the owner of the goods.

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1. W.P. No. 648 of 1951.

A minor point was sought to be raised by Mr. R. Gopalaswami Ayyangar, learned counsel for the petitioners, based on section 23-A of the Madras Port Trust Act. That section provides that no trustee shall vote on or take part in the discussion of any question coming up for consideration at a meeting of the Board if the question is one in which he has any direct or indirect pecuniary interest by himself or his partner, or in which he is interested professionally on behalf of a client or as agent for any person other than the Central Government, a local authority or a railway company. It was said that one Anthony Pillai who was one of the trustees of the Board was the President of the Port Trust Employees' Union. He was apparently one of the two representatives of Labour chosen by the Central Government under section 8 (1) (*h*) of the Act The argument was that, as the President of the Employees' Union, he had pecuniary interest on behalf of the employees of the Port Trust who would be benefited if the Port Trust Board took over the handling of export cargo. The contention was, however, abandoned at a later stage.

In view of the above findings the writ petitions fail and are dismissed. There will be no order as to costs.

P.R.N. ——— *Petitions dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM, MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE ANANTANARAYANAN.

The State of Madras represented by the Public Prosecutor Madras .. *Petitioner**

v.

G. Krishnan .. *Respondent.*

Criminal Procedure Code (V of 1898 as amended by Act XXVI of 1955), section 173 (4)—Construction and scope of—Statements recorded under section 164—Character of—Right of accused to copies thereof prior to filing of charge-sheet—Statements—If "public document"—Evidence Act (I of 1872), section 74 (1) (iii)—Interpretation of Statutes—General and special law—Judicial interpretation accepted for long time—Effect of—Code—Exhaustive character of—Implied repeal—Principle of.

The statements recorded under section 164, Criminal Procedure Code, would be public documents falling under section 74 (1) (iii) of the Evidence Act and the accused would be entitled to copies of the same as a person interested ; but his right to obtain such copies before the filing of the charge-sheet has been taken away by implication by section 173 (4) of the Criminal Procedure Code, and he would be entitled to the copies of those documents only in accordance with section 173 (4).

Emperor v. *Muthia Swamiyar*, (1907) 17 M.L.J. 471 : I.L.R. 30 Mad. 466, approved.

Queen Empress v. *Arumugam*, (1897) 7 M.L.J. 167 : I.L.R. 20 Mad. 189 (F.B.), discussed and explained. Case-law reviewed.

Section 173 (4) of the Criminal Procedure Code must be construed as impliedly prohibiting the grant of copies earlier than the time prescribed by it.

When two statutes, though expressed in affirmative language, are contrary in matter, the latter or special would abrogate the earlier or general.

A judicial construction of a statute which had been accepted for a long period of time would, *prima facie*, be taken as expressing the true intention of the Legislature.

"Statutory Construction" by Crawford, (1940 Edition), page 107, referred to. Maxwell on Interpretation of Statutes cited.

An enactment which is a Code, such as the Code of Criminal Procedure, must be deemed to be exhaustive in regard to any point dealt with by it.

Narendra Nath Sircar v. *Kamal Basini Dasi*, (1896) 6 M.L.J. 71 : L.R. 23 I.A. 18 : I.L.R. 23 Cal. 563 (P.C.), relied on.

Where there is specific provision in the Code the law must be ascertained by references to its provision alone.

Rahim Sheikh v. *Emperor*, (1923) I.L.R. 50 Cal. 872, relied on.

* Crl.R.C. No. 826 of 1960. (Crl.R.P. No. 797 of 1960.) 23rd August, 1960. (1st Bhadra, 1882—Saka).

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Town Sub-Magistrate, City I, Coimbatore, dated 14th July, 1960, in Crime No. 313 of 1960, on the file of the R.S. Puram Police Station.

The Public Prosecutor (*P. S. Kailasam*), for Petitioner.

G. Gopalaswami, for Respondent.

The Court made the following Order of Reference to a Full Bench :

Somasundaram, J.—This is an application by the Public Prosecutor, Madras, to revise the order of the Town Sub-Magistrate, City I, Coimbatore, The respondent and some others have been arrested in connection with counterfeiting currency notes and they have been remanded to custody. The investigation is not yet complete and the charge-sheet has not yet been filed. In the course of the investigation statements have been recorded under section 164, Criminal Procedure Code. The respondent applied for copies of those statements. The Magistrate has directed copies of those statements to be granted to the respondent. Against this order directing the grant of copies to the respondent, the present revision has been filed by the Public Prosecutor. The contention of the learned Public Prosecutor is that these copies are not to be granted at this stage, that is, before the filing of the charge-sheet. He had also contended that even after the filing of the charge-sheet, copies of those statements should not be granted unless they form part of the record, though in the objection filed by the Deputy Superintendent of Police, Crime Branch, C.I.D., Sri R. N. Krishnaswami, he has stated that the accused are entitled to such copies only after the charge-sheet is filed.

The question for consideration before me now is whether copies of the statements under section 164, Criminal Procedure Code, can be granted at this stage, that is, before the filing of the charge-sheet.

That these documents fall under section 74 (1) (iii) of the Evidence Act seems to me to be clear. The other question is whether the accused has a right to inspect and demand a copy of the same on payment of the usual charges. On the question as to who is a person who has a right to inspect the public document mentioned in section 74 of the Evidence Act, there is no indication in the Evidence Act. In the Criminal Procedure Code also there is no indication. The Criminal Procedure Code does not deal with the public documents as such and so the question as to who has a right to inspect such a document and demand a copy is not dealt with therein. The question has therefore to be decided on the case-law on the subject.

In *Queen Empress* v. *Arumugam*[1], the question that arose was as to whether reports made by a Police Officer in compliance with sections 157, 168 and 173, Criminal Procedure Code, are public documents within the meaning of section 74 of the Evidence Act and consequently an accused person is entitled before trial to have copies of such reports. That is a decision of a Full Bench of this Court, consisting of four Judges. Subramania Ayyar and Davies, JJ., who heard the case in the first instance referred the matter to a Full Bench. In the Order of Reference made by them, they say, with reference to documents under sections 157, 168, and 173 that :

> " . . . . in the eye of the law, every person has a right to inspect public documents subject to certain exceptions, provided he shows he is individually interested in them . . . . In *Mutter* v. *Eastern & Midlands Railway Company*[2] Lindley, L.J., with the concurrence of the Lords Justices Cotton and Bowen laid down the rule thus : 'When the right to inspect and take a copy is expressly conferred by statute, the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and what is reasonably necessary for the protection of such inerest. The common law right to inspect and take copies of public documents is limited by this principle as is shown by the judgment in *Rex* v. *Justice of Staffordshire*[3]. In the case mentioned by the Lord Chief Justice, Lord Denman, Chief Justice, observed that for the persons interested 'Every Officer appointed by law to keep records ought to deem himself for that purpose (for the production of documents) 'a trustee'."

1. (1897) 7 M.L.J. 167 : I.L.R. 20 Mad. 189 (F.B.).
2. L.R. (1888) 38 Ch.D. 92, 106.
3. (1837) 6 A. & E. 84, 100 : 112 E.R. 33.

The Reference then came before a Full Bench consisting of Sir Arthur Collins, C.J., Shephard, Subramania Ayyar and Benson, JJ. The learned Judges held by a majority (Subramania Ayyar, J., dissenting) that reports under sections 157 and 168 are not public documents. In the course of the judgment Collins, C.J., at page 194 observes as follows :

" there appears no doubt that a person accused is a person interested in the documents referred to in sections 157, 168 and 173, Criminal Procedure Code, if the reports relate to the accusation against him ; and *if such reports are public documents he would be entitled to inspect and have copies of such documents.*" (italics is mine).

Shephard, J., at page 196 states as follows :

" I think it may be inferred that the Legislature intended to recognise the right generally for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such documents should be given. Within that limit the right appears to be recognised according to the English authorities. In the present case there can be no question as to the interest of the party who claims inspection. It is plain that a person charged with an offence is legitimately interested in knowing beforehand the particulars of the charge made against him, and the names of the witnesses who are going to support it. His interest is none-the-less a legitimate one, because some persons might make improper use of the information so obtained. *If, therefore, the documents sought to be inspected are public documents,* and *if they are umprotected by special privilege, it follows that the claim to inspection must be allowed* (italics is mine). If any of the documents is not a public document, the claim must clearly be disallowed."

Benson, J., merely held that as the documents are not public documents they cannot be given to the accused. Subramania Ayyar, J., clearly held that all the documents fell within section 74 of the Evidence Act, and, therefore, the accused is entitled to the same. It is clear from the judgment of the Full Bench in the above case that if the document falls under section 74 of the Evidence Act, then the accused will be entitled to the same as he is a person interested in getting it, unless it is protected by any special privilege. But the majority of the Judges held that documents under sections 157 and 168 are not public documents, and so the accused are not entitled to the same. On the question of the report under section 173, Criminal Procedure Code, Collins, C.J., and Benson, J., held that the report under section 173, Criminal Procedure Code, also is not a public document while Shephard and Subramania Ayyar, JJ., held that a report under section 173, Criminal Procedure Code, is a public document and, therefore, the accused is entitled to the same. This decision is relied on to show only that if the document is a public document and if there is no express provision prohibiting the grant of copies, then the accused will be entitled to the same.

In *Emperor* v. *Muthia Swamiyar*[1], a decision of a Bench of this Court, the question of granting copies of statements recorded under section 164, Criminal Procedure Code came directly for consideration. The question came up for consideration before the learned Judges on a reference made by the Sessions Judge of Tiruchirapalli against the order of the Sub-Magistrate who refused to grant copies of statements recorded under section 164, Criminal Procedure Code. The Sub-Magistrate relied on the decision in *Queen Empress* v. *Arumugam*[2] though that decision does not relate to statements under section 164, Criminal Procedure Code, but only to reports under sections 157, 168 and 173, Criminal Procedure Code. The Sessions Judge, thought that the Sub-Magistrate was not justified in refusing copies of statements recorded under section 164, Criminal Procedure Code. He, therefore, made a reference under section 438, Criminal Procedure Code. The learned Judges who heard the reference referred to the decision in *Queen Empress* v. *Arumugam*[2], and observe as follows :

" In *Queen Empress* v. *Arumugam*[2], it was held by the Full Bench that an accused person was not entitled to copies of the reports made by a police officer under sections 157 and 168 of the Criminal Procedure Code..... We have not been referred to any authority in which the present question is dealt with. *It cannot, we think, be determined merely with reference to the question whether these statenents are public documents within the definition in section 74 of the Evidence Act, because section 76 only provides the means of proof of public documents which any person has the right to inspect,* (italics is mine) and whether any person has a right to inspect any particular public document is, in our opinion, a question not dealt with by the Evidence Act and altogether outside its scope." (italics is mine).

1. (1907) 17 M.L.J. 471 : I.L.R. 30 Mad. 466.

2. (1897) 7 M.L.J. 167 : I.L.R. 20 Mad. 189 (F.B.).

Then the learned Judges point out how the Code of Criminal Procedure does not give a right to inspect and have copies of statements recorded under section 162, Criminal Procedure Code, and how the Code provides for giving an accused a copy of the charge under section 210, and how the other part of the record and other documents referred to in section 548 are to be granted. Then they say at page 468 :

"None of these sections entitles the prisoner to a copy of the statements under section 162 at the present stage. There is, however, no provision similar to section 173 of the Criminal Procedure Code which forbids these statements to be used as evidence and if a witness at the preliminary enquiry has previously made a statement under section 162, such statement may be put in to contradict him when it will become part of the record and the accused will be entitled to a copy after commitment.

We think that if the framers of the Code had intended that persons under remand should be entitled to copies of statements under section 162 of the Criminal Procedure Code, they would have said so. On the contrary, we think they deliberately refrained from doing so on grounds of public policy and in accordance with the principle embodied in section 125 of the Evidence Act. The question must, in our opinion, be decided in accordance with the provisions of the Code. We know of no general principle of the common law which would entitle an accused person to copies of documents of this kind. As regards the English cases referred to in the Order of Reference in *Queen Empress* v. *Arumugam*[1], in which the parties were allowed copies of public documents on the ground of interest, the limits of the common law right to inspect and take copies on the ground of interest were not discussed or in question in *Mutter* v. *Eastern & Midlands Railway Co.*[2], or the other cases referred to, and we are not aware of any English authority in favour of allowing an accused person to inspect and take copies of statements such as these. We must, therefore, decline to interfere in revision with the Magistrate's order."

It would be seen from the observations extracted from the above decision, *Emperor* v. *Muthia Swamiyar*[3], that though the question arose on a reference made with regard to refusal of grant of copies of statements recorded under section 164, Criminal Procedure Code, beyond making a reference to it in the commencement of the judgment, all the other observations relates only to statements recorded under section 162, Criminal Procedure Code. I thought that the reference to section 162 might be a mistake in printing and I called for the original judgment but I found in the original judgment also the reference throughout is only to section 162. There are express provisions in the Code of Criminal Procedure prohibiting the grant of copies recorded under section 161, at any stage prior to the filing of the charge-sheet because under the provisions of section 162 statement made to any Police Officer cannot be used for any purpose except to contradict a witness when he is called in the witness-box. Now under the provisions of section 173 as amended these copies are to be granted before the commencement of the trial after the filing of the charge-sheet. The observations which relate to section 162 statements canot apply to section 164 statements. The learned Judges in *Emperor* v. *Muthia Swamiyar*[3], seem to think that the question of granting copies under section 164, Criminal Procedure Code, cannot be determined merely with reference to their being public documents under section 74 of the Evidence Act and the application by an interested person under section 76 of the Act. It seems to me that in *Queen Empress* v. *Arumugam*[1], the right of an accused to apply for public documents if they fall under section 74 of the Evidence Act is recognised because he is a person interested in those documents. This appears to have been overlooked by the Bench because the learned Judges observe that it cannot be determined merely with reference to the qustion of those documents falling under sections 74 and 76 of the Evidence Act. Further, the learned Judges in *Emperor* v. *Muthia Swamiyar*[3] observe that in *Queen Empress* v. *Arumugam*[1], the common law right to inspect and take copies on the ground of interest was not discussed. If discussion means examination of the question in detail and by argument then it is correct. But in *Queen Empress* v. *Arumugam*[1], the Full Bench by a majority held that the documents under sections 157 and 168 were not public docments. Still they have observed that if they are public documents an accused person is the person interested in inspection of the record and obtaining copies. To this extent it appears to me that the Bench has overlooked the observations of the Full Bench. The only decision, *Emperor* v. *Muthia Swamiyar*[3], which is against the grant of statements recorded under section 164, Criminal Procedure Code, has not given due importance to the weighty obser-

1. (1897) 7 M.L.J. 167 : I.L.R. 20 Mad. 189 (F.B.).
2. L.R. (1888) 38 Ch.D. 92, 106.
3. (1907) 17 M.L.J. 471 : I.L.R. 30 Mad. 466.

vations of the Full Bench. It is no doubt a decision of a Bench of this Court and it is binding on me. But it seems to me that it requires reconsideration in view of the finding in *Queen Empress* v. *Arumugam*[1], that an accused is a person interested in getting copies of the documents which fall under section 74 of the Evidence Act, if it relates to the charge against him.

It is forcibly contended before me by Mr. Gopalaswami, learned counsel for the respondent, that under the present Rule 339 of the Criminal Rules of Practice, copies of any portion of a criminal case must be furnished to the parties concerned on payment of the proper stamp, etc. It is a mandatory rule and, therefore, it is contended, he is entitled to copies of those documents. It is pointed out by him that when *Emperor* v. *Muthia Swamiyar*[2], was decided the rule was different. The rule as it stood then was Rule 177 of the Criminal Rules of Practice which was as follows :

> "Copies of any portion of the record of a criminal trial must be furnished to the parties concerned on payment of the proper stamp and the authorised fee for copying...."

whereas Rule 339 of the Criminal Rules of Practice which is now in force is as follows :

> "Copies of any portion of the record of a criminal case must be furnished to the parties concerned on payment of the proper stamp and the authorised fee for copying."

As it now stands, Rule 339 seems to have altered the position in law from what it was at the time when *Emperor* v. *Muthia Swamiyar*[2], was decided. The learned Judge who decided *Emperor* v. *Muthia Swamiyar*[2], did not refer to the Rule 177 at that time but nevertheless it may be justified on the ground that under that rule the accused is not entitled to copies except during the trial. But the present rule as pointed out entitles the accused to get copies at any stage of the case in the absence of any limitation contained in the rule.

The learned Public Prosecutor contends that there are certain provisions in the Code of Criminal Procedure which direct copies to be given such as sections 103 (3) and (4), 165 (5), 166 (5), 173 (4), 207-A (3) and (8) and 251-A, Criminal Procedure Code and in the absence of a similar provision in section 164 the accused is not entitled to it. Mr. Gopalaswami points out that under section 172 (2) there is a prohibition against looking into the case diaries. Under section 172, though a Criminal Court may send for police diaries of a case, the accused or his agents shall not be entitled to call for such diaries, and they shall not be entitled to see them merely because they are referred to by the Court. Similarly there is prohibition in section 162, Criminal Procedure Code, against the use of the statements made to a Police Officer except for purposes mentioned in the section, *i.e.*, only when a witness is called for the purpose of contradicting the same. In the absence of similar prohibition in section 164, Criminal Procedure Code, it is contended that the accused is entitled to copy of the same.

One of the arguments advanced by the learned Public Prosecutor in support of his contention that the documents ought not to be granted at this stage is that the grant of those documents will only enable the accused to tamper with the witnesses. As pointed out by Subramania Ayyar and Davies, JJ., in the Order of Reference in *Queen Empress* v. *Arumugam*[1] at page 193 :

> "In our view, no weight should be given to the suggestion of the Public Prosecutor that to allow the accused access to documents like the present would enable them to tamper with prosecution witnesses and thus hinder the course of justice. On the contrary, it is impossible not to feel the force of the observation of Trevelyan, J., that he did not know of anything more disastrous to the administration of criminal law than that the accused should be debarred from having access to information to which he has a right and to which he is not absolutely debarred from having access by some express provision of the Legislature (*Shorn Sha* v. *The Queen Empress*)[3]

and on a considration of the provisions of sections 74 and 76 of the Evidence Act and the decision in *Queen Empress* v. *Arumugam*[1], and the other provisions of the Code relating to both the grant of copies and to the prohibition of granting copies, it seems to me that the decision in *Emperor* v. *Muthia Swamiyar*[2], requires reconsideration. This is a question of importance and it arises frequently.

The papers will therefore be placed before my Lord the Chief Justice for orders as to posting the case before a Full Bench.

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1. (1897) 7 M.L.J. 167 : I.L.R. 20 Mad. 189 (F.B.).
2. (1907) 17 M.L.J. 471 : I.L.R. 30 Mad. 466.
3. (1893) I.L.R. 20 Cal. 642.

The question that I would formulate for decision by the Full Bench is :

"Whether statements recorded under section 164, Criminal Procedure Code, fall under section 74 (1) (iii) of the Indian Evidence Act and if so whether the accused will be entitled to copies of the same under section 76 of the Evidence Act at any stage of the investigation and even before the filing of the charge-sheet and whether there are any provisions in the Criminal Procedure Code or any other law prohibiting the granting of copies at the stages mentioned above."

Pursuant to the Order of Reference, the petition came on for hearing before the Full Bench (*Somasundaram, Ramachandra Iyer* and *Ananthanarayanan, JJ.*).

The Advocate General (*V. K. Tiruvenkatachari*) and the Public Prosecutor for the Petitioner.

G. Gopalaswami, for Respondent.

The Full Bench expressed the following opinion :

Ramachandra Iyer, J.—The following question has been referred to us for decision :—

"Whether statements recorded under section 164, Criminal Procedure Code fall under section 74 (i) (iii) of the Indian Evidence Act and if so whether the accused will be entitled to copies of the same under section 76 of the Evidence Act at any stage of the investigation even before the filing of the charge-sheet and whether there are any provisons in the Criminal Procedure Code or any other law prohibiting the granting of copies at the stages mentioned above."

The question, as formulated, has to be considered in its two aspects, namely, (1) whether a statement recorded under section 164, Criminal Procedure Code, could be held to be a public document falling under section 74 (1) of the Indian Evidence Act, and if so, whether a person , against whom no charge-sheet had yet been filed, could be said to have such an interest therein as to entitle him to inspect the same, or obtain copies thereof, and (2) whether, even if the two questions were answered in the affirmative, there would be any prohibition under the Criminal Procedure Code or any other law against permitting him to inspect or obtain a certified copy of such a document.

The claim of the respondent to the copy of the statement recorded under section 164, Criminal Procedure Code, is rested on the basis that such a statement, on being recorded became public document whithin the meaning of section 74 of the Indian Evidence Act, and that the respondent against whom an investigation of a cognisable offence is proceeding would have such an interest therein as would entitle him under the provisions of section 76 of the Indian Evidence Act to a copy of it.

Section 74, which defines "public documents", states :—

"The following documents are public documents :

(1) Documents forming the acts, or records of the acts.—

(i) of the sovereign authority,

(ii) of official bodies and Tribunals, and

(iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country ;

(2) public records kept in India of private documents."

Section 76 provides for the issue of certified copies of public documents. That states :—

"Every public officer having the custody of a public document which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, shall be sealed, whenever such officer is authorised by law to make use of a seal, and such copies so certified shall be called certified copies."

. . . .

(*Explanation* Omitted as unnecessary).

Section 76 in terms entitles a person, who has a right to inspect a public document to a certified copy thereof. The section, however, does not specify the persons who would be entitled to inspect a public document. But judicial decisions have long ago settled that question. It has been held that the right to inspect a public document is correlated to the interest which the person who seeks inspection has in the document. That interest should be a direct and tangible one in the document ; a

mere curiosity or even an interest in some other matter which could perhaps be better served by the inspection, would not be sufficient.

The right of an accused person to obtain copies of public documents which concern the offence with which he is charged was recognised in *Queen Empress* v. *Arumugam*[1]. In that case a Full Bench of this Court had to consider whether the reports made by a police officer in compliance with sections 157, 168 and 173, Criminal Procedure Code of 1882 were public documents so as to entitle an accused to the grant of a certified copy thereof. The Court by a majority (Subramania Ayyar, J., dissenting), held that the documents were not public documents, and that the accused would not be entitled to copies thereof. In the course of their judgment, the learned Judges observed that, if the documents were held to be public documents, the accused should be held to have an interest therein which would entitle them to copies thereof under section 76 of the Indian Evidence Act. It must be remembered that the decision under that case was rendered having regard to the provisions of the Criminal Procedure Code of 1882 which contained nothing corresponding to sub-section (4) of section 173 which was introduced by Act XVIII of 1923 or to the present section 173 (4). No question arose in that case of the right of a person to obtain copies of documents, even before the investigation had been completed. That question however arose for consideration in *Emperor* v. *Muthia Swamiyar*[2]. The decision in that case negatived the right of the applicant to obtain certified copies of statements or confessions recorded under section 164, Criminal Procedure Code, before the charge-sheet was filed. The judgment in that case however contains certain errors (noticed in the order of reference) which justified the criticism that it is difficult to ascertain the precise reason which influenced the learned Judges to come to the conclusion they did. The judgment would appear as if the question arose in regard to the statements recorded under section 162 ; but it is plain from the context that the learned Judges were dealing with statements recorded under section 164, Criminal Procedure Code. Again the learned Judges could not be held to have correctly appreciated the position, when they observed that section 76 of the Evidence Act provided the means of proof of public documents which a person had the right to inspect. Section 76, on the other hand, declares the right of a person entitled to inspect a public document, to demand a certified copy on payment of legal fees therefor; it does not provide for the means of proof. It was also stated that the English cases relied on in the order of reference in *Queen Empress* v. *Arumugam*[1], did not define the limits within which a person interested could inspect a public document. It is not however clear whether the learned Judges while making those observations thought that even if there was an interest there should exist limitations on the right to inspect or the question was merely one in what circumstances could it be said that there was an interest. It is, however, clear from the judgment taken as a whole that the main reason for refusing the copies was that there was no provision in the Criminal Procedure Code to enable the Court to do so. It has to be seen whether that conclusion could be justified on principle or authority.

Section 164, Criminal Procedure Code, confers a power on Magistrates specified in sub-section (1) thereto to record any statement or confession made to them in the course of investigation by the Police before the commencement of the inquiry or trial. The statement may be made by an accused, or by one who may ultimately become an accused , or by a witness capable of giving useful information. The object of recording a statement under section 164, Criminal Procedure Code, are: (1) to use them as confession in case the person making them is ultimately charged with an offence, and (2) to deter a witness from changing his version later by succumbing to temptations, influences, or blandishments. A person suspected of an offence might like to confess in a penitent mood and if that opportunity is not taken advantage of, he might recant. Interests of justice require that such statements should be recorded in a manner which would be above cavil and not open to objection under sections 25 and 26 of the Evidence Act. Section 164, Criminal Procedure Code, provides the

1. (1897) 7 M.L.J. 167 : I.L.R. 20 Mad. 189 (F.B.). 2. (1907) 17 M.L.J. 471 : I.L.R. 30 Mad. 466.

machinery for the record of such confessions and statements. From their very nature such confessions or statements will necessarily have to be kept secret; they being taken in the course of investigation, a disclosure before the authorities decide to launch a prosecution might impede the even course of the investigation or even lead to undesirable results. It is undeniable that one of the prime duties of the State is to investigate into offences and bring the offenders to trial. In our country, the obligation is a statutory one, provided for in the Code of Criminal Procedure. Reason and convenience would dictate that nothing should impair the efficacy of the investigation into offences. But those considerations will of course not be relevant, if the law enables a person to obtain copies of such statements even before the commencement of the inquiry or trial. It is claimed that sections 74 and 76 of the Evidence Act provide the statutory basis for the right of a person, against whom an information is given and is pending investigation, to obtain copies of any public document connected with the investigation. Those sections being clear, if they were to apply to the instant case, the claim of the respondent cannot be rejected merely on the ground that to do so would be inconvenient to the prosecution.

The learned Advocate-General contested the right of the respondent to obtain a copy of a statement made and recorded under section 164, Criminal Procedure Code, on the ground that the record itself would not be a public document and that therefore section 76 which created the right to obtain certified copies in respect of public documents would not apply to that record. The argument was put thus :—A confession or statement made under section 164, Crminal Procedure Code, was in substance nothing more than a statement of the deponent, a private individual; the recording of the same under section 164 is done with the object of perpetuating the testimony, so as to pin down the parties making statements from going behind them. That circumstance cannot alter its character and make it as it were an act of the public officer. A public document on the other hand, is one that would form the acts or record of acts of a public officer in his capacity as such officer. Those would comprise only the sovereign or official acts and cannot cover the testimony, incriminatory or otherwise, of a person. A record of such confessions or statements cannot give what essentially is an individual's statement, the status of a public act.

Alternatively, it was contended that a public document would be one made for the purpose of being kept available to the public and deposition or statement not being one in which the public could be held to be interested, section 74 would not apply. Reliance was placed for the contention on the observations of Lord Blackburn in *Sturla v. Freccia*[1], where it was stated at page 643 as follows :—

> " I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the Bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done ; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards."

It will be convenient to deal with the alternative argument first. Under the English common law, a public document coming from a proper place or a certified copy of it was proof of every particular contained in it. There were several documents *e.g.*, Parish registers, Vestry books, Court rolls of Manor, log books maintained in the King's ships, those maintained by certain Corporations, etc., which were claimed to be public documents in order that the entries therein might be accepted as evidence without further proof. The rule which insisted access of the public as a test for the document being considered public was necessitated evidently by the reason that the possibility of access of the public enhanced its probative value. But this rule cannot apply to our country where the statute defines what a public document is. Under the Evidence Act the right of a person to have access to or inspection of the document is not made a condition to its being a public document, but such right would arise as a consequence of its being one. In *Sturla* v. *Freccia*[1], a question

1. L.R. (1880) 5 A.C. 623.

arose as to the admissibility of a statement containing the age and place of birth of an individual in a report of a Committee appointed by a foreign Government about his fitness to hold a post under it. The House of Lords rejected the evidence afforded by the report on the substantial ground that it was not (1) made under a duty to inquire into the circumstances recorded, (2) concerned with a public matter, (3) intended to be retained permanently and (4) meant for public inspection. It is clear from the passage in the speech of Lord Blackburn that a judicial act would be a public duty. It was also recognised in that case that a matter may be public without it being the concern of the entire community, *i.e.*, the public at large. Applying the rule in *Sturla* v. *Freccia*[1], it can be said that a statement recorded under section 164, Criminal Procedure Code, would be a public document as (1) the Magistrate recording it performs a duty imposed on him by statute, a public duty, (2) it is judicial act, (3) the record could not be considered as one intended for a temporary purpose. The last condition about the access of the public could also be held to be satisfied in that those who have an interest in the document would (subject to such statutory restriction as may exist), by virtue of section 76, be entitled to inspect. But as stated earlier, access of the public to the document is not a necessary condition for its being a public document within section 74 of the Evidence Act.

This leads us to the principal contention advanced by the learned Advocate-General. Under section 74, the record of the acts of a public officer acting judicially would be a public document. The record of a Court or Magistrate will undoubtedly come under that head. We are unable to agree with the learned Advocate-General that a deposition or a statement under section 164, Criminal Procedure Code, will not constitute the act of the officer, but merely that of the deponent. It may be that what occasioned the record was the statement of an individual; but as the statute imposes a duty on the public officer to record what is stated by the person making the statement, the record will be that of the officer just like any other report by that officer in the discharge of his official duties. It is now well accepted that the recording of a deposition by a judicial officer is a public act, and that the depositions of witnesses taken by the officer of the Court are public documents; vide *Hara Nund* v. *Ram Gopal*[2], and *Chandreshwar Prasad Narain Singh* v. *Bisheshwar Pratap Narain Singh*[3]. So too will be a statement or confession recorded under section 164, Criminal Procedure Code. That section imposes a duty (it may be his right as well) on the concerned Magistrate to record a confession or a statement, and it also prescribes the formalities therefor; a record of a statement after administering an oath would be a judicial act. This is the view of the Allahabad High Court in *Bashiruddin* v. *Emperor*[4]. It was there held that such statements were public documents, being acts of a judicial officer done under the provisions of the Code. The learned Advocate-General, however, contended that as it cannot be said that any authority was bound to investigate or prosecute, an investigation will not be a public duty so that any statement taken in the course of it could be said to be a public document. Reliance was placed on the decision in *Hartin* v. *London County Council*[5], to show that no duty could exist to prosecute for a criminal offence. The question in that case was whether the act of prosecution was a " public duty " within the meaning of the Public Authorities Protection Act, 1893, of England. The plaintiff in that case, the suit being one for damages for malicious prosecution, was earlier unsuccessfully prosecuted for stealing certain stamps. The defendants pleaded that the suit was barred on the ground that, in prosecuting the plaintiff, they were acting in execution of a public duty within section 1 (*a*) of the Act which stated :

" Any action. . . . . against any person for any act, done in pursuance, or execution. . . . of any Act of Parliament, or of any public duty or authority, in respect of any alleged neglect, "and so on " shall not lie unless it is commenced within six months next after the act . . . . ."

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1. L.R. (1880) 5 A.C. 623.
2. (1900) I.L.R. 27 Cal. 639 (P.C.).
3. (1926) I.L.R. 5 Pat. 777.
4. A.I.R 1932 All. 327.
5. 141 L.T. 120.

Avory, J., held that the public duty referred to in the section meant a duty which could be legally enforced, having regard particularly to the succeeding words relating to a neglect or default of the duty, and that the duty to prosecute for an offence was not a public duty within the statute. We cannot see how the principle of that decision can apply to the instant case. Under the Criminal Procedure Code the Police is charged with the duty of investigating offences : so also the Magistrate with a duty to record a confession or a statement by a person during the course of investigation.

The argument then was that even assuming there was a public duty in a Magistrate to record the statements under section 164, it is not every act in the performance of that duty that would become a public act, particularly when the Evidence Act itself showed that the Legislature made a distinction between the part of the act which is strictly the act of the officer and the other part which is only the statement of an individual. Reliance is placed in this connection on section 80 which raises a presumption that the document which purports to be a deposition or confession is genuine, duly taken and given under the circumstances recorded therein. It was contended that if the Legislature had intended that the entire record were to be treated as a public document, section 77 would have sufficed as it specifically provided that certified copies of public documents could be produced in proof of the contents thereof, or that section 80 would have been made to apply to the entire deposition. There is, however, a fallacy in the argument. Section 77 applies to certified copies of all types of public documents enumerated under section 74 : in the case of a record of a deposition or confession, a mere recital that they were taken in accordance with the rules may not always be sufficient, as but for section 80, they will have to be proved. Section 80 dispenses with the necessity of formal proof in the case of (1) deposition of a witness in a Judicial proceeding, (2) record of a statement or confession which has been taken in accordance with law : it raises a presumption that the document is genuine, that the circumstances mentioned in the document existed, and that the record was duly made. Sections 77 and 80 should, therefore, be held complementary to each other in a case where public document is a deposition given before judicial officer or where it is a statement or confession. The former section enables proof of the public document by the production of a certified copy while the latter raises a presumption as to the document itself. It will be meaningless to raise any presumption like the one under section 80 in regard to the portion relating to the deposition or confession. We fail to see how section 80 can be construed as implying that the actual deposition or confession would not be a public document.

Reference was then made to section 30 of the Evidence Act which enables a Court to take into consideration the confession of a co-accused. The argument was put like this. Suppose a person while giving a statement under section 164, Criminal Procedure Code, implicates himself and another, but ultimately the person making the confession is not charged while the other person alone is charged, the confession will not be admissible against the person charged, as the person who confessed is not a co-accused. If such a document is not even admissible, how could it be a public document the recitals of which could be proved by the production of a certified copy in respect of which a presumption could be raised under section 80 ? There again is a fallacy in the argument. The fact that a document is a public one does not necessarily mean that it is either relevant or admissible. That question has to be decided with reference to the other provisions of the Evidence Act. Conversely, the fact that a document is not admissible, cannot mean that it is not a public document, if otherwise it is one.

A Magistrate recording a statement or confession under section 164, Criminal Procedure Code, is performing a judicial act and the record would be a public document within the meaning of section 74 of the Indian Evidence Act. To entitle the respondent to a certified copy of such a document, he should show that he is interested in the document. In the present case, the investigation is still proceeding : no charge-sheet has been filed. It cannot be predicated with certainly that the

respondent will be ultimately charged. Can it be said for that reason that his interest is not a direct one but merely hypothetical? We are of opinion that it is not so. The respondent is kept in remand and that itself would be sufficient to show that he has a substantial interest in the statements or confessions which presumably have implicated him. If the question of the respondent's right to the grant of the copies has to be decided purely on sections 74 and 76 of the Evidence Act, there can be no doubt that he would be entitled to it.

But it can readily be conceded that the right granted by section 76 of the Evidence Act might be restricted or taken away by another statute. It has, therefore, to be seen whether there is any other statutory provision which takes away or qualifies the right granted under section 76 of the Evidence Act. The statute which deals with the statements or confession in question is the Code of Criminal Procedure. There is no express provision in that Code which prohibits the granting of copies of such statements. But it is not always necessary that a statute should necessarily be explicit in the matter. The language of the statute may be such that a prohibition can be implied. In "Statutory Construction" by Crawford (1940 Edition), it is stated at pages 266 and 267 :—

"The implications and intendments arising from the language of a statute, are as much a part of it as if they had been expressed. But it is only necessary implication which may thus be read into the statute. Mere desirability or plausibility alone will not meet the test. And while the implication does not need to shut out every other possible conclusion, or be one from which there is no escape, it must be one, which, under all the circumstances, is compelled by a reasonable view of the statute, and the contrary of which would be improbable and absurd. In order to meet the test, the implication must be so strong in its probability that the contrary thereof cannot be reasonably supposed. ...... In a broad sense, true implications are as much a part of the language which makes up the statute as the meanings of the various words are a part of it. Viewed from this standpoint, no exception is created to the general rule that the intent of the law-makers must be derived from the language used in the enactment. And the Court in ascertaining a necessary implication is simply determining and making effective the legislative will."

It has to be considered whether there is anything in the Code from which it can be implied that the right of inspection conferred on a person interested under section 76 of the Evidence Act is taken away in regard to the cases provided for by it. The Code of Criminal Procedure which enacts in the main the procedural or adjectival criminal law, also provides for the duties of the police in investigating the offences. Chapter XIV deals with information to the police and its power to investigate. The enactment being a code, must be deemed to be exhaustive in regard to any point specifically dealt with by it: Vide *Narendra Nath Sircar* v. *Kamal Basini Dasi*[1]. Therefore, where there is a specific provision in the code, the law must be ascertained by reference to its provisions alone: Vide *Rahim Sheikh* v. *Emperor*[2]. When a code which itself confers a power to investigate and take statements during such investigation provides, also for the grant of copies of statements made by persons during the course of investigation at a particular stage of the investigation, it is but reasonable to assume that it did not envisage any grant of copies at any earlier stage of the investigation. An examination of the provisions of Chapter XIV of the Code shows that there is a ban on the use of statements recorded under section 161 (3) except for the purpose of contradiction of the prosecution witnesses. No such limit for the use is placed in regard to statements under section 164, though such statements (except confessions) will not be substantive evidence. In both cases, their use can normally be only if and when the enquiry or trial begins. The statute fixes the stage at which the copies would be given to the accused. Section 173 (4), Criminal Procedure Code, provides that, after forwarding of a report by the police, the accused shall be furnished, before the commencement of the inquiry or trial, free of cost, a copy of the police report, the first information report and all other documents or relevant extracts thereof including statements and confessions, if any, recorded under sections 164 and 161 (3) of all the persons whom the prosecution proposes to examine as its witnesses. Whatever might have been the position before the amendment of the section in 1955, a right is now created in the accused in a criminal case

1. (1896) 6 M.L.J. 71 : L.R. 23 I.A. 18 : I.L.R. 23 Cal. 563 (P.C.).
2. (1923) I.L.R. 50 Cal. 872.

for obtaining copies of statements taken during the course of investigation at a particular stage or time. That would mean that there is a limitation placed on the right: it would also mean that the copies should not be granted earlier. If for instance a person is empowered to conduct an enquiry confidentially with instructions to disclose it to others at a particular stage, it does not need much argument to say that disclosure at any earlier stage is prohibited. Such a prohibition would be a necessary implication from the nature of the inquiry and the provision for the stage at which the disclosure is to be made. We have, therefore, to consider whether on a true interpretation of Chapter XIV of the Code there is implied prohibition for the grant of copies at a stage earlier than the filing of the charge of theft. The principle of interpretation of a statute as stated by Maxwell on Interpretation of Statutes (10th Edition) at page 191, is :—

"In determining either the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles, should, in all cases of doubtful significance, be presumed to be the true one."

The rule stated above applies to the ascertainment of the scope and operation of a statute and is not to be mixed up with what we have stated earlier in regard to the interpretation of a statutory provision which is clear in its terms. To put it more clearly, if the question is whether on the terms of section 76 of the Evidence Act the accused would be entitled to a copy, the Court could not enquire into the reasonableness of the request or of the hardship to the prosecution. But if the question is what was the object with which Chapter XIV of the Code was enacted and whether the grant of copies provided for under section 173 (4) was the only remedy and whether thereby there is an implied prohibition against the grant of copies earlier, the object of the enactment, etc., could be considered. In the latter class of cases the Court would be entitled to ascertain the intention of the Legislature in accord with reason and avoiding inconvenience : and the aim, object and scope of the enactment would be relevant. Maxwell on "Interpretation of Statutes", states at page 19 :—

"The literal construction then, has, in general but *prima facie* preference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope, and object of the whole Act ; to consider, according to Lord Coke : (1) what was the law before the Act was passed ; (2) what was the mischief or defect for which the law had not provided ; (3) what remedy Parliament has appointed; and (4) the reason of the remedy......"

At page 20 :—"The true meaning of any passage, it is said, is to be found not merely in the words of that passage, but in comparing it with other parts of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing from those circumstances which the Legislature had in view."

We have already referred to the fact that an investigation into an offence has necessarily to be kept confidential till the charge-sheet is filed. When therefore the Code provides for the grant of copies after the charge-sheet is filed, it must be taken as impliedly prohibiting the divulging of the recorded statements earlier.

There is yet another principle of statutory constructions which will lead to the same conclusion. A later or special enactment which conferred a new right would impliedly repeal an earlier one, if the co-existence of such right would produce inconvenience: (*Vide* Maxwell on Interpretation of Statutes at page 168). It is undoubted that the right given under section 76 of the Evidence Act cannot co-exist with the implied prohibition contained in section 173 (4) of the Criminal Procedure Code. The former should therefore be held not to apply to such statements till the charge-sheet is filed.

Section 76 of the Evidence Act which deals with the granting of copies of public documents being of general application should be held to be in the nature of a general law. The Code of Criminal Procedure could be said to be special law in regard to criminal investigation and trials. That a prior or general enactment can be rendered inoperative without being actually repealed, is laid down in *Williams*, In re[1].

1. L.R. (1887) 36 Ch. D. 573.

In that case, the actuary of a savings bank died insolvent; owing the bank, money received in his capacity of actuary. The question arose whether the bank would be entitled to priority for its claim against the estate. Under section 14 of the Savings Bank Act, 1863, the bank would be entitled to priority in respect of its claim. But under section 40 of the Bankruptcy Act, which was enacted later, there was no such priority. It was held that, although the prior Act was not in terms repealed the subsequent legislation had rendered the prior enactment inapplicable in a case where the estate of the debtor was administered in insolvency. At page 577 North, J., observed :

> "Now it is clear that the provisions of an earlier Act may be revoked or abrogated in particular cases by a subsequent Act, either from the express language used being addressed to that particular point, or *from implication or reference from the language used.*"

In *Jenkins* v. *Jones*[1], an Act of 1540 imposed penalty on the sale of "pretenced" title. A mere right of entry by a landlord having title would be a "pretenced" title. But the Real Property Act of 1845 permitted the sale of the rights of entry. A person obtained by sale from the owner a property of which he had no possession. What the purchase acquired was a mere right of entry. It was held that, although before the enactment of the Real Property Act of 1845 a mere right of entry would be "pretenced" title, the alienation of which was prohibited by the 1540 Act, the effect of the subsequent enactment, though it did not actually repeal the law, did restrict its application to cases other than those covered by the latter enactment.

Whether the precise effect of section 173 (4), Criminal Procedure Code, is to be viewed as an implied repeal of section 76 of the Evidence Act in regard to statements under section 164, Criminal Procedure Code, or merely as a restriction of the right declared by the latter in regard to the cases covered by the former, the principle is the same.

To sum up, section 76 of the Evidence Act entitles a person interested in a public document to inspect or obtain certified copy thereof. A statement or confession recorded under section 164, Criminal Procedure Code, being a public document, a person interested (the respondent) would be entitled to obtain a certified copy thereof if there is no other statutory prohibition. Chapter XIV of the Criminal Procedure Code authorises the recording of a confession or statement during the course of the investigation into an offence. Section 173 (4) of the Code which occurs in that Chapter provides for the supply of a free copy of the statements specified therein. Thus both section 76 of he Evidence Act and section 173 (4), affirmatively enact and confer a right to copies. But the object and intendment of Chapter XIV of the Code requires that section 173 (4) should be exhaustive of the right at the stage prior to the commencement of the enquiry. To hold otherwise would defeat the very purpose of Chapter XIV, namely, effective investigation into offences. Therefore, section 173 (4), Criminal Procedure Code, should be construed as impliedly prohibiting the grant of copies earlier than the time prescribed by it. That prohibition will become ineffective if an unlimited right under section 76 of the Indian Evidence Act is recognised. Therefore, the implied prohibition enacted by section 173 (4) would itself imply a repeal or an abrogation in part of the right under the former section. This is no new principle. When two statutes though expressed in affirmative language are contrary in matter, the later or special would abrogate the earlier or general.

In *Emperor* v. *Muthia Swamiyar*[2], the learned Judges, on a construction of the provisions of the Code, held that a person in remand could not get a copy of a statement made under section 164, as the Code did not enable him to obtain it. That conclusion was arrived at even when there was no provision in the Code like the present section 173 (4). The introduction of the amendment specifically providing for the grant of copies, should on the principle of the cases cited above be held as impliedly taking away the right of the person under section 76 of the Evidence Act

1. L.R. (1882) 9 Q.B.D. 128.
2. (1907) 17 M.L.J. 471 : I.L.R. 30 Mad. 466.

This would be in accord with the general scheme of Chapter XIV of the Criminal Procedure Code. It would, therefore, follow that the accused would have no right to obtain copies of the statement under section 164, Criminal Procedure Code, before a charge-sheet is filed, notwithstanding section 76 of the Indian Evidence Act.

Another line of reasoning will lead to the same conclusion. It is a well settled principle of construction that a judicial construction of a statute, which had been accepted for a long period of time, would *prima facie* be taken as expressing the true intention of the Legislature: In the "Statutory Construction" by Crawford, (1940) Edition, at page 407, it is stated :

> "Similarly, an acquiescence in a statute's construction as declared by the Court will also arise when the Legislature permits the old statute to stand without change, especially for any great length of time. This continued use of the same language on the part of the Legislature indicates that the Court's construction is in accord with its intent : otherwise it would have used new or different language. In fact, it is to be presumed that the Legislature spoke with a knowledge of the case-law upon the subject-matter of the statute. It may also be assumed that such construction met with Legislature favour."

In *Queen Empress* v. *Arumugam*[1], the copies of the reports were sought after charge-sheet was filed. In *Emperor* v. *Muthia Swamiyar*[2], this Court negatived the right of a person kept in remand to obtain copies of the statements under section 164, Criminal Procedure Code, before the charge-sheet was laid. The decision in the later case has been understood as laying down that a person under remand would not be entitled to copies of the statements before the commencement of the preliminary inquiry, but that, after such commencement, he would be entitled to copies of the same: Vide *Karuppaswami Moopanar* v. *Chottabhai Janerbhai and Co.*[3] The view taken in *Emperor* v. *Muthia Swamiyar*[2], was also adopted in *Ghulam Nabi* v. *Emperor*.[4] As a result of the judicial decisions, the result was that (1) the accused will not be entitled to copy of the police report, etc., made under sections 157, 168, 173, etc., (2) that the person suspected of an offence will not be entitled to copies of confessions or statements recorded under section 164 before charge-sheet is filed and (3) that after the inquiry has commenced the accused will have a right to obtain copies of statements recorded under section 164, Criminal Procedure Code.

In 1923, section 173, Criminal Procedure Code, was amended by introducing sub-clause (4) which entitled the accused to the copy of the report of the police officer under section 173 (1). The effect of introduction of that sub-clause was to get over the decision in *Queen Empress* v. *Arumugam*[1], which held that a report under section 173 not being a public document, certified copies of the same could not be given. The legislature thus remedied the mischief of the decision in *Queen Empress* v. *Arumugam*[1]. But it did not seek to alter or remedy the law as laid down in *Emperor* v. *Muthia Swamiyar*[2], though it must be taken that it was aware of that decision : this presumably for the reason that it was in accord with its own intention. This state of affairs continued to exist till 1955 when the Preliament by enacting Act XXVI of 1955 repealed section 173 (4) and enacted sections 173 (4) and 173 (5). A reading of the amended section would show that the Parliament accepted the principle of the decision in *Emperor* v. *Muthia Swamiyar*[2], and provided for the grant of copies only after the filing of the charge-sheet. It must follow that the decision in *Emperor* v. *Muthia Swamiyar*[2], correctly represents the intention of the Legisature, and should be accepted.

The learned counsel for the respondent relied on rule 339 of the Criminal Rules of Practice as entitling the respondent to the grant of the copies. That rule merely states that copies of records in criminal cases must be furnished to the parties concerned on payment of proper stamp charges. That would not entitle the parties to copies of those documents which under the law could not be granted till after a particular stage is reached.

1. (1897) 7 M.L.J. 167 : I.L.R. 20 Mad. 189 (F.B.).
2. (1907) 17 M.L.J. 471 : I.L.R. 30 Mad. 466.
3. (1944) 2 M.L.J. 307.
4. A.I.R. 1929 Lah. 429.

Our answer to the question therefore can be stated thus : (1) The Statements recorded under section 164, Criminal Procedure Code, would be public documents falling under section 74 (1) (iii) of the Indian Evidence Act ; (2) the accused will be entitled to copies of the same as a person interested ; (3) but his right to obtain such copies before the filing of the charge-sheet has been taken away by implication by the provisions of section 173 (4) of the Code of Criminal Procedure, and that he will be entitled to the copies of the documents only in accordance therewith.

Reference answered.

Anantanarayanan, J.—I have had the advantage of study of the judgment of my learned brother (Ramachandra Iyer, J.), and I entirely agree with him upon the answer propounded by him to the reference before us. If I am impelled to state the grounds for our view in words of my own, it is for a significant reason. We are here dealing with what appears to be the statutory right of a subject who, in jeopardy, desires to obtain copies of certain public documents which, in effect, are the records of information that is being accumulated against him upon a grave criminal charge. If, by the words " which any person has a right to inspect ", which occur in section 76 of the Indian Evidence Act, the Legislature intended to refer to persons having an interest in such documents springing from a possibility of being affected by them, in accordance with certain well-understood Common Law principles to which I shall make more explicit reference later, the instant case before us does indeed furnish a most indubitable example of such interest. And if the statutory right exists, it cannot be taken away, or even whittled down, upon any considerations of administrative expediency or interest. We cannot permit ourselves to import possibilities, or to strike a balance between interests, when the Legislature has not thought fit to do so. I can only echo the words of Trevelyan, J., in *Sheru Sha* v. *The Queen Empress*[1], cited with approval in *Queen Empress* v. *Arumugam*[2], to this effect :—

" I do not know of anything more disastrous to the administration of the Criminal Law than that the accused should be debarred from having access to information to which he has a right, and to which he is not absolutely debarred from having access, by some express provision of the Legislature".

Hence, if we are to hold that this right exists, but that by the necessary implications of the provision of section 173 (4) of the Code of Criminal Procedure, this right cannot be invoked prior to the filing of the charge-sheet by the accused who may be in custody. the judicial conscience must be thoroughly satisfied that no alternative interpretation is permissible. In brief, we have to hold that the right which an accused person in remand might invoke, prior to the filing of the charge-sheet, to obtain copies of statements affecting the case recorded under section 164 of the Code of Criminal Procedure, upon section 76 of the Indian Evidence Act, is not reconcilable with the intendment and implications of section 173 (4) of the Code of Criminal Procedure as now enacted. I think it is necessary to view the case for an opposite standpoint, in its most acute and forceful form, before we permit ourselves to reject it. We are undoubtedly dealing with an important right of the subject, and our responsibility is all the greater because our view is based upon an implied repeal or abrogation, not an expressed one.

I propose to make but this reference to the arguments of the learned Advocate-General to the effect that statements recorded under section 164 of the Code of Criminal Procedure are not 'public' documents at all within the definition of section 74 (1) (iii) of the Indian Evidence Act, and hence that the question adumbrated by me earlier does not arise. My learned brother has dealt with these arguments extensively, and has shown the grounds upon which we are unable to accept them. I find myself in entire agreement with him. Further, it is not as if this matter is *res integra* before us. There are authorities which are entitled to our great respect: *Hera Nund* v. *Ram Gopal*[3]; *Chundreshwar Prasad Narain* v. *Bisreshwar Pratap*[4], and *Bashiruddin* v. *Emperor*[5], which have held that depositions of witnesses

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1. (1893) I.L.R. 20 Cal. 642 at 645.
2. (1897) 7 M.L.J. 167 : I.L.R. 20 Mad. 189 at 196 (F.B.).
3. (1899) L.R. 27 I.A. 1 : I.L.R. 27 Cal. 639 (P.C.).
4. (1926) I.L.R. 5 Pat. 777.
5. A.I.R. 1932 All. 327.

and statements or confessions recorded under section 164 of the Code of Criminal Procedure are undoubtedly 'public' documents within the scope of section 74 (1) (iii) of the Indian Evidence Act. Above all, I think that this difficulty really arises from an attempt to import a concept of the nature of a 'public' act, as involving the exercise of some sovereign power or affecting the public or a section of it in a determinate manner, which is really foreign to the definition. Certainly that particular argument of the learned Advocate-General derives substance and support from certain English decisions. Not merely from the dicta of Lord Blackburn in *Sturla* v. *Freccia*[1], referred to and discussed by my learned brother, but also the words of approval of Farewell, J., in *Meerer* v. *Danee*[2], to the effect that

"The test of publicity as put by Lord Blackburn is that the public are interested in it......so that if there is anything wrong in it they would be entitled to protest......The whole gist of the rule......is that the publicity must be contemporaneous";

also see *Ioannou* v. *Demetriou*[3]. But these authorities must be understood against the background of a particular development of English Law, as pointed out by my learned brother. They have no relevance to this statutory definition, which is the basis of a right which springs from it, and of a mode of proof. The learned Advocate-General, as I understood him, sought to distinguish such records of the acts of a judicial officer as a statement taken under section 164 of the Code of Criminal Procedure or a deposition, on the ground that they are primarily not a record of the act of a judicial officer at all, but of what an individual said before that officer. But such a distinction would be logically unsustainable through the range of instances. It would be difficult to hold that the public is affected by a judgment *inter partes* upon a question of fact; for that reason, a judgment is certainly not the less a 'public' document under section 74. It would be equally difficult to hold that judicial functions are not being exercised in, for instance, the recording of a confession under section 164 of the Code of Criminal Procedure; on the contrary that may involve a nice judicial discretion.

I make no apologies, therefore, in passing to the heart of the problem, which appears to me to be this. If we were not confronted with section 173 (4) of the Code of Criminal Procedure at all, could we uphold *Emperor* v. *Muthia Swamiyar*[4], as rightly decided, however, greatly it might be entitled to our respect, both upon the principle of *stare decisis*, and otherwise? But, if dissenting from *Emperor* v. *Muthia Swamiyar*[4], we affirm the right of a person situated like the present accused, to obtain copies of statements under section 164 of the Code Criminal Procedure even during the stages of investigation, on ground of the undeniable urgency of his interest in them, and the terms of section 76 of the Indian Evidence Act, can that right be whittled down upon what seems to be the insecure foundation of an implied repeal? I think that this problem of interpretation does merit searching and anxious consideration on our part. But before proceeding into it, I wish to dwell a little both upon the Common Law principles of ascertaining "interest" and certain observations in *Emperor* v. *Muthia Swamiyar*[4], pertaining thereto.

In *Mutter* v. *The Eastern and Midlands Railway Company*[5], Lindley, L.J., said :—

"when the right to inspect and take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy, and what is reasonably necessary for the protection of such interest."

Commenting upon this and similar English authorities Shepherd, J., observed in *Queen Empress* v. *Arumugam*[6], that the Legislature appears to have intended, by the implications of section 76, to recognise the right to inspect for all persons "who can show that they have an interest for the protection of which it is necessary that liberty to inspect such documents should be given." It seems to me that this is the true rule, and that any other interpretation of section 76 would be clearly unsustain-

1. L.R. (1880) 5 A.C. 623.
2. L.R. (1904) 2 Ch. 534 at 541 and 544.
3. (1952) 1 All E.R. 179.
4. (1907) 17 M.L.J. 471 : I.L.R. 30 Mad. 466.
5. (1888) L.R. 38 Ch.D. 92 at 106.
6. (1897) 7 M.L.J. 167 : I.L.R. 20 Mad. 189 at 196 (F.B.).

able. As my learned brother has pointed out, the observation in *Emperor* v. *Muthia Swamiyar*[1], to the effect that "section 76 only provides the means of proof of public documents which any person has the right to inspect" is not justified, for the section clothes the person who has the right to inspect, with a right to obtain a certified copy upon payment of the due fees. I find myself equally unable to follow the reasoning of the decision, when it attempts to render significant the fact that, in order to determine who has a "right to inspect", we have to travel outside the ambit of the Evidence Act itself. The Legislature intended determinate persons to possess this right, and further must have been aware that the means of ascertaining them must be present. When the Statute omitted to state the criterion, we may assume that this was deliberate, and that the Common Law principle was held to suffice. The learned Judges who decided *Emperor* v. *Muthia Swamiyar*[1], appear to have felt that the limits of exercise of the power could not be gathered precisely from the English cases exemplifying the Common Law rule. This difficulty is not clear, since an 'interest' which is not a mere curiosity but which springs from the fact that the document affects the person concerned or his rights, is a most definite concept to apply to a given situation. The limits would appear to be self-evident.

Upon this question of 'interest', *The King against Tower*[2] is very illuminating. That was a case in which a feudal superior who had custody of manorial records, refused to grant the tenant the right to inspect, at a stage when no suit was pending, though the rights of the tenant were affected. The judgment proceeds as follows :—

> "The lord has the custody of the muniments which contain the evidence of the manorial rights. And shall he, who is a trustee and guardian of the evidence of the tenants' rights, look it up from them, and in a matter too where his own interest is in question ? I do not see upon what principle of justice that is to be done. Nor does the Court require, before it interposes by *mandamus,* that there must be a suit depending. It would be exremely hard if it did, for then the tenant would be obliged to commence an action blindfold."

This has significance in the instant case, for, at one stage of the arguments, we were exercised by the fact that while the accused here could justly plead an interest which was direct and urgent in obtaining copies of the statements, being in remand, the rule must be uniform and cannot depend on the question of arrest and remand. Ultimately, in either case, the person may never be an accused at the trial. But we are satisfied that 'interest' ought not to be narrowly construed. In brief, had the matter depended on section 76 alone, we can see no justification whatever for the deferring or abrogating the right to obtain copies of such statements with regard to the stage of investigation of a criminal case, as distinguished from the commencement of the enquiry or trial. I think that we must equally hold that *Emperor* v. *Muthia Swamiyar*[1] must be dissented from, if the Legislature had not intervened with the enactment of section 173 (4) of Code of Criminal Procedure in its present form.

But with regard to this of an implied repeal or abrogation by the subsequent statute, certainly we are on delicate ground, for the Courts do not favour this mode of inference. Upon one test or criterion, the passage already quoted by my learned brother from Crawford on "The Construction of Statutes" (1940) Edition, contains this significant qualification that the implication must be compelled by a reasonable view of the statute, "the contrary of which would be improbable and absurd". (page 266). The question is whether we could hold that here, or whether section 173 (4) of the Code of Criminal Procedure and section 76 of the Indian Evidence Act could co-exist without conflict as Sri Gopalaswami contends. Crawford states (page 630) :—

> "The Courts do not look with favour upon implied repeals, and the presumption is always against the intention of the Legislature to repeal legislation by implication. The absence of an express provision in a statute for the repeal of a prior law gives rise to this presumption. . . . . ."

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1. (1907) 17 M.L.J. 471 : I.L.R. 30 Mad. 466 and 467.
2. (1815) 4 Maule & Selvyn's Reports 162 : 105 E.R. 795.

Again, (page 631) :

"This presumption against the intent to repeal by implication rests upon the assumption that the legislature enacts laws with a complete knowledge of all existing laws pertaining to the same subject so that the failure to add a repealing clause indicates that the intent was not to repeal any existing legislation."

But bearing these dicta in mind and carefully considering the matter, I still think that there can be no doubt whatever that the Legislature did intend to abrogate, by implication, any rights flowing from section 76 of the Indian Evidence Act in so far as they relate to copies of statements, *etc.*, under section 164 of the Code of Criminal Procedure sought to be obtained by an accused, prior to the filing of a charge-sheet. This is not merely based upon the canon in *Heydon's case*[1], but follows from the entire complex of the circumstances, the prior state of the law, the self-sufficient character of the Code of Criminal Procedure, and the intendment of section 173 (4) itself. The situation confronting us here appears to be most aptly summarised by a passage in Maxwell on the "Interpretation of Statutes" (Tenth Edition), page 168 :—

"Again, if the co-existence of two sets of provisions would be destructive of the object for which the latter was passed, the earlier would be repealed by the later."

It could no doubt be urged that section 173 (4) of the Code of Criminal Procedure does not include words such as "notwithstanding anything contained in section 76 of the Indian Evidence Act." But that is obviously because section 76 refers to a far wider class of persons entitled to inspect and to obtain copies of public documents. It has no necessary limitation of reference to accused persons, or to criminal cases. The argument that section 173 (4) merely deals with the exceptional case of the obtaining of copies free of cost, as distinguished from the terms of section 76 of the Indian Evidence Act, does mean justice to its phrasing, scope and intendment. I have no doubt that this is an instance of legislative wisdom, a limitation imposed upon considerations of a balance of opposing interests and opposing principles. We must presume that the Legislature introduced this implied restriction as to the point of time at which the accused would obtain copies of such 'public' documents affecting him, well realising that here, as elsewhere, considerations of the liberty and rights of an individual, and of public interest and justice may conflict, and need a harmonisation based upon the broadest equities. I would answer the reference as proposed by my learned brother.

Somasundaram, J.—I entirely agree with the Judgments of Ramachandra Iyer, J., and Anantanarayanan, J.

This petition came on for hearing after the expression of opinion by the Full Bench.

The Public Prosecutor (*P. S. Kailasam*), for Petitioner.

G. Gopalaswami and *S. Sethuratnam*, for Respondent.

The Court made the following

ORDER.—The Full Bench has held that the copies of section 164, Criminal Procedure Code statements cannot be granted to the accused before the filing of the charge-sheet. The order of the lower Court is set aside and the petition is allowed.

P.R.N. *Petition allowed, Order set aside.*

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1. (1584) 3 Co-Rep. 7 (*a*) : 76 E.R. 637.

(FULL BENCH)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*; MR. JUSTICE SOMASUNDARAM AND MR. JUSTICE VEERASWAMI.

The Board of Revenue, Madras, Chief Controlling Revenue Authority .. *Referring Authority**

v.

Messrs. Simpson and Mc. Conechy, Ltd., Madras .. *Respondent.*

Madras Stamp (Amendment) Act (VI of 1922)—*Schedule I-A, Art.* 30 (*c*)—*Lease stipulating for premiums or advance in addition to rent—Duty chargeable.*

Where under a lease deed the parties stipulate for payment of rent and also for advance for discharge of an encumbrance on the property, even though such advance is to be liquidated by a part of the rent payable every month, the document will be chargeable to duty under section 30 (*c*) of Schedule I-A of the Stamp Act as amended in Madras. The provision would be attracted even in cases when the rent is paid in advance and there is no other additional sum advanced.

Reference under Stamp Act, Section 46, (1883) I.L.R. 7 Mad. 203, *Collector of Madras* v. *Runacres*, (1943) 2 M.L.J. 136 : I.L.R. (1944) Mad. 260 and *The Chief Controlling Revenue Authority* v. *Nanabhai Hormusji*, I.L.R. (1952) Bom. 507, referred to.

Case referred under section 57 of the Stamp Act by the Chief Controlling Revenue Authority, Madras, for the decision of the High Court on the following question :—

"Whether the document in question is chargeable with a stamp duty under Article 30 (c) of Schedule I-A of the Act?"

arising out of a Document presented before the Registrar of Assurances, Madras, dated 31st December, 1953 purporting to be a Deed of Lease between S.M. Abdul Jameel Sahib who was described as the Lessor and Messrs. Simpson and Mc. Conechy Ltd., Madras, the Respondent herein, as Lessee.

G. Ramanujam for the Government Pleader on behalf of the Referring Authority.

V. Tyagarajan for *M. V. Gopalaratnam* and *N. K. Pattabiraman*, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is a reference under section 57 of the Indian Stamp Act in respect of a document which was the subject-matter of an earlier reference to this Court (Referred Case No. 23 of 1957). The question then referred for decision was whether the document was to be classified as a lease or a mortgage with possession. This Court was of the opinion that the document was not a mortgage with possession, but a lease, and that it also contained a separate agreement for subrogation. The learned Government Pleader then tried to raise the question as to the proper duty leviable on the document on the footing that it was a lease. We refused to answer that question then because that was not the subject-matter of the reference. Now, the Board of Revenue, as the Chief Controlling Revenue Authority, have made a reference of the question as to what is the stamp duty chargeable for the document.

The point for determination is whether the document would fall within Article 30 (*c*) of Schedule I-A of the Act, that is, the Stamp Act as amended in Madras. That provision is as follows :

" Where the lease is granted for a fine or premium or for money advanced in addition to rent reserved."

The material recitals in the document, in our opinion, leave no room for doubt that the document, as a lease, falls within the scope of the above provision. We under-

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*Referred Case No. 2 of 1959. 25th October, 1960. (3rd Kartika, 1882—Saka).

stand the word 'for' to mean 'in consideration of.' In the preamble to the indenture, we have the following statement :—

"Whereas, with a view to discharge subsisting encumbrances on the property, the Lessor applied to the Lessee for an advance of Rs. 75,000 (rupees seventy-five thousand), agreeing to secure unto the Lessee the due repayment of the sum on the property hereunder described by rights of subrogation and also to grant a lease in favour of the lessee, and the latter consented to grant the advance, interest free, subject to terms and conditions hereunder set out."

The first clause in the operative portion of the document makes it abundantly clear that this advance is the consideration for the lease. The very words "in consideration of the sum of Rs. 75,000" are used. Clause 3 provides for the rent of a sum of Rs. 1,750 per month. Clause 4 empowers the lessee to withhold from and out of the monthly rent of Rs. 1,750 a sum of Rs. 750 per month and appropriate the same in liquidation of the sum of Rs. 75,000 advanced by him. The first covenant mentioned in clause 6 is the covenant to pay the monthly rent reserved, subject to deduction above referred to. There is therefore both money advanced and also rent reserved. It is impossible to contend that the document does not fall within the mischief of Article 30 (*c*) of Schedule I-A of the Act.

Cases have arisen, in which the lessee pays the rent for one month or for the entire period of the lease in advance, and there is no other additional sum advanced. Even then, this Court has held that the above provision would apply. In *Collector of Madras* v. *Runacres*[1], the facts were these. Under the terms of the lease of a house, the tenant agreed to pay a monthly rent of Rs. 250 in advance and to deposit with the landlord a month's rent, which was to be held as security for future payment of rent. It was held that the lease must be stamped under Article 30 (*c*) of Schedule I-A of the Madras Stamp (Amendment) Act (VI of 1922) (vide also, *Reference under Stamp Act*[2]. The early decision *Reference under Stamp Act Section* 46[3] was relied on by learned counsel for the party. There, by a document purporting to be a lease, certain land was leased for four years at a rent of Rs. 15 per annum. Out of the total rent, it was stipulated that Rs. 50 should be paid in advance and the balance of Rs. 10 at the end of the term. It was held that the payment of Rs. 50 in advance was not payment of a premium or fine within the meaning of Article 39 (*c*) of the Indian Stamp Act, 1879. It was also held in that case that a document purporting to be a rent agreement, in and by which the lessee agreed to pay Rs. 30 per annum as rent and deposited one year's rent with the lessor, which was to be credited to the rent of the last year of the term, did not fall within the said Article 39 (*c*), because the deposit of one year's rent was not a fine or premium. This decision can have no application to the instant case, because, in Article 39 (*c*) of the Stamp Act of 1879, the words " or for money advanced" were absent.

The decision of the Bombay High Court in *The Chief Controlling Revenue Authority* v. *Nanabhai Hormusji*[4], may be usefully referred to. There, in consideration of the lessee having paid to the lessor a sum of Rs. 33,000 for rent for three years at the rate of Rs. 11,000 per year, the lessor agreed to give the lessee a lease of certain salt pans for a period of three years. There was another similar agreement, providing for the grant of a lease for two years on payment of the rent for the two years in advance of Rs. 22,000. It was held that both the sums of Rs. 33,000 and Rs. 22,000 were moneys advanced by the lessee to the lessor. Chagla, C.J., observed thus :—

" If the lessee pays an amount in respect of the rent prior to the liability arising, that payment is nothing more than an advance made by the lessee to the lessor. He makes an advance, and the agreement is that the lessor will satisfy the lessee's liability out of that amount when that liability arises. But the legal character of that payment is not rent, but moneys advanced by the lessee to the lessor."

In that case, there was no rent reserved in addition. So it was held that the documents fell under Article 35 (*b*) of the Stamp Act, which ran as follows :

" Where the lease is granted for a fine or premium or for money advanced and where no rent is reserved."

1. (1943) 2 M.L.J. 136 : I.L.R. 1944 Mad. 260.
2. (1902) I.L.R. 26 Mad. 473.
3. (1883) I.L.R. 7 Mad. 203.
4. I.L.R. (1952) Bom. 507.

The decision in *Reference under Stamp Act, Section* 46,[1] was cited ; but the learned Judges distinguished it on the ground that it was not necessary there to consider whether the sum of Rs. 50 was rent or was money advanced.

We hold that the document is chargeable with stamp duty under Article 30 (*c*) of Schedule I-A of the Madras Stamp (Amendment) Act (VI of 1922). The reference is answered accordingly.

There will be no order as to costs.

R.M. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction).

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VEERASWAMI.

Globe Theatre Private Ltd., having its registered office at Bombay and its Branch Office at Madras .. *Appellant**

v.

The State of Madras represented by Deputy Secretary to Government, Home Department, Madras and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 13—*Exemption order under—Scope of.*

It cannot be said as a general rule that the power of exemption under section 13 of the Madras Buildings (Lease and Rent Control) Act, 1949, could be exercised only on grounds contained in the Act as valid grounds for eviction of tenants. Far from it if such grounds exist in any case resort must be had to the Tribunals established under the Act and if a party fails to get relief before such tribunals it may not be open to the Government to give relief by exemption under section 13 of the Act on the same grounds.

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Rajagopalan, dated 14th July, 1960 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 465 of 1960 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to the order in G.O. Ms. No. 351, dated 3rd February, 1960 made by the first respondent the State of Madras and quash the said order.

K. Rajah Iyer and *K. S. Ramamurthi*, for Appellant.

Respondent not represented.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal from the Judgment of Rajagopalan, J., in Writ Petition No. 465 of 1960 filed by the Appellant for the issue of a writ of *certiorari* to quash the order of the Government in G.O. Ms. No. 351, dated 3rd February, 1960. It is sufficient to state the following facts. The second respondent, who is the contesting respondent, obtained a lease of a site in Mount Road, Madras, and constructed a Cinema Theatre known as the New Globe Theatre. He leased the theatre to the appellant before us in 1941. Subsequently the Madras Buildings (Lease and Rent Control) Act came into force. In March, 1959, the second respondent applied to the Government to exempt the theatre from the provisions of the Rent Control Act of 1949. The appellant before us opposed the grant of exemption and made his representations. Eventually the Government passed the order above referred to and exempted the premises from the operation of section 7 of the Act, that is the section relating to eviction.

The validity of the impugned order was attacked on several grounds. The first and most substantial ground was that section 13 of the Act under which the Government purported to pass the order of exemption was itself *ultra vires* and, therefore, the Government had no jurisdiction to act under that section. Unfortunately for the appellant this question is concluded so far as this Court is concerned by a decision of a

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1. I.L.R. (1883) 7 Mad. 203.

* W.A. No. 107 of 1960. 18th August, 1960.
(27th Sravana, 1882—Saka).

Division Bench to which one of us was a party in *Globe Theatres Ltd.* v. *State of Madras*[1]. Following the decision Rajagopalan, J., held that section 13 of the Act was valid. We shall now briefly mention the other ground which also did not find acceptance with Rajagopalan, J., who dismissed the petition. It is contended that the Government in passing the order in question were really adding another ground for eviction to the grounds set out in section 7 of the Act. That they could not do, because of the principle laid down in a decision of this Court in *Abdul Subhan Sahib & Sons* v. *State of Madras*[2]. We confess that there are here and there certain observations in this case which might appear to support this argument. But when examined carefully it will be evident that it was not the intention of the Division Bench to lay down a general proposition that the exemption could be granted only on grounds contained in the Act as valid grounds for eviction. Indeed the contrary was laid down in the leading decision in *The Globe Theatres* v. *State of Madras*[1], namely, that if a ground is actually covered by any provision of the Act, then resort must be had to the Tribunals established under the Act, and if a party has failed in his attempts to get relief from such Tribunals it would not be open to the Government to give him relief on the same ground. In a later decision, the same Division Bench which decided *Abdul Subhan Sahib & Sons* v. *State of Madras*[2], explained the decision in *Chinniah Servai* v. *State of Madras*[3]. We agree on this point with Rajagopalan J's. summary which he quotes from an earlier decision of his :

> " It should therefore be taken as well settled now that the grant of exemption is not vitiated merely because it may result in eviction on grounds other than those specified in section 7 of the Act. It should be obvious that, if the desired eviction could be secured under the terms of the Act itself, there should be no occasion at all to grant any exemption from the operation of the Act. The exemption is not a substitute for a relief permissible under the Act itself."

We may point out in this connection that it would be wrong to say that by reason of the exemption the Government are adding a new ground for eviction. Actually what happens on an exemption is that the ordinary law of the land applies, namely, the Transfer of Property Act, and the parties are governed by the provisions of that Act. There is no substance in this ground.

Nor do we find any merits in the contention that the Government had not made a proper enquiry in respect of the representations made by the appellant and by the respondent and that the appellant had not been given an opportunity to offer evidence which he wished to adduce before the Government. There is nothing in section 13 of the Act which makes it incumbent on the Government to conduct any particular enquiry. Indeed it is very doubtful if the order of Government under section 13 can be said to be a Judicial order at all. Actually in this case the Government did call for reports from the Accommodation Controller and they expressly state in the course of the order that they have carefully examined the request of the respondent in consultation with the Accommodation Controller, Madras. They also say that they have fully gone through the objection statement of the appellant. Then it was said that there was nothing to show that the Government had applied its mind to the relevant circumstances which should have guided them in deciding whether or not to grant an exemption. But here again learned counsel for the appellant is reading far more into the section than can be discovered there. It cannot be said that the Government had travelled outside the record. At the outset they say that the request of the owner of the premises is genuine. It is not open to this Court to say that they erred in so holding. Then they discuss the point whether it will be reasonable to grant an exemption. It is not for this Court again to say whether the Government erred in holding that the exemption would not be unreasonable. The order is not in any sense an arbitrary order. It is a speaking order. But it is not open to this Court to examine the correctness of the reasons on which it is based.

Finally we should refer to two contentions raised by Mr. Rajah Ayyar, learned counsel for the appellant, which we are not able fully to appreciate. One is that

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1. (1954) 2 M.L.J. 110.
2. (1959) 2 M.L.J. 387 : I.L.R. 1959 Mad. 1014.
3. (1959) 2 M.L.J. 191.

the ground on which exemption can be granted by the Government under section 13 should be a ground relating to the building as such and not relating to the owner of the building. It is difficult for us to conceive of a case where the ground can have relation to the building without having relation to the owner of the building because it is the owner who seeks the exemption. The building itself does not. The Act itself is full of provisions including grounds on which eviction can be obtained, which are personal either to the landlord or to the tenant, as for example, a *bona fide* requirement for occupation, sub-letting , wilful default in payment of rent, etc. Mr. Rajah Ayyar was unable to give even a single instance to illustrate the principle which he was advancing before us. Another argument which we have not been able to follow is that the respondent was estopped from making an application for exemption because he had made an application under section 4 of the Act for fixation of fair rent and had succeeded in obtaining an enhanced rate of rent. We need not spend more time in meeting this point than to say that because he resorted to section 4 of the Act, it does not mean that he cannot take advantage of another provision of the Act, namely, section 13. It must not also be overlooked that the exemption is only from the provisions of section 7 of the Act. The respondent is well within his rights to resort to section 4 and at the same time seek exemption from section 7. None of the necessary ingredients to found a plea of estoppel is to be found in this case. We agree with the reasoning and conclusion of the learned Judge, Rajagopalan, J., and dismiss the appeal.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE VEERASWAMI.

Seethalakshmi Ammal .. *Appellant**

v.

G. Krishnaswami Rao and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), section 12—Charge created on private lands in an estate for unpaid purchase money—Effect on, after notification under the Act.

Under section 12 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, the landholder is entitled to a ryotwari patta in respect of his private lands. Hence a charge created for unpaid purchase price will enure over such lands and the charge holder cannot be deprived of his security over the lands even though they have ceased to be private lands but continue to be the property of the land-holder. The ownership of the private lands continue with the erstwhile zamindar with a change in the nature of the tenure. Hence the charge would continue to subsist in respect of the private lands for which under section 12 of the Act a ryotwari patta is issued to the land-holder.

Appeal against the Decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 91 of 1956 preferred against the Decree of the Court of the District Munsif of Koilpatti in Original Suit No. 190 of 1955.

R. Rangachari, for Appellant.

V. Vedantachari and *T. Rangaswami Ayyangar*, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—The only question which arises in this appeal relates to the effect of the Madras Estates (Abolition and Conversion into Ryotwari) Act on a charge created on an estate for unpaid purchase price under a sale deed relating to the estate. The sale was for a sum of Rs. 14,000 out of which a sum of Rs. 10,400 remained to be paid. On 4th November, 1917, a deed of charge or hypothecation was executd by the purhasers in favour of the vendors over lands comprised in schedules 1 and 2. The estate was notified under the Abolition Act and subsequently the landholder-purchaser obtained ryotwari pattas under section 12 of the Act for the suit lands which fell within the category of private or homefarm lands of the landholder.

* S.A. No. 702 of 1957. 25th August, 1960
(3rd Bhadra, 1882—Saka)

In the suit out of which this appeal arises the representative of the vendors sought to enforce the charge *inter alia* against these lands. The claim was resisted mainly on the ground that the charge had somehow disappeared with the notification under the Act even in respect of the pannai lands because they had ceased to be private lands and ryotwari pattas had been issued in respect of them. This contention found favour with the learned District Munsif but on appeal the learned Subordinate Judge repelled it and granted a decree for the plaintiff. The above second appeal has been filed in which this contention is once more pressed upon us. Pending the appeal an application for stay of the passing of the final decree came up before Ramaswami, J. He dismissed it. Even at that stage he dealt rather elaborately with the main contention in the second appeal itself and he held that by virtue of the notification the Government had in no way put an end to, modified or altered the mutual rights between parties in regard to pannai lands over which the charge had been created. He held that the patta lands should be deemed to be substituted security for the pannai lands. The second appeal came up for final disposal before the same learned Judge but he considered that the appeal should be disposed of by a Division Bench as it raised a question of importance.

We do not find any difficulty in deciding the case. Admittedly, there was a charge on the pannai or private lands of the landholder for the unpaid purchase price. The argument of Mr. Rangachari, learned counsel for the appellant is that the Abolition Act is a piece of expropriatory legislation and the effect of the notification is to completely destroy the rights *inter se* between the chargeholder and the persons who created the charge. This of course is not quite right, because there is a provision entitling a mortgagee of an estate to obtain relief by the payment of the amount due to him from and out of the compensation deposited by Government. This is an indication that it was not the intention of the Act to completely abrogate the rights of mortgagees or chargeholders. Indeed Mr. Rangachari concedes that the chargeholder in this case also will be entitled to obtain relief so far as the amount of compensation is concerned. But his argument, if we understood him right, is that the pannai lands as such have ceased to exist, and though in respect of the same lands ryotwari pattas have been issued to the landholder, they cannot be deemed to be subject to the charge created in this case. We cannot accept this contention. Under section 12 of the Act in the case of a Zamindari estate, the landholder *shall* be entitled to a ryotwari patta in respect, among other lands, of what can be established to be private lands within the meaning of section 3, clause (10) (*a*) of the Estates Land Act. If in this case ryotwari patta has been issued, it is only because they have been established to be private lands. If instead of issuing ryotwari patta the Government had taken the interest in these private lands and awarded compensation for them, surely it cannot be contended that the charge-holder will not be entitled to have the amount of compensation. If that be so, we fail to see why the charge-holder should be deprived of his security over the same lands which though they have ceased to be private lands continue to be the property of the landholder. Only before the notification these lands were subject to the payment of peshkush along with other lands in the estate, but after issue of pattas they would be subject to the ryotwari assessment. This Court took this view in an early case, *vide* C.M.Ps. Nos. 8017 of 1950, *etc.*, and 1032 of 1951. We pointed out that the ownership of private lands must be deemed to continue with the Zamindar and there has only been a change of the nature of the burden on such lands. If follows that the charge would continue to subsist in respect of the private lands for which under section 12 a ryotwari patta has been issued to the landholder. The second appeal is therefore dismissed with costs.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Parasatti Ammal .. *Petitioner**

v.

Kuppuswami Iyengar, Proprietor of Sivaji Touring Talkies and another .. *Respondents.*

Madras Cinemas Regulation Act (IX of 1955) and Rules framed thereunder—Rule 101 (1)—*Space all round—Scope of requirement.*

Considering the scheme of rule 101 (1) of the Rules framed under the Madras Cinemas Regulation Act, 1955 and also the object underlying that rule, the requirement of the rule would be satisfied if factually the land around the cinema-shed was vacant, so that if necessity arose people could escape into that vacant land from the shed without any real obstruction. The requirement of vacant space of twenty yards all round a cinema is a measure of safety in times of emergency like fire. The rule itself contemplates that the vacant land may belong to the licensee or to others and there is nothing in the rule which implies that the public should be able to use the land around as of right.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the second respondent herein dated 16th January, 1960, granting to the first Respondent herein a 'C-' Licence and to quash the said order dated 16th January, 1960 and to direct the second respondent herein to issue any Licence after strictly complying with Rule 101 of the Madras Cinematograph Rules.

R. Sundaralingam, P. S. Sarangapani Ayyangar and *Kumari Maithrayi Ramadurai*, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*) and *K. Parasaran*, for Respondents

The Court made the following

ORDER.—The first respondent obtained a lease of S. No. 324/4 in Kummangalam village, and he applied to the Collector of Chingleput for the issue of a "No-objection Certificate" to locate a touring cinema in that plot. That was granted on 21st October, 1959. He followed it up by applying for a C-Licence for the cinema located in that site. The C-Licence was granted on 16th January, 1960, overruling the objections of the petitioner. The petitioner's lands adjoined S.No. 324/4 on three sides. It is enough to note that one of those fields was S. No. 324/1, which belonged to the petitioner and which lay to the west of S. No. 324/4.

The petitioner applied under Article 226 of the Constitution for the issue of a writ of *certiorari* to set aside the order of the Collector dated 16th January, 1960, under which a C-Licence was granted to the first respondent.

The contention of the petitioner was that the grant of the C-Licence to the first respondent for the touring cinema in S. No. 324/4 contravened the provisions of rule 101 (1) of the Rules framed under Madras Act IX of 1955. Rule 101 (1) runs :

"The building shall be provided on all its sides with an open space, which in no part thereof shall be less than 20 yards in width.

"*Note* :—The open space of 20 yards may comprise not only of the land of the licensee within the fence, but also the open space outside the fence, if any, whether it belongs to the licensee or not, provided that it is open for the public to use the land without obstruction."

The factual position has been set out in the counter-affidavit filed on behalf of the Government. There, it was pointed out that, at the south-western corner, the shed that the first respondent constructed to house the cinema was only 37 feet from S. No. 324/1. At the time of the grant of the "No-objection Certifi-

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*W.P. No. 50 of 1960. 14th July, 1960. (23rd day of Asadha, 1882, Saka).

cate," S. No. 324/1 was vacant land. Subsequent to the grant of the "No-objection Certificate" and, apparently, at some point of time before the C-Licence was granted, the petitioner planted some casuarina seedlings, encroaching 20 feet into S. No. 324/4 with the result that, at the south-eastern corner, there was only 17 feet of clear ground between the cinema shed and the casuarina posts and casuarina seedlings which the petitioner had planted, partly in S. No. 324/1, and partly in S. No. 324/4.

It is with reference to these facts that I have got to decide whether the grant of C-Licence contravened the requirements of rule 101 (1). Learned counsel for the petitioner contended that it was clear that, on the date when the C-Licence was granted, even ignoring the encroachment made by the petitioner in S. No. 324/4 there was only 37 feet of vacant land available in S. No. 324/4. The further submission of the learned counsel for the petitioner was that S. No. 324/1 belonged to the petitioner, which the public had no right to use, and that the petitioner had all along been objecting to any use of her land by the public. The acceptance of the contention of the learned counsel for the petitioner requires some words being read into the *Note* appended to rule 101 (1). Learned counsel requires me to read it " Provided that it is open for the public to use *as of right* the land without obstruction." Considering the scheme of rule 101 (1) and also the object underlying that rule, I see no justification for reading those extra words into the statutory rule. The requirement of vacant space of 20 yards all around a cinema is a measure of safety in times of emergency like fire. The rule itself contemplates that the vacant land may belong to the licensee or to others. In a time of emergency like that, no question of right to use either the land of the licensee or the adjacent land belonging to others was apparently contemplated or provided for in the rules. The requirement of the rule would be satisfied if actually the land around the shed was vacant, so that, if necessity arose, people could escape into that vacant land from the shed without any real obstruction. If, for instance, there had been a building within 60 feet of a shed, obviously, that would prove an obstruction which would prevent the public or any member of the public from using the land, quite independent of any question of a right to use that. It is under these circumstances I am unable to read into the note the further words " as of right ", qualifying the words " used by the public."

As far as this case is concerned, the position was that, on the date when "No objection Certificate" was granted, there was vacant land all around S. No. 324/4 exceeding 20 yards, though part of it lay also in S. No. 324/1, which did not belong to the licensee. Even at the time of the grant of the C-Licence, what the petitioner did, did not make it any the less effectively available for use as vacant land without any obstruction. The Collector was therefore justified in coming to the conclusion that the requirements of rule 101 (1) were not violated by the conditions prevailing at the time when even the C-Licence was granted.

Besides, it should be remembered that it is substantial compliance of the rules that is necessary.

The rule *nisi* is discharged, and the petition is dismissed.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Shri Venkatakrishna High School, Kaniyur, represented by its present Manager and correspondent Sri K. V. Ganapathi Subramania Iyer .. *Appellant**

v.

Rangaswami Ayyar and another .. *Respondents.*

Madras Indebted Agriculturists (Repayment of Debts) Act (I of 1955), section 2, Explanation II (b)—'Debt' due'—Meaning of.

Having regard to the object of the Madras Indebted Agriculturists (Repayment of Debts) Act, 1955 and the context in which the expression 'due' occurs in the definition of the term 'debt' in section 2 (*b*) of the Act, the expression 'debt' would cover all debts due by an agriculturist, subject to the statutory exceptions, whether they were immediately enforceable or not by the creditors. 'Debt due' in its wider signification includes debts payable immediately or in future.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore, in O.S. No. 157 of 1955.

A. Subramania Ayyar and *S. Jayaraman*, for Appellant.

V. S. Ramakrishnan (*amicus curiae*), for Respondents.

The Court delivered the following

JUDGMENT.—This appeal involves a point of some interest, relating to the interpretation of the expression 'due' as occurring in the definition of 'debt' in *Explanation* II (*b*) to section 2 of Madras Act I of 1955.

The facts necessary for an appreciation of the question are very simple. The plaintiff in the Court below is a High School represented by its Manager and correspondent, and is also the appellant here. There was a deed of mortgage executed by the two defendants in favour of the plaintiff for a principal of Rs. 10,000 on 14th November, 1945. The defendants contended that they were agriculturists entitled to the benefits of Madras Act IV of 1938 as well as of Madras Act I of 1955. Admittedly, the present action was instituted by the plaintiff-appellant during the period when suits of this kind were barred under section 3 of Madras Act I of 1955, which was an enactment intended to give benefits to indebted agriculturists. Under sub-section (2) of section 3 of the Act, if such a suit is filed, the Court shall in decreeing the suit direct the plaintiff to bear his own costs, and pay the costs of the defendant who is an agriculturist.

In accordance with this provision of law, the Court below, in granting the preliminary decree, directed that the plaintiffs should be disallowed their costs and should further pay the costs of the defendants under sub-section (2) of section 3 of Madras Act I of 1955. The short point raised in the appeal is that the debt in this case does not fall within the *Explanation* already referred to by me, because, though it existed as a debt between the parties, it was not enforceable by the creditor on 1st October, 1953, under the terms of the contract. In order to appreciate this point, it is necessary to refer to the definition itself, which is in the following terms :

"'Debt' means any liability in cash or kind, whether secured or unsecured, due from an agriculturist on the 1st October, 1953, whether payable under a contract or decree or order of a Court, Civil or Revenue or otherwise."

In the present case it is not disputed that (i) the mortgage deed was executed on 14th November, 1949; (ii) that, under the terms of the contract, the principal amount was payable only after a period of 5 years from that date and (iii) that, actually, there was no interest due upon the mortgage upon the date, 1st October, 1953, since interest for that year would accrue only on 14th November, 1953.

*Appeal No. 98 of 1957.

24th August, 1960.
(2nd Bhadra, 1882, Saka).

Hence, the argument is that this is not a debt ' due ' within the ambit of the definition, and that in consequence, section 3 (2) under which costs were awarded in this case would not be operative, as between the parties.

It would at once be obvious that the entire argument depends upon the construction of the word ' due ' as occurring in the definition. The argument of the learned counsel for the plaintiff-appellant is that this means not merely that a debt subsists between the parties, and that there is a jural relationship of creditor and debtor, but also that the debt is enforceable as such by the creditor. In other words, unless the debt was enforceable on 1st October, 1953, by the creditor, or was payable by the debtor on that date, which is the same thing, the definition would not apply. The question is, how far such an argument finds support in the authorities available upon this problem of interpretation.

In *Stroud's Judicial Dictionary*, 3rd edition, the word ' due ' is defined under two primary meanings. Firstly, a debt is ' due ' when it is payable or immediately payable. Secondly, a debt is due even when it is payable *in futuro*, and when it is owing and subsisting. Before I refer to the cases on the subject, I may also refer to a discussion upon this aspect in *The United States* v. *The State Bank of North Carolina*,[1] Mr. Justice Story said as follows in delivering the opinion of the Court :

"The whole difficulty arises from the different senses in which the term ' due ' is used. It is sometimes used to express the mere state of indebtment, and then is an equivalent to owed, or owing. And it is sometimes used to express the fact that the debt has become payable."

An examination of the cases reveals that both these meanings are normally attached to the expression, and that the wider signification ought not to be excluded, unless the language used expressly warrants such a restriction in the scope of the meaning. Thus, for instance, James, V. C., stated in *European Life Assurance Society*, In re[2], that a debt was 'due' when it was payable. Again, in *Stockton Iron Co.*, In re,[3] where certain articles gave a company a lien upon the shareholders' shares for moneys due from the shareholder, the word was interpreted as meaning ' presently payable ' in the context of the particular facts. But as Gibson, J., stated in *Irish Land Commission* v. *Massereene*[4], 'due' means not merely immediately payable, but payable *in futuro*. In *ex parte Gawley*[5], a debt was held ' due ' notwithstanding that the Statute of Limitations might have barred the remedy, for that does not extinguish the debt, as distinguished from the remedy.

Having these authorities in mind, as well as the entire scheme of this Act, particularly as revealed by the language of *Explanations* I and II to section 2 (*b*), I have no doubt that the Act intended to give relief to agriculturists-debtors who were in a state of indebtedness, whether the debts, which they owed, were immediately enforceable by their creditors, or otherwise.

The decision cited by learned counsel for the appellant, *Ramanathan Chettiar* v. *P. S. L. Ramanathan Chettiar*[6], relates to the interpretation of the words 'payable on such commencement' in section 19 (2), with reference to a deposit. That has no relevance to the present question of interpretation. Hence, after a careful consideration of the context in which the expression ' due ' occurs, the entire scheme and intendment of the relevant provisions, and the authorities available upon the interpretation of the expression 'due' as occurring in statutory law, I have no doubt whatever that the lower Court was justified in applying section 3, sub-section (2) to the present facts and in awarding costs accordingly.

The appeal is therefore dismissed. The respondents are unrepresented, and hence the parties will bear their own costs. Before parting with the appeal, I desire to acknowledge my indebtedness to Sri V. S. Ramakrishnan, who has acted as *amicus curiae* for the absent respondents, at the instance of Court.

R.M. ——— *Appeal dismissed.*

1. (1832) 30-33 U.S. Sup. Court Report 28 at 36.
2. (1869) L.R. 9 Eq. 122.
3. L.R. (1875) 2 Ch.D. 101.
4. (1904) 2 Ir. R. 513.
5. 34 S.J. 29.
6. (1960) 1 M.L.J. 1 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

K. M. S. Lakshmana Aiyar .. *Petitioner**

v.

The Additional Income-tax Officer, Special Circle, Madras .. *Respondent.*

Income-tax Act (XI of 1922), *sections* 2 (6-A) (*e*) *and* 12 (1-B)—*Object and scope of—Controlled company—Loans to shareholders to the extent of accumulated profits—Deemed to be 'dividends' and liable to tax as on income—Legislation competent under Entry* 82 *of List I, Schedule VII of Constitution—Legislation to prevent evasion of tax—Entry* 97 *of List I, Schedule VII and Article* 248 *of the Constitution—Legislation competent as under the residuary powers—Article* 14 *of the Constitution—No violation.*

The effect of sections 2 (6-A) (*e*) and 12 (1-B) of the Income-tax Act is to create a fiction and to treat the loans received by a shareholder in a controlled company to the extent of the undistributed profits as 'dividends' though factually no such dividends were received.

The purport of sections 2 (6-A) (*e*) and 12 (1-B) of the Income-tax Act is to tax income and the impugned legislation would come within Entry 82 of List I, Schedule VII of the Constitution—Taxes on income other than agricultural income.

The word 'income' in Entry 82 should be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to comprehend in it and the legislative measure to prevent evasion of tax on income would be within the scope of the legislative powers to tax income.

If the essence of the transaction were to be looked into it will be seen that the tax sought to be levied is only on the occasion of the loan the loan being only the semblance for the payment of profits. Where a shareholder in a controlled company possessing accumulated profits takes money with no idea of repayments it would be open to the legislature to tax such drawings as income as by so doing it legislates having regard to the reality of the transaction.

The Union Legislature would have authority to enact the impugned legislation under Article 248 and Entry No. 97 in List I of Schedule VII of the Constitution which confers residuary powers of legislation on matters not enumerated in Lists I and III of Schedule VII.

The classification attempted is between controlled companies whose main business is not money-lending and other companies and the classification is a real one and the provisions of the impugned legislation undoubtedly treat alike all those shareholders of a company who borrow from it when there are accumulated profits. The impugned provisions do not violate Article 14 of the Constitution.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in G.I. No. 7-L/55-56, dated 28th February, 1957, on the file of the Additional Income-tax Officer, Special Circle, Madras, and quash the order therein.

V. Tyagarajan and *T. V. Balakrishnan*, for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) for *C. S. Rama Rao Sahib*, Special Counsel, for Respondent.

The Order of the Court was made by

Ramachandra Iyer, J.—This is a petition under Article 226 of the Constitution praying for the issue of a writ of *certiorari* to call for records in G.I. No. 7-L/55-56, dated 28th February, 1957, and to quash the order of the Additional Income-tax Officer, Special Circle, Madras, assessing the petitioner to tax under section 34 of the Indian Income-tax Act.

The petitioner, an assessee, was assessed to an income of Rs. 3,362 for the year 1955-56 (the corresponding year of account being 13th April, 1954 to 12th April, 1955) on the basis of his return, no tax was levied thereon, as it was below the taxable limit. Some time thereafter, the Additional Income-tax Officer, Special Circle, Madras, obtained information which revealed that the assessee had failed to disclose fully and truly his real income for the year. The Officer initiated pro-

*W.P. No. 457 of 1957. 19th July, 1960. (28th day of Asadha, 1882, Saka).

ceedings under section 34 of the Act, and after enquiry, found that, during the year of account, the assessee should be held as deemed to have received by way of dividend a sum of Rs 1,01,695. On that finding, the petitioner was assessed to tax on his total income of Rs 1,05,057, the tax levied thereon being Rs. 31,830-8-0. The petitioner has filed before the Appellate Assistant Commissioner, an appeal against the order of assessment under section 30 of the Act. He has also applied under Article 226 of the Constitution for quashing the same on the ground that the provisions of the Indian Income-tax Act, namely, sections 2(6-A) (*e*) and 12 (1-B), under which he was deemed to have received the dividends, were *ultra vires* of the Union Legislature.

The facts necessary to appreciate the question raised are these. The assessee is a shareholder, owning one share of Rs. 1,000 in a private limited company, K.M.S. Lakshmana Iyer & Sons, Ltd. The company has its registered office at Madurai, and carries on buiness as dealers in yarn, it being one of the distributors of the yarn produced by Madura Mills, Ltd. The year of account adopted by the company is the year ending with 15th of September, each year. The paid up capital of the company is Rs. 5,00,000 divided into 500 shares of Rs. 1,000 each. During the relevant period, the other shareholders in the company were the four sons of the petitioner, the first three holding 125 shares each and the fourth 124 shares. On 31st August, 1955, the assessee transferred even the one share held by him in favour of his fourth son. There is no dispute that the company is a "controlled company" coming within section 23-A of the Income-tax Act, and that, during the relevant period, the petitioner was a shareholder therein.

The Company earned considerable profits. a sum of Rs. 25,000 out of the undistributed profits was set apart on 16th September, 1953, as a reserve. In the following year that is, on 16th September, 1954, there was a similar reserve of Rs. 75,000. Those amounts, which could have been distributed to the shareholders as dividends, were not so distributed. But the petitioner was drawing monies from the company as loans. During the year of account, a sum of Rs. 70,429-9-11 was granted to him as a loan. On 27th April, 1955, the liability of the petitioner to the company for amounts granted to him by way of loans was Rs. 87,596-0-8. On the latter date, the company by a resolution made in that behalf, wrote off the entire amount due by the petitioner as irrecoverable. To offset the loss resulting from the writing off of the petitioner's liability, the company transferred the reserve fund of one lakh of rupees (representing the undistributed profits) to its profits and loss account. In effect, the undistributed profits wiped off the liability of the petitioner in respect of his drawings.

The Income-tax Officer held that the loans advanced by the company to the assessee would be dividends, as defined in section 2 (6-A) (*e*) of the Act, and would be assessable to tax under section 12 (1-B), being loans to shareholders prior to 1st April, 1955. The amount of loan was, therefore, held liable to be included in the assessment for the following year.

The correctness or otherwise of the assessment would ordinarily be a matter to be agitated in the appeal. On the facts stated above, there is no doubt that, while there were accumulated profits in the company, advances or loans were made by it to the petitioner during the year of account. It is, however, unnecessary to decide at this stage the precise amount of profits available or the extent of the advances made. Section 12 (1-B) read with section 2 (6-A) (*e*) of the Act, which brings to charge such advances up to the limit of undistributed profits of the company, would apply. Arguments in this petition were restricted to the Constitutional validity of these provisions, it being agreed that the question relating to the propriety of the assessment should be left to be agitated in the appeal.

Sections 2 (6-A) (*e*) and 12 (1-B) were introduced by way of amendment to the Indian Income-tax Act by the Finance Act of 1955, and they came into operation from 1st April, 1955. The former section brought into the definition of the term "dividend" three types of payments made by a controlled company (which had

accumulated profits) to or on behalf of its shareholders, namely, (1) payment by way of loan or advance made to a shareholder, (2) payment to a third party on behalf of a share-holder and (3) payment made for the benefit of a shareholder. The payments mentioned above, to the extent to which the company had accumulated profits, were regarded as dividends, received by the assessee in the year in which the company made the payment to the shareholder by way of loan or advance. Section 12 (1-B) related to loans to shareholders of controlled companies made during the earlier years, that is, earlier than the relevant year of account of the assessee, corresponding to the assessment year, 1955-56. All such loans outstanding on the first day in the year of account, corresponding to the assessment year, 1955-56, were treated as dividends and made chargeable in that year of assessment. The effect of the two sections is to create a fiction, and treat the loans received by a shareholder in a controlled company to the extent of the undistributed profits of the company, as dividends received, though factually no such dividends were received. The fiction created by section 2 (6-A) (*e*) is so comprehensive, that a shareholder who borrows from the company will have to pay tax on an amount which might be far in excess of what he would obtain by way of dividend, if dividends had been duly declared. To explain this by an illustration : suppose a member of a controlled company owning one share borrows from the company the entire accumulated profits available, the entire amount taken by way of loan would be treated as dividend and taxed, though his share of the dividend, if declared, would only be a fraction thereof, corresponding to his one share. The reason for such a drastic provision is not far to seek. It is a familiar device of the tax evaders to take shelter under the corporate personality which law confers on a company. No company is bound to declare dividends; profits earned by the company could therefore, be accumulated and the persons who would get the share, if dividends were declared in the normal course, adopt devices to get the benefit of such profits indirectly, *e.g.*, a loan is taken from the company which is never repaid ; the company meets an obligation of the shareholder or makes a payment for his benefits. Thus, the shareholder would get the benefit of the dividend, though in form the process of obtaining such benefit would be otherwise than by way of a declaration of dividend. Such receipts (prior to the amendment) would not be liable to tax, as it could not be said that any dividend was either declared or received. Such or similar subterfuges would be possible only in the controlled companies and not in those where the public have a substantial interest. It can be expected that in the latter category of companies the public would see to it that they get their dividends properly and in time. In the controlled companies, however, the persons controlling would decide what is to be done. Profits distributable to the shareholders could ostensibly be accumulated; the persons in control could nevertheless have the benefit of the money by taking it under the guise of a loan or advancing it to a shareholder who would make it over to them and thus avoid tax on dividends. It is to check this type of evasion that the Legislature introduced sub-clause (*e*) to section 2 (6-A) which contained definition of the terms " dividend ". That stated :—

> " Any payment by a company, not being a company in which the public are substantially interested within the meaning of section 23-A, of any sum (whether as representing a part of the assets of the company or otherwise) by way of advance or loan to a shareholder or any payment by any such company on behalf or for the individual benefit of a shareholder, to the extent to which the company in either case possesses accumulated profits.
>
> But " dividend " does not include,
>
> (i) ....
>
> (ii) any advance or loan made to a shareholder by a company in the ordinary course of its business where the lending of money is a substantial part of the business of the company ;
>
> (iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of clause (*e*) to the extent to which it is so set off ;"
>
> (*Rest of the section omitted as unnecessary*).

The new definition of the term, " dividend " as incorporated by the Finance Act of 1955, would by itself operate only from the assessment year 1955-56. Sec-

tion 12 (1-B) brought to tax under the head 'income from other sources' earlier loans made by controlled company to its shareholder. It runs :—

"Any payment by a company to a shareholder by way of advance or loan which would have been treated as a dividend within the meaning of clause (*e*) of sub-section (6-A) of section 2 in any previous year relevant to any assessment year prior to the assessment year ending on the 31st day of March, 1956, had that clause been in force in that year, shall be treated as a dividend received by him in the previous year relevant to the assessment year ending on the 31st day of March, 1956, if such loan or advance remained outstanding on the first day of such previous year."

It will be noticed that by virtue of the definition in section 2 (6-A) (*e*) in regard to assessments beginning from 1955-56, loans once advanced by a controlled company to its shareholder would attract tax liability, though such loans might be repaid subsequently even during that year. Section 12 (1-B) which applies to loans made earlier, only brings to tax loans outstanding at the beginning of the year of account, corresponding to the assessment year 1955-56, thus relieving the shareholder of the tax liability to the extent of repayment. Further section 12 (1-B) deals only with one of the three categories of payment mentioned in section 2 (6-A) (*e*), that is, loan advanced to shareholders. This difference in their respective operation of the two sections was presumably intended for the benefit of the assessee. In cases of assessment for and subsequent to 1955-56, an assessee would know that even if he took a loan from a controlled company in which he was a shareholder, he would be made liable to tax by treating the loan made to him as dividend received by him. In regard to the earlier years, however, the borrowing shareholder could not have known that the loans themselves would attract tax: nor that he would be liable to pay tax on amounts paid by the company for his benefit. Section 12(1-B) therefore restricts the tax liability to the loans outstanding. It must be noticed that section 2 (6-A) (*e*) excludes the operation of the definition to the case of companies, a substantial part of whose business is money lending, for in such cases it cannot always be said for certain that the borrowing was a device to get the dividend.

The contention of the assessee is that the impugned sections which bring to tax that which is not income, is beyond the constitutional competence of the Parliament, as under Article 246 of the Constitution, it would only have a power to enact legislation in regard to the subjects mentioned in Lists 1 and 3 of the VII Schedule. Entry 82 in List 1 of the VII Schedule runs : "Taxes on income other than agricultural income." The learned counsel for the petitioner contended that the enactment was part of the Income-tax legislation, and unless the provisions come under the head of a tax on income, there would be no authority in the Parliament to enact the provisions referred to above and that the impugned sections, which purported to tax a loan advanced by a company to its shareholder could not properly come under Entry 82. It is also contended that the impugned sections being discriminatory in their operation, would contravene the provisions of Article 14 of the Constitution.

The first of the two contentions rested on the assumption, that the Parliament had no power to legislate except on the matters specifically set out in Lists 1 and 3 to the VII Schedule to the Constitution. We shall consider later whether such an assumption is justified. Taking that assumption as correct, *viz.*, that in order that sections 2 (6-A) (*e*) and 12 (1-B) of the Income-tax Act may be valid they must be a part of a legislation imposing a tax on income, the question for consideration would be whether those provisions in substance aimed at taxing the income. According to the learned counsel for the petitioner, the term income is a well known concept, which implies that the person who gets it takes it for himself and would be under no obligation to repay. A loan, however, is one which has to be repaid. A liability of a shareholder under loan or advance made to him by the company, of which he is a shareholder, could not therefore be characterised as income, as there would always subsist his liability to repay the same, and the company could always recover the amount from the shareholder. Therefore, what was brought to tax by the impugned sections was not income but a loan which had to be repaid.

The question for consideration is not so much whether the term 'income' would include the monies advanced as loan but whether the Legislature was competent to enact legislation which would have the effect of bringing such amounts to tax. In *Navinchandra Mafatlal* v. *The Commissioner of Income-tax, Bombay City*[1], the Supreme Court held that, in construing an entry in a list conferring legislative powers, the widest possible construction according to their ordinary meaning must be put upon the words used therein, and that, where the question was whether a constitutional enactment conferred legislative power, a most liberal construction should be put upon the words, so that the same may have effect in their widest amplitude. In *Amina Umma* v. *Income-tax Officer*[2], the question was raised whether, in enacting section 16 (3) (*a*) (ii) of the Indian Income-tax Act, the Legislature transgressed the powers conferred on it by Entry 54 of List I of the Seventh Schedule in the Government of India Act, 1935 (which corresponds to Entry 82 of List I of the Seventh Schedule to the Constitution). It was held that, although the impugned provisions purported to tax a person who did not receive the income, it was nevertheless only income that was assessed, and that the enactment of a legal fiction shifting the incidence of taxation from the person who received the income to another, would not take it out of the scope of Entry 54. A similar point arose in regard to the validity of section 4 (2) of the Indian Income-tax Act, where the incidence of taxation was shifted from the non-resident husband to the wife who was a resident within the taxable territories, in *Jameelamma* v. *Income-tax Officer*[3], it was held that the basis of taxation was income, and, therefore, within the competence of the Legislature, and that the section did not violate the provisions of Article 14 of the Constitution. *Spencer* v. *Income-tax Officer, Madras*[4], considered whether the provisions of section 23-A, under which the tax was levied in respect of undistributed portion of the profits, were *ultra vires* as they sought to bring to tax the undistributed profits of a controlled company as income, even though they did not become income of the shareholders until they were distributed. At page 119, it is observed :—

> "To focus attention on the incidence of the tax for which also section 23-A provided, to the exclusion of the basis of taxation, can only tend to cloud the issue of legislative competence. What was it that was taxed ; undisbursed profits. Undisbursed profits were undoubtedly income, a part thereof. True it was the income of the company and it remained as part of the assets of the company even after the Taxing Authorities had passed an order under section 23-A. Except notionally and then only for the purpose of the incidence of the tax, undisbursed profits did not become the income of the shareholders. Nonetheless, the position remains, that what was taxed, undisbursed profits, was income. The net profits of the company were subject to tax. A provision for a further levy on undisbursed profits, which constituted a part of the net profits of the company would still be a statutory provision to tax income. Legislative power to provide for a further levy on the same income, the income of the company, could not be denied......So, what section 23-A, did was, in essence, to tax income, the income of the company. Only, the incidence of that tax was not on the company in the first instance but on the shareholder, who had no doubt no legal right to get his share of the undisbursed profits of the company."

In *Navinchandra Mafatlal* v. *The Commissioner of Income-tax, Bombay City*[1], the Supreme Court observed that the word 'income' should be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it, and that the legislative measure to prevent evasion of tax on income would be within the scope of the legislative powers to tax the income. As stated already, sections 2 (6-A) (*e*) and 12 (1-B) were introduced, in order to prevent evasion of tax. Those sections deal only with controlled companies, and not with those in which the public have a substantial interest. The income itself in reality belongs to the persons who form the company, and the distribution of profits of the company depends entirely on the will of the persons who control the company. Evasion of tax was possible by keeping the dividends undistributed, and at the same time paying monies under the guise of loans. Having regard to the identity of the interest of the shareholders in a controlled company

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1. (1955) S.C.J. 158 : (1955) 1 M.L.J. (S.C.) 87 : (1955) 1 S.C.R. 829.
2. (1955) 2 M.L.J. 393 : I.L.R. (1955) Mad. 702.
3. I.L.R. (1956) Mad. 1155 : (1956) 2 M.L.J. 83.
4. 31 I.T.R. 107 : I.L.R. (1957) Mad. 251 : (1956) 2 M.L.J. 518.

with that of the company, the assumption that the loans advanced are mere camouflages for payment of profits to the shareholders, is one based in reality on a number of cases. If the essence of the transaction were to be looked into, it will be seen that the tax sought to be levied is only on the occasion of the loan, the loan being only a semblance for the payment of the profits. The learned counsel for the petitioner posed a number of possibilities in which the provisions of the Act would work hardship. One illustration mentioned was this :—If a particular sum is advanced to a shareholder *A* and he repays the same, and the same amount is advanced to another shareholder *B*, both *A* and *B* would be liable to pay the tax. We do not consider that the assumption that both *A* and *B* would be liable to tax, is correct. Another illustration was that if a shareholder *A* borrows, pays back and again borrows, the fiction would entitle the Income-tax Department to levy the tax twice over. That is also incorrect. As soon as the first advance is made to *A*, the statute would deem that as payment of dividend and even if *A* pays back the money, it could not be held that there was undistributed profit, as the very fiction would show that the undistributed profits was paid as dividend in the first advance and that the same profits could not exist for the second advance. That one shareholder who borrows money first would be taxed, and that the others who take loans later escape such taxation would (subject to the consideration of the question under Article 14) have no relevance in considering the legislative competence.

It is no doubt true that if a shareholder in a controlled company becomes indebted, it may not necessarily follow that there has been a distribution of dividend to him. A debt, notwithstanding that it is advanced to the shareholder, would be an asset of the company and not income in the hands of the shareholder. But it is this very principle which is taken advantage of for the various subterfuges adopted to avoid taxation. There can be no doubt, that, where a shareholder in a controlled company possessing accumulated profits, takes money with no idea of repayments it would be open to the Legislature to tax such drawings as income as by so doing it legislates having regard to the reality of the transaction. Having regard to the devious ways which the ingenuity of man can adopt, if the Legislature raises an irrebuttable presumption, that in all cases where the loans are advanced to a shareholder, in a controlled company having undisbursed profits, the advances should be deemed to be income, the legislation would still be one relating to income-tax; though it may be that it operates harshly in certain cases. It may also be that in the operation of such a presumption or of a statutory fiction like the one contained in section 2 (6-A) (*e*) certain loans are taxed as income. But that is only incidental in the operation of the statute, whose pith and substance is taxation of income. It must be be remembered that section 2 (6-A) (*e*) only applies to controlled companies which have accumulated profits, the substantial part of whose business is not money lending. If a shareholder in that company wants money, he could as well take it out of the profits by declaring a dividend, for *ex concessi* the persons who decide to grant the loan, that is, the controlling directors can themselves declare the dividend.

Competence to legislate regarding income-tax would include a power to legislate in order to check evasion. That power should obviously extend also to subsidiary matters like taxing a loan where the loans are taken as a means of evading tax liability of income. Similar legislation has been made in other countries. Section 108 of the Commonwealth Income-tax Act states :—

"(1) If amounts are paid or assets distributed by a private company to any of its shareholders by way of advances or loans, or payments are made by the company on behalf of, or for the individual benefit of, any of its shareholders, so much, if any, of the amount or value of those advances, loans, or payments, as, in the opinion of the Commissioner, represents distributions of income shall, for all purposes of this Act, be deemed to be dividends paid by the company on the last day of the year of income of the company in which the payment or distribution is made.

(2) Where the amount or value of an advance, loan or payment is deemed, under the last preceding sub-section, to be a dividend paid by a company to a shareholder, and the company subsequently sets off the whole or a part of a dividend distributed by it in satisfaction in whole or in part of that advance, loan or payment, that dividend shall, to the extent to which it is so set off, be deemed not to be a dividend for any purpose of this Act."

It will be seen that the application of section 108 of the Commonwealth Income-tax Act depends upon a finding given by the Commissioner that the payment represents distribution of profits. But the Indian Income-tax Act does not treat it as a matter to be adjudged judicially by the Income-tax Officer but creates a fiction which would bring all advances (if other conditions are satisfied) made to a share-holder by a controlled company. Notwithstanding the fact that the Indian Income-tax Act vests no power in any authority to decide whether a particular loan was in reality a loan or the drawing of profits, the subject-matter of legislation is a tax on income. Whether the Australian model is to be adopted or the enactment should be made more stringent, is for the Legislature to decide. The purport of sections 2 (6-A) (*e*) and 12 (1-B) is to tax income, and the impugned legislation would come within Entry 82 of Schedule VII, List I.

Even if it were to be held that the impugned sections would not come under Entry 82, the Union Legislature would have authority under Entry 97 in List I to the Seventh Schedule. That confers residuary powers of legislation on the Parliament to enact legislation on all matters not mentioned in Lists II and III. The principle that where a subject of legislation is not enumerated it must belong to Parliament is embodied in Article 248. Therefore, even if the impugned sections of the Income-tax Act are held to impose a tax not on the income but on a loan and thus outside the ambit of Entry 82 in List I of Schedule VII to the Constitution, the Legislative Authortiy therefor could be derived under Entry 97 of the List I or Article 248. In *Mithan Lal* v. *State of Delhi*[1] a question arose as to the validity of a taxing enactment imposing tax on building contracts. The Bengal Finance (Sales Tax) Act, 1941, imposed such a tax. Parliament encted Part C States (Laws) Act, 1950, under which the Central Government may by notification (within restriction or modifications) extend any enactment in force in Part A State to Part C State. Acting under that provision, the Central Government extended the provisions of the Bengal Finance (Sales Tax) Act, 1941, to Delhi a Part C State. It was held in *State of Madras* v. *Gannon Dunkerley*[2], that a State Law imposing a tax on works contract was *ultra vires*. It would follow that the Bengal Act in so far as it purported to do so would be invalid. Did that invalidity extend also to the Sales Tax Law operating in Delhi? The Supreme Court answered the question in the negative. The reason for the conclusion was that the Sales Tax Act operating in Delhi was not one enacted by a State Legislature but by Parliament (*viz*., the authority being under Part C States Laws Act, 1950) and that the Parliament's authority was extensive enough to impose a tax on building contracts even though there was no sale there involved therein. The decision of the Supreme Court upholds the residuary power to the Parliament on all subjects except those that are mentioned in List II.

It is next contended that the impugned sections, in their operation would contravene the provisions of Article 14 of the Constitution, in that there has been denial of equality before the law or the equal protection of the laws, guaranteed by the Article, to all the shareholders, the first shareholder who obtains loan being the only person made liable to tax. The argument however fails to take note of the fact, that the impugned sections are expressly made inapplicable to companies a substantial part of whose business is money-lending. Money-lending not being a normal feature of the companies to which the provision applies, the occasion of the loan is taken for imposing the tax by creating a fiction that it is a dividend. That in such companies another shareholder might take a loan when there are no accumulated profits is only a possibility, and question of discrimination cannot be judged with referrence to hypothetical cases. The classification attempted is between controlled companies whose main business is not money-lending and other companies. That a classification between controlled and other companies is a real one has been recognised in *Spencer's Case*[3]. Article 14 provides that all persons similarly circumstanced shall be treated

1. (1958) S.C.J. 899 : (1959) S.C.R. 445.
2. (1958) S.C.J. 696 : (1958) 2 M.L.J. (S.C.) 66 : (1958) 2 An.W.R. (S.C.) 66 : (1959) S.C.R. 379.
3. 31 I.T.R. 107 : I.L.R. (1957) Mad. 257 : (1956) 2 M.L.J. 518.

alike both in regard to privileges conferred and liabilities incurred (*State of West Bengal* v. *Anwar Ali*[1]). The provisions of sections 2 (6-A) (*e*) and 12 (1-B) undoubtedly treat alike all those shareholders of a company who borrow from it when there are accumulated profits. Further a legislation embodying a system of taxation on the basis of a rational distinction even between individuals would be proper and valid. There is a substantial distinction between a person who draws monies in a controlled company whether by himself or his nominee while undistributed profits are available and a person who draws monies therefrom when there are no undistributed profits. Taxing the former on the basis of the fiction enacted, takes note of the fact that even on that day he having the control of the company could declare the dividend and draw the money : while in the other case it cannot be so done. There is, therefore, no substance in the argument that the enactment is in any way discriminatory.

The petition fails and rule *nisi* is discharged. The petitioner will pay the costs of the respondent. Counsel's fee Rs. 250.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE JAGADISAN.

The Management of Express Newspapers, (Private) Ltd., Madras-2 .. *Petitioners**

v.

The Industrial Tribunal, Madras and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *section* 33 (2)—*Scope—Jurisdiction of the Tribunal—Not an appellate authority.*

The Industrial Tribunal in dealing with applications under section 33 of the Act cannot function as an appellate authority sitting in judgment over the decision of the Management and review the facts and rehear the parties for that purpose.

Prevention of victimization and unfair labour practice or methods is the limit of the jurisdiction of the Tribunal in exercising its powers under section 33 of the Act.

The Management should not be deprived of its rights to administer its internal affairs and domestic Management so long as they do not come into conflict with the statute.

The question whether the word 'misconduct' occurring in section 33 (2) of the Act should not be construed as referring only to misconduct as attempted to be defined in the Standing Orders by the Management was not decided.

Case-law discussed.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Petition No. 60 of 1958 in I.D. No. 32 of 1957 on the file of the Industrial Tribunal, Madras, and quash the Order, dated 25th September, 1958 and made therein.

M. R. Narayanaswami, for Petitioners.

S. Mohan Kumaramangalam, K. V. Sankaran and *S Ramaswami,* for Respondents.

The Court made the following

ORDER.—This is a petition under Article 226 of the Constitution of India in which the petitioners, the Management of Express Newspapers (Private) Ltd., Madras, pray for the issue of a writ of *certiorari* or other appropriate writ or direction to quash the order of the Industrial Tribunal, Madras, in Petition No. 60 of 1958 in I.D. No. 32 of 1957, dated 25th September, 1958.

The petitioners which are a concern printing and publishing newspapers, had employed in its staff U. Dorairaj, the second respondent herein, as an attender in its Editorial section, of the "Indian Express", Madras. On 21st July, 1958, the second

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1. (1952) S.C.J. 55 : (1952) S.C.R. 284 at 320.

*W.P. No. 873 of 1958. 24th May, 1960. (3rd Jyaistha, 1882—Saka).

respondent, the employee attended office in the morning at 9 A.M. as usual and reported himself before the time-keeper for duty and offered his card for punching. He was then informed that T. Gopal, the attender who was to do the night duty that day had taken sick leave on production of medical certificate, and that he should report himself to duty that day for the night shift. The card was returned to him without punching and he went away stating that he would return to do the night duty. But actually he failed to do the night duty on that day. On 22nd July, 1958, the Management, the petitioner, received a leave letter from the second respondent in which it was averred that he had left for Villupuram on receipt of information that his aunt's daughter was dead. In that letter he prayed for a leave from 21st July, 1958 to 24th July, 1958. The Management felt suspicious about the conduct of the second respondent and wanted to assure themselves of his *bona fides* in applying for leave when he was specifically asked to do the night duty in the unavoidable absence of another employee deputed to do the night duty. The second respondent was asked to produce the death certificate from the Villupuram Municipality relating to the death of his aunt's dughter as reported by him. He was also intimated that failure to produce the death certificate will result in the period of absence not being treated as leave, and also in other suitable action permissible under the rules governing the service. On 24th July, 1958, the second respondent reported himself to duty at 9-30 A.M. in the morning before the time-keeper, one Seshadri. He was then informed by the time-keeper that the Management had already sent a communication to him on 22nd July, 1958, itself in answer to his application for leave. The second respondent however denied having received any such letter and wanted a copy of that letter which was furnished to him by the Management.

The second respondent submitted a written explanation on 26th July, 1958, in which he stated that he got news at 6 O'clock on Sunday (20th July, 1958) that his cousin sister at Villupuram was dangerously ill, that when he went there on 22nd July, 1958, he found the cousin sister in the death bed seriously ill but not dead. He further stated therein that he left Villupuram on 23rd July, 1958 and came straight to the office at 9-30 A.M. on 24th July, 1958. The Management replied on 26th July, 1958, stating that the second respondent deliberately absented himself from duty on and from 21st July, 1958, on false excuses and that he should explain why he should not be dismissed from service for giving false reasons for leave and staying away without prior approval of leave. He was also suspended from service on and from 26th July, 1958, pending enquiry and disciplinary action in the matter of his having stayed away from duty under the aforesaid circumstances. The Management gave notice to the second respondent fixing 28th July, 1958 as the date for enquiry and also intimated to him that he can bring such record or witnesses as he may have, to explain and justify his conduct.

The enquiry was held on 28th July, 1958. The second respondent gave evidence in support of his conduct. In the enquiry, the version the second respondent gave for his absence from Madras was totally different from the contents of his leave letter dated 22nd July, 1958, or his memorandum dated 26th July, 1958. He deposed that on 21st July, 1958 on reaching home from the office he was informed that his aunt's daughter was dead at Villupuram and that he left for Villupuram by the 10-35 train on that date. He further stated that he merely signed a blank paper and left it with a messenger to be filled up by him and delivered at the office on 22nd July, 1958. He submitted that when he reached Villupuram he found that the person who was reported to have died was not dead and that she was not even sick but that her child was sick. He stated that he brought his aunt's daughter and her sick child to Madras on 24th July, and both the mother and the child accompanied him when he reported himself to duty before the time-keeper on 24th July, 1958. The following questions and answers recorded at the enquiry may be referred to:

Q.—Do you know that you are asked to come to night duty because the other person was absent ?

A.—He told me that the person is not able to attend duty.

Q.—Who was said to be ill at Villupuram ? Is it the aunt's daughter or grand-daughter ?

A.—I was informed that it was only the daughter.

Q.—In your explanation dated 26th July you have not stated that the child was ill and that you have brought the child to Madras from Villupuram ?

A.—I could not state so ; I cannot say why I have not written.

The Press Superintendent employed under the petitioner who held the enquiry found that the second respondent was guilty of a serious act of misconduct in having availed himself of four days leave from 21st July, 1958 to 24th July, 1958, on false reasons and that his conduct was such as to call for suitable disciplinary action. On 30th July, 1958, the Management dismissed the second respondent from service with effect from 21st July, 1958 and communicated the order of dismissal to him. It was also mentioned therein that the Management was applying to the Industrial Tribunal, Madras, for approval of the action in conformity with the provisions of the Industrial Disputes Act.

The petitioner filed an application under section 33 (2) of the Industrial Disputes Act before the Industrial Tribunal, Madras, Petition No. 60 of 1958 in I.D. No. 32 of 1957 for approval of the action taken by the Management against the second respondent. The second respondent participated in the proceedings that ensued as a result of the aforesaid application and filed a counter statement. By order dated 25th September, 1958, the Industrial Tribunal, Madras, refused to accord approval of the action taken by the Management by dismissing the second respondent. The Tribunal commented upon the course of the disciplinary proceedings and the manner in which the said proceedings were conducted. The following extract from the decision of the Tribunal indicates its mind in the matter :

"It may be that on those contradictions, the Management was justified in entertaining a strong suspicion as to the veracity of the grounds on which the application for leave was made. But I do not agree that those contradictions by themselves furnished any proof that the grounds stated are all false. In the first place it must be observed that those contradictions, on which the Management relied, have not been, in the course of the enquiry, put to the worker himself for an explanation. If they had been so put, we cannot say what explanation he would have given and whether that explanation would not be convincing. Secondly, I think that the Management should have addressed itself to these broad points : (1) there being no death, as he was informed, whether anyone was dangerously ill at Villupuram, and (2) whether as a matter of fact the worker did not go to Villupuram. The enquiry was not directed on these points. If the worker, on receipt of information, had actually gone to Villupuram, that would go a great way to corroborate his story that he believed that somebody was dead at Villupuram and applied for leave for that reason."

The Tribunal took the view that on the facts alleged and found by the Management there has been no contravention of clause (3) of the provisions of the Standing Orders of the Management bringing home to the second respondent any act of misconduct, so as to justify dismissal from service. In this view of the matter as stated already the application filed by the Management under section 33 (2) of the Industrial Disputes Act stood rejected.

The petitioners have filed the above writ petition invoking the jurisdiction of this Court under Article 226 of the Constitution feeling aggrieved by the order of the Industrial Tribunal as aforesaid.

The primary question which was argued before me at some length by the learned Counsels appearing on both sides related to the jurisdiction of the Industrial Tribunal in dealing with applications under section 33 (2) of the Industrial Disputes Act. Before considering that question I wish to make a few observations on the events that culminated in the dismissal of the second respondent by the petitioners.

The conduct of the second respondent as can be gathered from the record placed before me is hardly commendable. He has been prevaricating hopelessly at every stage and it is obvious that veracity is not his strong point. The Management arrived at the conclusion, after giving every opportunity to the second respondent, that having deliberately absented himself from duty as required of him, he was merely amusing himself by inventing queer falsehoods. It cannot be said that the act of the Management was in any way arbitrary or unreasonable. It must be conceded that the conduct of the Management has been throughout above-board and *bona fide*.

The Tribunal has commented upon the procedure adopted by the management for reasons which hardly convince me. I am not able to appreciate why the Tribunal states that the prevarications and contradictions of which the second respondent was guilty ought to have been put to him in the course of the enquiry. They were staring him in the face and it was for him to perform the miracle of extricating out of a welter of irreconcilable statements. It is not the duty of the Management to evolve from out of the mouth of the second respondent a cogent explanation for the alleged misconduct against him. I am however not deciding this writ petition on this ground of infirmity in the decision of the Tribunal.

I shall now consider the scope and ambit of the jurisdiction of the Industrial Tribunal in considering an application preferred to it under section 33 (2) of the Industrial Disputes Act. Section 33 (2) of the Act in its present form came into the statute book only by reason of Act XXXVI of 1956. In the original Act as it stood in 1947, section 33 forbade an employer during the pendency of any conciliation proceeding, or proceedings before a Tribunal to alter to the prejudice of the workmen concerned in the dispute the conditions of service applicable to them or to discharge, dismiss or otherwise punish any such workman save with the express permission of the Conciliation Officer, Board or Tribunal except for misconduct not connected with the dispute. In 1950 the Act was amended. The Industrial Disputes (Appellate Tribunal) Act (XLVIII of 1950) was also enacted. The amended section 33 of the Industrial Disputes Act ran as follows :

"During the pendency of any conciliation proceedings or proceedings before a Tribunal in respect of any industrial dispute, no employer shall—

(*a*) alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings; or (*b*) discharge or punish, whether by dismissal or otherwise any workman concerned in such dispute, save with the express permission in writing of the Conciliation Officer, Board or Tribunal, as the case may be."

This amendment fettered the right of the employer even in respect of misconduct of employee, not connected with the pending dispute. Section 22 of the Industrial Disputes (Appellate Tribunal) Act (XLVIII of 1950), ran as follows :

" During the period of thirty days allowed for the filing of any appeal under section 10 or during the pendency of any appeal under this Act, no employer shall (*a*) alter, to the prejudice of the workmen concerned in such appeal, the conditions of service applicable to them immediately before the filing of such appeal, or (*b*) discharge or punish, whether by dismissal or otherwise any workmen concerned in such appeal, save with the express permission in writing of the Appellate Tribunal."

The provisions of section 33 of the 1947 Act (Industrial Disputes Act) corresponded to and were in *pari materia* with the provisions of section 22 of the 1950 Act, Industrial Disputes (Appellate Tribunal) Act.

The Supreme Court of India had occasions to construe the provisions of section 33 of the 1947 Act and section 22 of the Industrial Disputes (Appellate Tribunal) Act of 1950. In *The Automobile Products of India, Ltd.* v. *Rukmaji Bala and others*[1], at page 1256 it was observed as follows :

" The object of section 22 of the 1950 Act like that of section 33 of the 1947 Act as amended is to protect the workmen concerned in disputes which form the subject-matter of pending proceedings against the victimisation by the employer on account of their having raised industrial dispute or their continuing the pending proceedings. It is further the object of the two sections to ensure that proceedings in connection with industrial disputes already pending should be brought to a termination in a peaceful atmosphere and that no employer should during the pendency of those proceedings take any action of the kind mentioned in the sections which may give rise to fresh disputes likely to further exacerbate the already strained relation between the employer and the workmen. To achieve this object a ban has been imposed upon the ordinary right which the employer has under the ordinary law governing a contract of employment. Section 22 of the 1950 Act and section 33 of the 1947 Act which impose the ban also provide for the removal of that ban by the granting of express permission in writing in appropriate cases by the authority mentioned therein. The purpose of these two sections being to determine whether the ban should be removed or not, all that is required of the authority exercising jurisdiction under these sections is to accord or withhold permission..... ....Even a cursory perusal or section 33 of the 1947 Act will make it clear that the purpose of that section was not to confer any general power of adjudication of disputes.".

1. (1955) S.C.J. 253 : (1955) 1 M.L.J. (S.C.) 148 : (1955) 1 S.C.R. 1241.

In *Lakshmi Devi Sugar Mills* v. *Pt. Ram Sarup*[1], the Supreme Court considered the scope of the enquiry before the Labour Appellate Tribunal under section 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950. At page 93, Bhagwati, J., observed as follows :

"The Tribunal before whom an application is made under that section has not to adjudicate upon any industrial dispute arising between the employer and the workmen but has only got to consider whether the ban which is imposed on the employer in the matter of altering the conditions of employment to the prejudice of the workman or his discharge or punishment whether by dismissal or otherwise during the pendency of the proceedings therein referred to should be lifted. A *prima facie* case has to be made out by the employer for the lifting of such ban and the only jurisdiction which the Tribunal has is either to give such permission or to refuse it provided the employer is not acting *mala fide* or is not resorting to any unfair practice or victimization.......The Tribunal before whom such an application for permission is made under section 22 of the Act would not be entitled to sit in judgment on the action of the employer if once it came to the conclusion that a *prima facie* case had been made out for dealing out the punishment to the workman. It would not be concerned with the measure of the punishment nor with the harshness or otherwise of the action proposed to be taken by the employer except perhaps to the extent that it might bear on the question whether the action of the Management was *bona fide* or was actuated by the motive of victimization. If on the materials before it the Tribunal came to the conclusion that a fair enquiry was held by the Management in the circumstances of the case and it had *bona fide* come to the conclusion that the workman was guilty of misconduct with which he had been charged a *prima facie* case would be made out by the employer and the Tribunal would under these circumstances be bound to give the requisite permission to the employer to deal out the punishment to the workman."

In *Martin Burn Ltd.* v. *R. N. Banerjee*[2], section 22 of the Industrial Disputes (Appellate Tribunal) Act of 1950 came up again for consideration. At page 85, Bhagwati, J. after referring to the decision already cited laid down the law thus :

"The Labour Appellate Tribunal had to determine on these materials whether a *prima facie* case had been made out by the appellant for the termination of the respondent's service. A *prima facie* case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a *prima facie* case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. It may be that the Tribunal considering this question may itself have arrived at a different conclusion. It has however not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record."

The next decision of the Supreme Court that can be usefully referred to is that reported in *Indian Iron and Steel Co.* v. *Their Workman*[3]. This case dealt with the powers of the Tribunal under section 15 of the Industrial Disputes Act. At page 138, S.K. Das, J., defined the scope and powers of the Labour Appellate Tribunal thus :

"Undoubtedly the Management of a concern has power to direct its own internal administration and discipline ; but the power is not unlimited and when a dispute arises, Industrial Tribunals have been given the power to see whether the termination of service of a workman is justified and to give appropriate relief. In cases of dismissal on misconduct, the Tribunal does not, however, act as Court of Appeal and substitute its own judgment for that of the Management. It will interfere (i) when there is a want of good faith, (ii) when there is victimisation or unfair labour practice, (iii) when the Management has been guilty of a basic error or violation of a principle of natural justice, and (iv) when on the materials, the finding is completely baseless or perverse."

Be it noted that if the powers of the Tribunal in regard to termination of service of an employee by the management are limited and circumscribed in the manner laid down by the Supreme Court as above, they are not less limited and circumscribed while dealing with an application under section 33 (2) of the Industrial Disputes Act. The decision of the Supreme Court in *The Management of the Hotel Imperial* v. *Hotel Workers Union*[4], cited on behalf of the second respondent is not in point.

Section 33 (2) of the Act as it now stands is as follows :—

"During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute,—

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1. (1957) S.C.J. 47 : (1956) S.C.R. 916 : A.I.R. 1957 S.C. 82.
2. (1958) S.C.J. 255: (1958) M.L.J. (Crl.) 208 : A.I.R. 1958 S.C. 79.
3. (1958) S.C.J. 285 : (1958) M.L.J. (Crl.) 266 : A.I.R. 1958 S.C. 130.
4. (1960) S.C.J. 317 : 1960 M.L.J. (Crl.) 207.

(*a*) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceedings ; or (*b*) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman :

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

The question whether the amendment introduced under Act XXXVI of 1956 has brought about a change of law or has rendered the decisions of the Supreme Court referred to above inapplicable to cases arising under the amended Act was considered by Rajagopala Ayyangar, J., in *Gordon Woodroffee & Co., Ltd.* v. *Venugopal*[1]. At page 172 the learned Judge observed as follows :

" The reasoning contained in the judgments of the Supreme Court in the decisions referred to above appear to me to apply with equal force to the construction of section 33 as it now stands. The broad distinction between the powers of a Tribunal in dealing with industrial disputes and when exercising jurisdiction to grant permission still prevails and there is in this connection no material difference between the powers of the Tribunal under the three sub-sections of section 33."

At page 173 it is further observed :

"From the passages I have extracted from the judgments of the Supreme Court particularly the passage in the judgment of Bhagwati, J. in *Lakshmi Devi Sugar Mills* v. *Pt. Ram Sarup*[2], it would be apparent that the scope of the power to grant permission is confined to saying 'yes' or 'no'. The Tribunal, the Supreme Court has held had power merely to grant or refuse permission and not to impose conditions subject to which alone permission would be granted. It is needless to repeat the criteria laid down by the Supreme Court to be satisfied before the Tribunal could withhold permission."

It is plain that the jurisdiction of the Industrial Tribunal in dealing with applications under section 33 of the Act is not the cloak of an appeal in disguise. It cannot function as an appellate authority sitting in judgment over the decision of the Management and review the facts and rehear the parties for that purpose. The Tribunal has not to decide whether on the facts that led to the decision of the Management another conclusion different from that reached by the Management is possible or not. As held by the Supreme Court in *Lakshmi Devi Sugar Mills* v. *Pt. Ram Sarup*[2], the duty of the Tribunal was to ascertain whether there was a *prima facie* case justifying the act of the Management for which approval was sought. The object and purpose of section 33 of the Act is to prevent victimization of any employee by the Management or the perpetration of any unfair labour practice during the pendency of other proceedings so as to keep the atmosphere calm and tranquil and the relationship between the parties equable and cordial. Prevention of victimization of the employee by the employer and prevention of unfair labour practice or methods is the limit of the jurisdiction of the Industrial Tribunal in exercising its powers of approval under section 33 (2) of the Act. The Management should not be deprived of its rights to administer its internal affairs and domestic Management so long as they do not come into conflict with the statute. The employee cannot disown his duties inherent in the service and proclaim only his rights to the point of turning a beneficent legislation in his favour as an engine of oppression against the employer.

I am of opinion that the impugned decision of the Tribunal is clearly in excess of its jurisdiction. The Tribunal has failed to approach the problem before it in the manner required by law as interpreted by the decisions referred to above. The relevant question whether there was a *prima facie* case justifying the Management in ordering dismissal of the second respondent and whether the Management was guilty of victimization of the second respondent or was chargeable with any act of unfair labour practice have not been considered. On the other hand, the Tribunal has dealt with the matter as if it was deciding an industrial dispute and as if its powers are as large and wide as that of an appellate Tribunal sitting in judgment over the decision of the Management. These defects constitute excess of jurisdiction and error of law apparent on the face of the record so as to attract the exercise of the

1. (1958) 1 M.L.J. 164.
2. (1957) S.C.J. 47 : (1956) S.C.R. 916 : A.I.R. 1957 S.C. 82.

jurisdiction of this Court under Article 226 of the Constitution. It is now well settled that a subordinate Tribunal cannot defeat the issue of a writ of *certiorari* by omission or failure on its part to decide material relevant and germane questions necessary for adjudication of the question before it. See *Rex* v. *Medical Appeal Tribunal*: Ex parte *Gilmore*[1].

The only other question that has to be dealt with is whether the Management acted lawfully in dismissing the second respondent from service on the facts and materials placed before them. Under the Standing Orders governing the relationship between the petitioner and the second respondent at the relevant time, namely, July, 1958, certain acts and omissions on the part of the employee were to be treated as misconduct. On and from 1st August, 1958, a large number of additions have been made to this category of "misconduct" defined in the Standing Order. Before the Industrial Tribunal it was apparently contended for the Management that the misconduct on the part of the second respondent was one governed by clause (3) of the Standing Orders which was as follows: "Theft, fraud or dishonesty in connection with the employer's business or property". The gist of the charge of the Management against the second respondent was his failure to obey their lawful orders. In the letter dated 26th July, 1958, addressed by the Management to the second respondent the charge was mentioned as follows:—

"You were specifically asked to come for duty from 21st and you deliberately absented on false excuse that you got information that a remote cousin died. You were not entitled to be absent without permission for this reason."

It is clear that the charge levelled by the Management against the second respondent was one which came under clause (1) of the Standing Orders, namely, "Wilful insubordination or disobedience whether alone or in combination with others of any lawful and reasonable order of a superior." In paragraph 7 of the affidavit in support of the writ petition it was averred as follows:

"Under the above circumstances the Petitioners-Company *bona fide* felt that the worker, with a view to avoid night duty had applied for leave on deliberate false grounds and had tried to justify his action by giving false explanations and because of that serious misconduct, the Petitioner-Company decided to take action against him. He was called upon to explain his conduct and also to show cause why he should not be dismissed for the aforesaid misconduct."

The second respondent has not filed any counter-affidavit. He was certainly aware of the specific charge of misconduct made against him. I am therefore of opinion that the second respondent was found guilty of misconduct within the meaning of that expression as defined in clause (1) of the Standing Orders, though the record of the enquiry enquiry by the Management does not refer to any Standing Order. Mr. M.R. Narayanaswamy, learned counsel for the petitioners, contended that the word 'misconduct' occurring in section 33 (2) of the Industrial Disputes Act should not be narrowly construed as referring only to misconduct as was attempted to be defined by the Management in its Standing Orders. But section 33 (2) provides that the employer may, in accordance with Standing Orders applicable to a workman, discharge or dismiss that workman. It cannot be said that the Standing Orders provided for every kind of misconduct on the part of an employee justifying disciplinary action being taken against him. The Standing Orders of the petitioner as they stood in 1958 did not provide for a case in which an employee happened to be convicted in a competent criminal Court for an offence involving moral turpitude. It would be unreasonable to contend that despite such a conviction he would still be deemed not to have committed any misconduct so as to justify removal from service. It is however unnecessary to pursue this matter further as I have held that in the instant case the misconduct with which the second respondent was charged was clearly governed by clause (1) of the Standing Orders of the petitioner which was in force even in July, 1958 and also thereafter.

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1. (1957) L.R. 1 Q.B. 574.

The Writ Petition is therefore allowed and the order of the Industrial Tribunal dated 25th September, 1958, in Petition No. 60 of 1958 in I.D. No. 32 of 1957 is quashed. The rule *nisi* is made absolute. The Tribunal will however be free to dispose of the Petition No. 60 of 1958 afresh in accordance with law. There will be no order as to costs.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Janab A. Syed Jalal Sahib (deceased) by legal representative
Syed Usman Sahib .. *Applicant**

v.

The Commissioner of Income-tax ,Madras .. *Respondent.*

Income-tax Act (XI of 1922), sections 4 (3) (vii) and 6—Receipts from betting and racing activities—Nature of—If income from business or vocation assessable to income-tax.

The assessee whose main business was the manufacture and sale of beedies, indulged in betting on horses and subsequently acquired horses of his own which he entered for the races. In the year of account ending on 31st March, 1947 (assessment year 1947-1948) the excess of receipts over expenditure amounted to Rs. 44,259. In the next year the receipts amounted to Rs. 13,014. The Income-tax Officer treated both these items as income of the assessee from his business. The contention of the assessee that what he made over racing was not assessable to income-tax in either of the assessment years was negatived both by the Assistant Commissioner and by the Tribunal. On a reference

Held : Under the scheme of the Income-tax Act even a casual receipt, a single item of receipt would constitute income, independent of the question whether it is assessable in law or not. When a person places a bet and loses it, that money is gone; if he wins the bet, he gets his money *plus* what the other party has lost as his bet ; in neither case can the placing of a bet be equated to an investment or even an expenditure to produce an income or receipt. A business postulates activities on a commercially organised basis. *Prima facie* at least gambling by betting on horses cannot be viewed as a business though a person indulges in it habitually and even makes money by it. Strong evidence would be needed to establish that racing and betting activities constituted a business of a person. (That evidence was lacking in the instant case). Even if the money made over gambling transactions furnished the main means of livelihood that would not establish that gambling was a profession or vocation. Non-recurring does not imply that if a person makes more than one successful bet or gamble in his life the receipt from each such gambling including the first is of a recurring nature.

The receipts of the assessee from his racing and betting activities in the two years in question constituted his income, but it was not income from any business, profession or vocation of his. It was income from other source within the scope of section 6. It was not taxable income as it was income of a casual and non-recurring nature within the scope of exemption granted by section 4 (3) (vii) of the Act. *Lala Indra Sen*, In re : (1940) 8 I.T.R. 187, followed.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench ' B ', under section 66 (2) of the Indian Income-tax Act, 1922 (Act XI of 1922) in R.A. Nos. 951 and 952 of 1952-53 arising out of I.T.A. Nos. 4749 and 4750 of 1951-52—Assessment years 1947-48 and 1948-49 on its file for decision on the following question of law, *viz.*:

" Whether on the facts and in the circumstances of the case, the Appellate Tribunal was justified in including in the taxable income of the assessee the sum of Rs. 44,259 for the assessment year 1947-48 and the sum of Rs. 13,014 for the assessment year 1948-49 being the profits from horse-racing, and whether the said sums are not exempt from inclusion as being income of a casual and non-recurring nature."

K. Srinivasan, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax and *S. Ranganathan*, on behalf of Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The main line of business of the assessee, Syed Jalal Sahib, since deceased, was the manufacture and sale of beedis. He interested himself in

*Case Referred No. 25 of 1955. 16th February, 1960.
(27th Magha, 1881—Saka).

horse racing, and he attended races at a number of centres in South India quite regularly for a number of years. Apparently at first he contented himself with betting on the horses in those races. Subsequently he acquired horses of his own which he entered for some of the races. Some of these horses he owned in partnership with others. When exactly the assessee started entering his horses for races is not clear. The racing horses of course were left in charge of the trainers. The assessee maintained a separate set of accounts, referred to by the Income-tax Officer as the Race Book, in which apparently the assessee showed the details of the monies expended by him and the monies realised by him, either from the stakes for which his horses ran or from his successful bets. In the year of account which ended on 31st March, 1947, which corresponded to the assessment year 1947-48, the excess of receipts over expenditure amounted to Rs. 44,259. In the next year his own book showed the excess of receipts over expenditure as Rs. 11,514. The Income-tax Officer accepted the book results for the assessment year 1947-48. But for the assessment year 1948-49 he added back a sum of Rs. 1,500 which he disallowed from the expenditure incurred by the assessee. The Income-tax Officer computed Rs. 13,014 as income from this source for the assessment year 1948-49. The Income-tax Officer treated these items of Rs. 44,259 and Rs. 13,014 as income of the assessee from his business. That was confirmed by the Assistant Commissioner, to whom the assessee appealed. The further appeal to the Tribunal also failed, and the contention of the assessee that what he made over racing was not assessable to income-tax in either of the assessment years was again rejected.

The following question was referred to this Court under section 66 (2) :

"Whether on the facts and circumstances of the case, the Appellate Tribunal was justified in including in the taxable income of the assessee the sum of Rs. 44,259 for the assessment year 1947-48 and the sum of Rs. 13,014 for the assessment year 1948-49, being the profits from horse racing and whether the said sums are not exempt from inclusion as being income of a casual and non-recurring nature ?"

Before we deal with the contentions of the counsel on either side on the question of law that we have to determine, it should be desirable to set out the findings of the Departmental authorities and the Tribunal.

No attempt was made at any time to verify how much the assessee made in each of the two years of account by racing his horses and how much he made out of bets he made. Nor was any attempt made to verify how much of the money he made was out of bets on his own horses. From the order of the Income-tax Officer it appears that in the year of account 1946-47 the assessee incurred an expenditure of Rs. 5,900. Apparently that was the cost of maintaining the horses he owned and what it cost him to enter the horses for races. In addition, he incurred an expenditure of Rs. 29,555, which apparently was the amount he lost in bets. The receipts for the year totalled Rs. 79,714. In the next year the expenses on horses amounted to Rs. 9,924; the amount lost on bets was Rs. 40,000. The total receipts that year were Rs. 61,438. We have set out these details only to show that this analysis of figures does not help us much. The Assistant Commissioner and the Tribunal did not apparently concern themselves with these details. They made no difference between what the assessee made or lost on his bets and what he made or expended on his horses. They treated them all as constituting one set of activities which could be comprehensively labelled the "racing activities" of the assessee.

In the order of assessment for the first of the years 1947-48 the Income-tax Officer recorded :

"The assessee is a race horse owner and derives income from this source. The auditor stated that this was casual and non-recurring and in the nature of a hobby, to the assessee. The assessee appeared before me and in a sworn statement declared that he owns four horses at present solely and in partnership with others. These horses are trained at Madras and Bangalore by trainers appointed by the assessee. The assessee also keeps a sort of race book showing the profit, loss of and expenses with reference to the races in which his horses took part. I find this is a regular line of business for the assessee."

In the order of assessment for the next year the Income-tax Officer stated :

"The assessee's auditor contended that racing was hobby with the assessee but the circumstances of the case showed that the assessee was doing regular business with a view to profit."

In the order the Income-tax Officer pointed out "for about eight months every year he (the assessee) attends to races leaving his son in charge of the beedi business at Salem." Thus, as far as the Income-tax Officer was concerned, in both the years he treated the amount in question as income which the assessee derived from his business.

That was confirmed by the Assistant Commissioner. With reference to 1947-48 the Assistant Commissioner recorded :

"Apart from owning horses and running them in various centres of racing, he has from the very beginning, been a regular punter, *i.e.*, better on horses. By his own admission he has been regularly following this activity."

After referring to the statements recorded from the assessee, the Assistant Commissioner stated :

"So it is clear that the appellant has been racing own horses and betting on horses of others as a regular business or vocation which he has been conducting for a number of years. It is not a mere hobby or pastime with him. Otherwise, he would not spend 7½ months out of a year in various centres of racing in India and leave his beedi business to his son at Salem. That the horse racing including betting has been indulged in by him for profit and not as a hobby or pastime or even as a mere habit, is borne out by his letter, dated 16th May, 1947......."

With reference to the letter dated 16th May, 1947, the Assistant Commissioner stated : "Clearly he thinks of this as a business proposition." Dealing with the conclusion, "the auditor would like to say that if at all only the profit from the racing of own horses should be included in the assessment", the Assistant Commissioner stated :

"This cannot be done because the appellant started his racing career as a better, and racing with his own horses was a later development in his case....."

The Tribunal consolidated the appeals with reference to both the years of assessment and disposed them of by a single order. The reasoning and the conclusions of the Tribunal were all in paragraph 3 of the judgment, the whole of which we shall now set out :

"In appeal before us, it is argued that the income from horse racing is not taxable as no business was carried on by the assessee. The learned counsel who appeared for the assessee drew our attention to some observations in the case of *Lala Indra Sen*, In re,[1] and also relied strongly on certain observations in *Graham* v. *Green*[2], in support of his view that horse racing cannot be called either a vocation, business or profession. It is unnecessary for us in this case to pronounce whether horse racing as such can be considered a business, profession or vocation. As pointed out by the Appellate Assistant Commissioner, in a letter by the assessee to his auditor on 16th May, 1947, the assessee has definitely stated that his racing activity is very important and there is every possibility of getting good profit in the race. This is enough to show that he treated this activity of his as a source of profit. Also, on the peculiar facts of the case, it has to be held that the assessee earned profits from horse racing. That is enough to bring them to tax."

The discussion in the appellate judgment which we have extracted above was certainly not elaborate. The Tribunal should certainly have been aware of the difference between the several heads of income listed in section 6 of the Income-tax Act. These heads are mutually exclusive. The Department treated the income as falling under the head 'business' of which the Tribunal was conscious. That was set out in paragraph 2 of its judgment. We are unable to appreciate the view propounded by the Tribunal in paragraph 3 of its judgment, that it was unnecessary to decide whether racing and/or betting—confining the question, of course, to the activities of the assessee—constituted his business, profession or vocation. It is not clear whether the receipts were treated as falling under the residuary head," "income from other sources" to which section 12 of the Act would apply. The Tribunal did not also deal with the specific plea of the assessee, that in any event the assessee was entitled to exclude these items under section 4 (3) (vii).

1. (1940) 8 I.T.R. 187 at 219. 2. (1925) L.R. 2 K.B. 37 : 9 T.C. 309.

The Tribunal supplemented in the statement of the case what it had recorded or rather what it had failed to record in its order on appeal. After setting out in paragraph 6 of the statement of the case the contentions of the assessee before the Tribunal, the Tribunal recorded in paragraph 7 :

" The Tribunal found that so far as periodicity, organised and sustained action went, there was abundant proof and material on record to show that the assessee had carried on the activities in horse racing regularly, in a commercially organised manner and continuously and that he treated this activity as important and indulged in it with a view to getting good profit in races. Therefore, they held that the assessee treated the activity as a source of profit. Further, they held that on the facts of the case, the assessee did earn profits as a fact from horse racing."

Even so there was no express finding that the receipts from the racing activities of the assessee amounted to income fom any business of his. After referring to section 4 (3) (vii) of the Act, the Tribunal stated in paragraph 8 of the statement of the case :

" Having regard to these essential ingredients of the sub-section and the facts in the case that the assessee treated this activity as important, as a source of profit and that he made profits from horse racing, the Tribunal came to the conclusion that the income was, therefore, neither casual nor non-recurring and it ought to be taxed."

It should be needless to point out that what has been stated in paragraphs 7 and 8 of the statement of the case was not mentioned in the order on appeal. We have also got to point out that there is no reference to the material on record on the basis of which the conclusions set out in paragraphs 7 and 8 were reached, assuming that they had been reached even when the appeals were disposed of.

Even at the outset we are constrained to observe that the Tribunal failed in its duty to investigate the facts in full before it gave its decision in the appeal The attention of the Tribunal was specifically drawn to *Lala Indra Sen*, In re[1], and the report of that case should at least have impressed on the Tribunal the need for a full investigation of the facts Paucity of material in *Lala Indra Sen*, In re[1] was deplored in no unmeasured terms by each of the three learned Judges of the Allahabad High Court who constituted the Full Bench. As far as the facts of this case are concerned we find ourselves in an even worse position than the learned Judges who decided *Lala Indra Sen*, In re[1]. As we have already pointed out, the Tribunal did not even decide under which of the several heads listed in section 6 of the Income-tax Act the assessee could have been taxed. Apparently the Tribunal was of the view that the decisions on that point was not necessary. If it was income from business, on that ground alone the application of section 4 (3) (vii) of the Act would have been ruled out.

It is on the scanty material furnished to us in the statement of the case that we have to answer the question that has been referred to this Court. We shall exmine first whether the two sums in question, Rs. 44,259 and Rs. 13,014, which had been admittedly received by the assessee, constituted income, and if it did constitute income, under which of the mutually exclusive heads enumerated in section 6 of the Act, that income fell.

Even before we deal with these questions, we have to point out that with reference to the facts and the circumstances of this case it is not possible to make any distinction between what the assessee made over the bets and what he made from his ownership of the horses and from the races in which he entered them. In the race book the assessee maintained he himself apparently made no distinction between these two departments of his activities. At the stage of the appeal to the Assistant Commissioner, an attempt appears to have been made to put forward as an alternative argument, that if anything was to be viewed as a business, it could only be the maintenance of race horses, and entering them in races. The assessee claimed all along that both betting and racing constituted his hobby or pastime, and that he himself did not make any distinction between these two departments

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1. (1940) 8 I.T.R. 187.

of his racing activities. At the stage of the appeal to the Tribunal it did not consider whether the betting transactions of the assessee should be viewed independent of his racing transactions. On the material available to us—and once again we have to point out that it is ever so scanty—we cannot say that the Tribunal would have been wrong in proceeding on the basis that both betting and racing should be viewed as component parts of a whole as far as the assessee was concerned. In *Lal Indra Sen, In re*[1], Braund, J., said :

> " Though it appears to have been assumed throughout these proceedings, both before the Income-tax authorities and here, that the maintenance and training of the three horses ought to be treated as a separate transaction from the assessee's betting, I desire to say for myself that I am not altogether sure that that on the facts is the right way of looking at it. I think they may just as easily, if not better be regarded as one and the same activity. If in the result they should be held to constitute business I should myself think that they were one business and not two. And whether they are to be held to be an enterprise productive of receipts which are casual and non-recurring or not I should prefer to regard them in this case as one enterprise and not as two."

On the facts of this case and in the case of the assessee with reference to the assessment years in question, we are of the view that there is no scope for separating the betting from the racing transactions and that they constituted one composite set of activities, whether it was a business as determined by the Department or whether it was a hobby as claimed by the assessee. We are not to be understood as saying that there is not and never can be any distinction between betting and racing. All we say is that in the case of the assessee and in the relevant assessment years he himself made no distinction between the fruits of his betting and those of his racing activities.

The question is, did the receipts of the assessee from his betting and racing activities constitute income. As has been repeatedly pointed out, income has not been defined by the Income-tax Act, and the scheme of the Act makes it a concept of the widest import. Even a casual and non-recurring item of receipt is income. Only it is excluded from the computation of assessable income by the provisions of section 4 (3) (vii) of the Act. We are referring to this at this stage only to understand what income means. The source of the income is relevant for determining first whether it is assessable or non-assessable, and if it is not exempt from assessment, for deciding next under which of the heads enumerated in section 6 the income has to be assessed. It is really in that light we have to understand what the Privy Council stated in *Commissioner of Income-tax, Bengal* v. *Shaw Wallace & Co.*[2], which passage was specifically adverted to by Bajpai, J., in *Lala Indra Sen, In re*[1], at page 213 :

> "The object of the Indian Act is to tax income, a term which it does not define. It is expanded no doubt into income, profits and gains. But the expansion is more a matter of words than of substance. Income their Lordships think under this Act connotes periodical monetary return coming in with some sort of regularity or accepted regularity from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of mere windfall."

The Supreme Court has pointed out in *Raghuvanshi Mills Ltd.* v. *Commissioner of Income-tax*[3], that the observations of the Privy Council must be confined to the facts found in *Commissioner of Income-tax, Bengal* v. *Shaw Wallace & Co.*[2]. As we have pointed out, under the scheme of the Act, even a casual receipts, a single item of receipt, would constitute income, independent of the question whether it is assessable income or not. Judged even by the test propounded by the Privy Council in *Commissioner of Income-tax, Bengal* v. *Shaw Wallace & Co.*[2], it should be clear that the receipts the assessee traced to his betting and racing transactions constituted his income. That, of course, is independent of the question, whether such a receipt is taxable. No case has been brought to our notice that such receipts did not constitute income at all. No doubt in *Graham* v. *Green*[4], Rowlatt, J., held that receipts from betting on horses would not constitute profits or gains for assessment either under Case

1. (1940) 8 I.T.R. 187 at 213.
2. (1932) 63 M.L.J. 124 : L.R. 59 I.A. 206 : I.L.R. 59 Cal. 1343 (P.C.).
3. (1952) S.C.J. 660 : (1953) 1 M.L.J. 113 : 22 I.T.R. 484 at 489.
4. (1925) L.R. 2 K.B. 37 : 9 T.C. 309.

VI or under Case II of Schedule D under the English Income-tax Act. We do not understand the learned Judge to have laid down that such receipts would not constitute income at all. Were that the underlying implication of his judgment, we would have ventured to dissent from such a view. At any rate we would have respectfully declined to accept it as authority for deciding what constitutes income under the scheme underlying the Indian Income-tax Act.

The next question we have to consider is, under which of the heads enumerated in section 6 of the Income-tax Act the receipt of that income fell.

We have no hesitation in holding that there was no material on record which would justify a conclusion, that it was income from the business of the assessee. That was no doubt the finding of the Department though the Tribunal itself refrained from going into the question and from recording any express finding that it was income from business.

In *Graham* v. *Green*[1], Rowlatt, J., said this :—

> "What is a bet ? A bet is merely an irrational agreement that one person should pay another person something on the happening of an event. *A* agrees to pay *B* something if *C's* horse runs quicker than *D's* or if a coin comes one side up rather than the other side up. There is no relevance at all between the event and the acquisition of property. The event does not really produce it at all. It rests, as I say, on a mere irrational agreement."

We are in respectful agreement with these observations. To those observations we can add : when a person places a bet and loses it that money is gone ; if he wins the bet he gets his own money *plus* what the other party has lost as his bet ; in neither case can the placing of a bet be equated to an investment or even an expenditure to produce an income or receipt.

What that learned Judge said about the realisation of successful bets would also apply, at any rate as far as the assessee was concerned, to his receipts of prize money or stakes from racing his horses. The success of a given horse, so much dependent on chance, to which both betting and racing have to be correlated, was not the event which itself produced the income. That of course is not conclusive in deciding the question, whether betting and racing could ever be viewed as constituting a business. A bookmaker's is an obvious case of betting being his business. It is not necessary for us to decide in this case whether as far as the punter is concerned, betting could ever be viewed as constituting his business, and whether the principle was laid down correctly in *Graham* v. *Green*[1], that under no circumstances betting, from the point of view of the punter, could ever constitute a business. Ours is a more limited question, whether there was material on which it could be found that the racing and betting transactions of the assessee constituted a line of his business. It was certainly not his sole means of livelihood. It is doubtful if it could be viewed as an additional means of livelihood in his case. He was a successful businessman with a lucrative line of business, manufacture and sale of beedies.

We are only referring to the factual position of the assessee. We are not to be understood as laying down that, if the receipts from the racing activities had constituted the sole or the main means of livelihood of the assessee, that with nothing more would have sufficed to establish that such receipts constituted income or profits of the business of the assessee. Apart from the fact that the assessee was not dependent on his income from his racing activities for his living, we have to point out that a business certainly postulates activities on a commercially organised basis. Even an adventure in the nature of a trade needs such a commercial organisation and activities. That was wholly lacking in this case, even as it was found to be lacking in *Lala Indra Sen*, In re[2].

At page 219 of the report in *Lala Indra Sen*, In re[2], Braund, J., observed :

> " . . . . the assessee was, as far as we can tell, a man well able to afford the pleasure both of keeping race horses and of betting. I think that in India, as in England, men of means take

1. (1925) L.R. 2 K.B. 37 : 9 T.C. 309. 2. (1940) 8 I.T.R. 187.

a pride in possessing race horses and in exhibiting their horses, and themselves, on race courses. And the instinct to gamble is not the perquisite alone of man of business. *Prima facie*, I think that, where the only facts known are that a well-to-do man owns and runs three horses and bets on them and other horses, he does so for his pleasure, even though that pleasure costs him Rs. 7,000 odd in a year. And nonetheless is this so by reason of the fact that he makes a note in his books of account of what his pleasure costs him. Many men of method do that."

We are in respectful agreement with these observations of Braund, J. To adapt the words of Braund, J., where the only facts known are that a well-to-do man like the assessee owns horses and bets on them and other horses the *prima facie* view should be that he does so for his pleasure, even though that pleasure brought him substantial sums of money. Obviously it is not the ultimate success or failure from a pecuniary point of view that really decides whether a given set of activities constituted the business of a person. If the racing and betting activities of the assessee constituted his business, it would continue to be his business whether he made profits or sustained losses in any given year or even over a series of years. The amount won or lost in a given period again may not be a relevant factor in deciding whether it was his business. The activities organised on normally accepted commercial lines constitute the essence of any business ; and, as we have pointed out, there was no evidence of that at all in the case of the assessee. There was nothing to rebut what Braund, J., held should be *prima facie* view of such racing activities, that a person of comparative affluence and means undertakes them for his pleasure. To that must be added the further factor to which we have already adverted, the very nature of a bet, with something wholly irrational about its results as pointed out by Rowlatt, J. Again we have to guard ourselves against being understood to say that gambling could never be organised on a commercial basis and could never constitute a business. All we need say, and do say in this case, is that *prima facie* at least gambling by betting on horses cannot be viewed as a business, though a person indulges in it habitually and even makes money by it. Strong evidence would be needed to establish that racing and betting activities constituted a business or one of the lines of business of a person. That evidence is lacking in this case.

No doubt, in the statement of the case submitted by the Tribunal, it recorded in paragraph 7 :

" The Tribunal found that so far as periodicity, organised and sustained action went, there was abundant proof and material on record to show that the assessee had carried on the activities in horse racing regularly, in a commercially organised manner and continuously and that he treated this activity as important and indulged in it with a view to getting good profit in races."

The finding that the assessee conducted his activities in a commercially organised manner was not correlated to any evidence, whether disclosed in the printed book or otherwise. It should be remembered there was no reference to any such commercial organisation of the assessee's activities in the orders of the Departmental officers or in the appellate order of the Tribunal.

We can sum up this part of the case by pointing out that there was no evidence to sustain the finding of the Department, that the racing and betting activities of the assessee constituted his business.

Neither the Department nor the Tribunal considered whether, if those racing activities did not constitute the business of the assessee, they could be viewed in the alternative as constituting his profession or vocation. The learned counsel for the Department urged that the racing activities of the assessee could be brought under either of the heads, profession or vocation.

Much of what we said in holding that there was no material on record to justify a finding, that such activities constituted the business of the assessee, would also apply in considering whether they constituted his profession or vocation. Whether or not betting could be organised on commercial lines by a punter to constitute a business of his, it is virtually impossible to look upon gambling by betting or racing, *i.e.*, entering horses for races, or a combination of both, as constituting a profession or vocation. Vocation may be an expression of much larger import than profession. But that makes no difference to what we have stated. No doubt the expression professional

gambler has the sanction of usage, but it only implies that he is a habitual gambler who hopes to make, and possibly does make, money by his gambling activities. That obviously is not enough to hold that gambling is his profession or even vocation, as these expressions have to be understood in the context of the Income-tax Act. After all, even a person who bets on horses for his pleasure or prestige also hopes to win his bet. Neither such hope nor the actual realisation of that hope by a habitual gambler could suffice to divest the gambling transaction of its essence of irrationality. A habitual indulgence in such irrational activities could not be viewed as constituting a profession or vocation. Even if the money made over such transactions furnished the sole or main means of livelihood, that would not establish that gambling was a profession or vocation.

At page 219 of the report in *Lala Indra Sen*, In re[1], Braund, J., said :

" . . . . . in my opinion, neither the assessee's activities on the race course itself nor his betting can, on the facts of this case, so far as we know them, be held to constitute a ' business '. They certainly do not, in my opinion, constitute a ' profession ' or a ' vocation '; and, though in a sense they engage part of their owner's time, they equally do not constitute his ' occupation' in the sense in which in my judgment that expression is in its context, used in this Act."

All these observations, with which we respectfully agree, apply also to the assessee in this case. His racing and betting did not constitute the business, profession or vocation of the assessee or even his occupation.

Of the cases cited before us, only two, *Graham* v. *Green*[2], and *Lala Indra Sen*, In re[1], deal directly with the question, whether the receipts from successful bets constituted taxable income. We have not therefore referred in this judgment to the other cases cited by either side during the course of the arguments. The learned counsel for the Department drew our attention to passages at pages 179 and 180 of Gunn's Commonwealth Income-tax Law and Practice, 4th edition. But the reports themselves from which the extracts were quoted by the learned author are unfortunately not available to us. We have said enough to make it clear that it is not as an abstract question that we can consider whether betting can be a business, profession, vocation or even occupation. The question will have to be answered in each case with reference to the facts disclosed by evidence in that case. We have therefore refrained from making use of the passages extracted by the learned author, Gunn, to which our attention was drawn.

Since we have held that the receipts of the assessee constituted his income, and since it was not income from any business, profession or vocation of the assessee, it could only be brought under the residuary head in section 6 of the Income-tax Act, income from other sources.

The next question is, whether that income of the assessee was exempt from taxation, and whether it satisfied the requirements of section 4 (3) (vii) of the Income-tax Act which runs :

" Any income, profits, or gains falling within the following classes shall not be included in the total income of the person receiving them—

* * * * * *

(vii) Any receipts not being capital gains chargeable according to the provisions of section 12-B and not being receipts arising from business, or the exercise of profession, vocation or occupation which are of a casual and non-recurring nature or are not by way of addition to the remuneratoin of an employee."

The receipts of the assessee did not fall into any of the excepted classes, capital gains chargeable under section 12-B of the Act, or addition to the remuneration of an employee. We have also held that they were not receipts from any busines conducted by the assessee or from the exercise of a profession or vocation of the assessee. Occupation as used in section 4 (3) (vii) is no doubt of larger import than vocation. But we have held that the racing activities of the assessee could not even be viewed as his occupation. Therefore what remains to be considered is, whether the receipts were of a casual and non-recurring nature. If that test is

1. (1940) 8 I.T.R. 187. 2. L.R. (1925) 1 K.B. 37 : 9 T.C. 309.

satisfied, the income from the racing activities of the assessee would be exempt from taxation.

All the three learned Judges who decided *Lala Indra Sen, In re*[1], held that such income from the racing activities of an assessee was casual. Braund, J., pointed out at page, 220 :

> " I think that the word ' casual ' in this section must be read as meaning the antithesis of that which is governed by something more than mere chance—something out of which, according to the probabilities of business or to the known course of practical experience, a rational expectation of profit arises. And that does not, in my opinion, apply to a mere bet."

The success of a horse or that of a bet is obviously uncertain and wholly a matter of chance, and the receipts dependent on such a chance can never be anything but casual. Whether a person made Rs. 40,000 over one bet or over a series of bets in a year could make no difference. The total would still be a total of casual receipts. What section 4 (3) (vii) of the Act requires is that the receipt should not only be casual but it should also be non-recurring. Casual *and* non-recurring is the requirement of the statutory provision. In *Lala Indra Sen, In re*[1], Iqbal Ahmad, J., held that the test that it should be non-recurring was not satisfied. Braund, J., with whom Bajpai, J., was in substantial agreement held that the receipt was both casual and non-recurring. At page 220 of the report Braund, J., said :

> " . . . . the true view is that he made a bet whenever he felt inclined to do so. He was not compelled to and, as far as we know, there was no method in his betting. I think, therefore, that the right way to look at this is that the assessee, whenever he felt inclined, from time to time made a bet and not that he made a series of bets on a prescribed plan. He was free to stop whenever he liked. And if each bet is, as I think, an individual transaction, I can myself see nothing of a ' recurring nature' about it. It was not its nature to recur. If it did in fact recur with great frequency, it might, on that account, become a ' business '. It may be true that, in fact, these bets did recur. But that was not the result of the 'nature ' of the transaction but of mere spasmodic volition of the assessee. They were not, to my mind, of a recurring ' nature ' . . . . ."

What section 4 (3) (vii) requires is that the receipts should be non-recurring. Braund J., was alive to that, as he pointed out at page 221 of the report. In the case of gambling by betting and racing, even as in the case of gambling with dice or cards, the habit of gambling, or the habitual indulgence in gambling is not enough to show that the receipts, when they do materialise are of a recurring nature. In the case of such receipts from betting, what suffices to establish that they were casual, should, to a large extent, suffice also to establish that they were non-recurring. "Non-recurring" does not imply that, if a person makes more than one successful bet or gamble in his life, the receipt from each such gambling including the first is of a recurring nature. Let us take the familiar example afforded by prizes won at lotteries. Winning a prize is usually wholly dependent on chance. If a person wins a prize in a lottery, that transaction is never likely to recur, as pointed out by Braund, J. In another lottery the same person may win another prize. It is not a recurrence either of the transaction, or even of a receipt of the prize. Could it be said that because a man won two prizes, either in the same lottery or in more than one lottery in the course of a short time or a long time, the receipts of prizes were of a recurring nature and therefore fell outside the scope of section 4 (3) (vii) of the Act. That is why we said that the very nature of a receipt from a gambling transaction should show that a successful gambling which brings in a receipt of money, even if repeated a number of times, will not make the receipts from such gambling transactions receipts of a recurring nature to take them outside the scope of section 4 (3) (vii) of the Act. We are clearly of opinion that receipts even from habitual betting are non-recurring receipts, which fell within the scope of the exemption for which section 4 (3) (vii) of the Act provides.

We find ourselves in respectful agreement with the conclusion reached by the majority of the Judges in *Lala Indra Sen, In re*[1], that such receipts are both casual and non-recurring. We also find ourselves in agreement with much of the reasoning of Braund, J., in that report on the several points which we have had to consider in this case.

1. (1940) 8 I.T.R. 187.

Our conclusions are : The receipts of the assessee from his racing and betting activities in the two years in question constituted his income, but it was not income from any business, profession or vocation of his. It was income from other sources within the scope of section 6 of the Act. It was however not taxable income as it was income of a casual and non-recurring nature within the scope of the exemption granted by section 4 (3) (vii) of the Act.

We answer the question in the negative and in favour of the assessee. The assessee's legal representative will be entitled to the costs of this reference. Counsel's fee Rs. 250.

K.L.B. ——— *Reference answered in favour of assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The Commissioner of Income-tax, Madras/Bombay .. *Applicant**

v.

The Express Newspaper Ltd., Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 34—Scope—Return by a director of a defunct company not authorised in conformity with section 208-A (2) of Companies Act (VII of 1913)—Assessment made after the company had ceased to exist and contrary to the provisions of section 26(2)—Proceedings for reassessment can be initiated on the basis of escape of assessment—Section 26 (2)—Assessment on the successor company—Successor company liable when the company succeeded is struck off the register—Section 26 (2) and 10 (2) (vii)—Profits made by sale of machinery in the course of winding up of the company—Liability to tax—Section 26 (2)—Profits and gains from a business—Does not include capital gain under section 6 (iv)—Section 6—Heads of income are distinct and mutually exclusive—Principles of abatement and representation—Applicability to proceedings before Taxing authorities.

The power to assess under section 34 (1) of the Income-tax Act would exist where there has been no assessment or where there has been an escape of assessment during the relevant assessment year. An invalid assessment would mean that there was no assessment at all. Such invalidity may be the result of there being no valid return or there being a valid return but the assessment thereon being illegal or void. A case where there is no return at all by the assessee will be covered by the terms of the section itself. A return which is purported to be filed on behalf of an assessee by a person not entitled to so act would be no return in the eye of the law and the assessment thereon would be equally invalid. Such a case will have to be treated as one where the assessee has failed to make a return.

Under section 208-A (2) of the Companies Act (VII of 1913) the normal rule is that on liquidation all powers of the directors cease and that it is necessary for a director to act on behalf of the company either authorized by a resolution of the company or at least by the liquidator. A return made by a director not so authorised would not be a valid one.

A mere publication of a general notice under section 22 (1) of the Income-tax Act could not be held to commence assessment proceedings.

It may be that the procedure relating to the assessment of an individual can be said to commence from the time of the issue of the notice under section 22 (2). Where an unauthorized person is served with the notice and a return is submitted by such person, it would not be a proper initiation of proceedings and the individual concerned should be deemed to have escaped assessment. In such a case the Income-tax Officer would under section 34 of the Act have jurisdiction to start assessment proceedings on the footing that there had been an escape of assessment.

The rules as to abatement laid down by the Civil Procedure Code will not apply to the proceedings before the Income-tax Officers. But the principle of representation applicable to regular suits and proceedings under the Civil Procedure Code would apply to such proceedings.

Alfred v. *Income-tax Officer*, (1957) 2 M.L.J. 290, referred.

The existence of an assessee is essential for an assessment. There cannot be an assessment of a non-existent person. The definition of 'assessee' in section 2 (2) would obviously apply only to a living person. The rule contained in Order 22, rule 6, Civil Procedure Code, cannot therefore apply to the assessment proceedings. The assessment in the instant case was made long after the company was struck off the register of companies and is therefore invalid.

The provisions of section 26 (2) would apply whenever there is succession to business. Where the person succeeded could not be found then the assessment shall be made on the successor. A company which is struck off the register is one which could not be found.

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* Case Referred No. 11 of 1955. 1st March, 1960. (11th Phalguna, 1881, Saka).

The order of assessment made contrary to the provisions of section 26 (2) would be invalid and the invalidity of that kind could be taken note of by the Income-tax Officer himself to initiate proceedings under section 34. The statutory liability of the successor arises on the disappearance of the person succeeded. If it is found that the successor in such a case had not been assessed it would be a case of an escape of assessment. The Income-tax Officer would therefore have jurisdiction to initiate proceedings under section 34.

The profits by the sale of machinery consisted of (i) a sum representing the difference between the written down value and the original cost price and (ii) a sum representing the excess of the price realized by the sale over the original cost price. Under section 10 (2) (vii) as at the relevant date where the sale results in an excess over the written down value that excess upto the limit of the cost price would be taxed as profit and anything obtained over and above the cost price would be taxed as capital gain.

Section 10 (2) (vii) would not apply to a case where the sale was being made in the course of the winding up of the company. The Second Proviso to section 10 (2) (vii) could be invoked only, where the sale was one made in the course of the business carried on by the predecessors. Where the sale is a closing down sale that profit could not be brought to tax.

It is well settled that the income chargeable under one head cannot be so done under a different head and that the various heads of income specified in section 6 are distinct and mutually exclusive. The words ' profits and gains from a business in section 26 (2) have a distinct meaning under the Act and should be limited in their meaning to the head of income referred to in section 6 (iv) and it cannot include another equally distinct meaning under the Act *i.e.*, capital gain. The successor would not be liable to be taxed on the capital gain made by the predecessor company. Under section 26 (2) the liability to tax was in respect of profits or gains in the business, profession or vocation to which there has been succession.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act (XI of 1922), in R.A. Nos. 1051 and 1254 of 1953-54 and No. 41 of 1954-55 and No. 100 of 1954-55 respectively (I.T.A. No. 7349 of 1951-52, Assessment year 1947-48) on its file for decision on the following questions of law, *viz.*,

" Whether the assessment made by the Income-tax Officer on 28th February, 1950, was valid in law ?

Whether the notice under section 34 (1) of the Act issued by the Income-tax Officer on 4th April, 1951, was validly issued ?

Whether the assessment made by the Income-tax Officer on 17th July, 1951, is a valid assessment?

Whether the Free Press Co., made a business profit of Rs. 2,14,090 under the Proviso to section 10 (2) (vii) of the Act ?

Whether the capital gain of Rs. 3,94,576 is not liable to tax in view of the Third Proviso to section 12-B (1) of the Act ?

Whether the capital gain made by the Free Press Company is liable to be assessed in the hands of Express Company under section 26 (2) of the Act ?"

C. S. Rama Rao Saheb, Special Counsel for Income-tax and *S. Ranganathan*, for Applicant.

R. Venkataraman, for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—Free Press of India (Madras) Ltd., a private limited company (hereinafter referred to as the Free Press Company) was carrying on business as printers and publishers of certain newspapers, namely, the *Indian Express*, *Dinamani* and *Andhra Prabha* at Madras, and *Eastern Express* and *Bharat* at Calcutta. During the course of the year 1946, the company also acquired rights in respect of *Sunday Standard* and *Morning Standard* at Bombay. There were only two shareholders in the company, and their holdings were as follows :

Ramnath Goenka (Managing Director).	242 shares of Rs. 50 each	..	Rs. 12,100.
Mahadeolal Dalmia (Director)	2,489 shares of Rs. 50 each	..	Rs. 1,24,450.

On 22nd April, 1946, another private limited company named the Express Newspapers, Ltd. (to be referred to hereafter as Express Company) was formed with the following shareholders :

Ramnath Goenka (Managing Director).	1,179 shares of Rs. 1,000 each.	Rs. 11,79,000.
Mahadeolal Dalmia (Director) ..	758 shares of Rs. 1,000 each ..	Rs. 7,58,000.
Bhagwandas Goenka (son of Ramnath Goenka) (Director).	1 share of Rs. 1,000 each ..	Rs. 1,000.
Basantilal Bhagwandas (Mrs. Goenka).	62 shares of Rs. 1,000 each ..	Rs. 62,000.

The object of the new company was to acquire and take over the newspapers, the *Indian Express*, *Dhinamani* and *Andhra Prabha* at Madras, and *Eastern Express* and *Bharat* at Calcutta and all or any of the assets and liabilities of the Free Press of India, Ltd., Madras. There was no reference in the Memorandum of Association to the *Sunday Standard* or *Morning Standard*, as the latter company had not acquired the right to publish those papers by then, but there can be no doubt that the Express Company was formed with the specific object of taking over the entire business of the Free Press Company. It was admitted before the Income-tax Officer that Mahadeolal Dalmia who is the cousin of Ramnath Goenka was not the real owner of the shares in either of the two companies, but held them, merely *benami* for the benefit of Mr. Ramnath Goenka. But the same thing cannot be said of Bhagwandas Goenka or Basantilal Bhagwandas who should be treated as holding their respective shares in the Express Newspapers, Ltd., in their own right. On 31st August, 1946, the Free Press Company passed the following resolutions :

"1. Resolved to give the right of printing and publishing our dailies and other publications in Madras, Bombay and Calcutta to Express Newspapers, Ltd., from 1st Spetember, 1946.

2. Resolved to let the Machinery and Assets to Express Newspapers, Ltd., on a lease of Rs. 10,000 per month till the sale of these assets.

3. Resolved that Express Newspapers, Ltd., to collect the book debt and pay off the liabilities on our behalf."

It is not disputed that the Express Company took possession of the machinery, assets and liabilities of the Free Press Company, and started publishing the newspapers from 1st September, 1946. The staff and management continued as before. Mr. Ramnath Goenka was the managing director of both the concerns. He had a dominating, if not, the sole voice in the management of the two concerns.

Nearly two months after the lease of the machinery, etc., on 31st October, 1946, there was a General Body meeting of the Free Press Company. It was resolved that the company should be wound up voluntarily. Mr. N. V. B. Sankar Rao, an Advocate, practising at Madras, was appointed the liquidator and he was invested with all the powers as such liquidator, in addition to those granted under clauses (*b*), (*e*) and (*h*) of section 179 of the Indian Companies Act. One of the resolutions passed on that date stated :

"Resolved further that the liquidator shall not carry on business for any purpose and that the business of the Free Press of India (Madras), Ltd., be and the same is hereby discontinued with effect from this day."

Mr. Sankar Rao, who appears to have taken charge immediately wrote a letter to the Express Company on the following day (1st November, 1946) thus :

"I am the liquidator of the Free Press of India (Madras) Limited (in voluntary liquidation). I find that you have been negotiating for purchase of the assets at the value noted in the Director's letter of 31st August, 1946 and signified your acceptance in your letter of 1st September, 1949.'

The liquidator also intimated that the balance of the assets book debts, bank balance, etc., over the liabilities taken over by the Express Company was ascertained to be a sum of Rs. 19,36,000 and that that sum should be distributed to the two directors of the former company thus :

Mr. Ramnath Goenka ..	Rs. 11,78,000.
Mr. Mahadeolal Dalmia ..	Rs. 7,58,000.

These sums were duly credited in the books of the Express Company as directed by the liquidator, and with the consent of the two directors.

The valuation of assets and the sale thereof which resulted in the Free Press Company getting a sum of Rs. 19,36,000 secured for it a profit of Rs. 6,08,666. That

represented the difference between the written down value and the sale price of the machinery. . That sum would be distributed as follows :

Original cost price over the written down value of the machinery ..	Rs. 2,14,090.
Excess over the original cost price, that is, the difference between the sale price and original cost price.	Rs. 3,94,057.

The liquidation of the Free Press Company was duly published in the dailies and in *Fort St. George Gazette* in January, February, 1946. The notice of dissolution of the Free Press Company was filed with the Registrar of Joint Stock Companies on 12th April, 1948. The company was struck off the rolls of joint stock companies on 12th July, 1948.

In the meanwhile, proceedings for assessment of the Free Press Company for the assessment year 1947-48, were initiated. The year of account of the company ended with 31st December, 1946. General notice contemplated under section 22 (1) was published in May, 1947. On the 14th June, 1947, the Income-tax Officer, Second Circle, Madras, issued a notice to the Free Press Company under section 22 (2) of the Act. That notice was accepted by the Manager of the Express Newspapers, purporting to be the manager of the Free Press Company. It may be noticed, that, by that time, the latter company had been voluntarily wound up. It is not clear from the materials available whether the Free Press Company which went into liquidation had a manager, and whether that manager had any authority to receive or accept notices under section 22 (2) or to appoint an auditor. The liquidator, who was in charge of the affairs of the company, did not submit a return though he was bound to do. Nor was any notice under section 22 (2) served upon him. But, on 3rd January, 1948, Mr. Ramnath Goenka submitted a return on behalf of the Free Press Company, disclosing a profit of Rs. 2,50,818. The return specifically referred to the fact that the company was in voluntary liquidation, but there was no indication therein that Mr. Goenka had the auhority to submit the return. The return was prepared by auditors, M/s. Subramania Iyer & Co., who had been engaged in connection with the assessment proceedings. The assessment proceedings appear to have undergone several adjournments at the request of the Auditors, and the enquiry was completed in April, 1948. The liquidation proceedings had, however been duly communicated to the Income-tax Officer by the manager of the Free Press Company on 15th September, 1947. There was another communication by the Express Company to the same effect on 4th April, 1949. No notice, however, appears to have been taken of these communications, nor of the fact that the company had been struck off the rolls on 12th July, 1948. Perhaps the Income-tax Officer was misled by the prompt submission of the return for the assessment year 1947-48 by Mr. Ramnath Goenka, by the appearance of the Auditor before him during the enquiry, the payment of the tax under section 18-A, and there being no dispute about the liability to pay the tax. On 28th February, 1950, the Income-tax Officer assessed the Free Press Company Ltd., on a total income of Rs. 6,44,802. That amount was made up as follows :

Profits during the year of account ..	Rs. 36,136.
Profits under proviso 2 to section 10 (2) (vii) *viz.*, written down value of the machinery.	Rs. 2,14,090.
Capital gains under section 12-B that is, excess of the price obtained on sale over the original cost price.	Rs. 3,94,576.

The assessment order was served on Mr. Goenka, who, however returned the same on 27th March, 1950, repudiating his liability to pay the tax. It will be seen that, by that time, the company had been struck off from the register of the companies.

Thereupon, the Income-tax Officer, Second Circle, Madras, who had by then succeeded the Officer who made the assessment initiated (with the previous approval of the Commissioner) proceedings under section 34 read with section 26 (2) against the Express Company. The notice was issued on the footing that there had been a succession to the business of the Free Press Company by the Express Company,

and that the latter would as the successor, be liable to be assessed to tax for the assessment year.

That there was a succession by the Express Company to the Free Press Company by the sale of the business, cannot be seriously disputed. But the Express Company denied the liability. Overruling the objection, the Income-tax Officer, held, by his order, dated 4th April, 1951, that the Express Company would be liable to pay the tax under section 26 (2) of the Act, as the person succeeded, namely, the Free Press Company was not in existence, and could not be found. Following the order under section 26 (2), the Officer made an assessment of the taxable income at Rs. 6,44,802, the amount being made up of the three heads mentioned above. In doing so, the Officer purported to act under section 34 read with section 26 (2) of the Act, as the income of the former company had escaped assessment. The assessee, the Express Company, appealed to the Appellate Assistant Commissioner against the two orders, *viz.*, that relating to the initiation of the proceedings under section 26 (2) as well as that in regard to assessment under section 34. The appeals failed. There were further appeals to the Appellate Tribunal. Various contentions were raised before the Tribunal. They were : (1) The Express Company did not succeed to the business of the Free Press Company. (2) The notice issued under section 34 of the Act to the Express Company was invalid, inasmuch as the assessment made by the Income-tax Officer on the Free Press Company on 28th February, 1950, was subsisting. (3) The Second Proviso to section 10 (2) (vii) of the Act did not apply to the case, and, therefore, the portion of the profit, *viz.*, Rs. 2,14,090 should not be treated as the business profit of the Free Press Company. (4). The capital gains made by the Free Press Company, namely, Rs. 3,94,576, on the transfer of its assets to the Express Company were not liable to tax under the Third Proviso to section 12-B (1). (5) Even if such capital gains were assessable to income-tax, the successor under section 26 (2) could not be made liable for the same, as the profits did not represent the profits of the business which was transferred.

The appeal was first heard by two members of the Tribunal, namely, Messrs. Malhotra and Karkhania. They agreed that the sum of Rs. 2,14,090 which represented the difference between the cost price and the written down value of the machinery sold to the Express Company, should not be assessed to tax, as the Proviso 2 to section 10 (2) (vii) would not apply where the sale of assets was not made when the company was carrying on business, but only, after cessation of such business. There was a difference of opinion between them on two questions. The former held that it would be open to the Income-tax Officer, in the circumstances of the case, to initiate proceedings under section 34 read with section 26 (2) but that the capital gains of Rs. 3,94,576 would not be liable to be included in the assessment against the successor under section 12-B of the Act. He, therefore, directed that the sum of Rs. 2,14,090 and Rs. 3,94,576 should be excluded from the assessment of the successor company. Mr. Karkhania, however, dissented from that view. In his opinion, the capital gain would be liable to tax, but that proceedings under section 34 read with section 26 (2) was not properly initiated, and that the entire assessment proceedings were null and void. The matter was then referred to the President who agreed with Mr. Malhotra on the propriety of the initiation of the proceedings under section 34 read with section 26 (2). He also held that the capital gain of Rs. 3,94,576 was liable to be taxed. The following questions were, thereupon, referred to this Court under section 66 (1) of the Act:

"Whether the assessment made by the Income-tax Officer on 23rd February, 1950, was valid in law ?

Whether the notices under section 34 (1) of the Act issued by the Income-tax Officer on 4th April, 1951, was validly issued ?

Whether the assessment made by the Income-tax Officer on 17th July, 1951, is a valid assessment ?

Whether the Free Press Company made a business profit of Rs. 2,14,090 under the Proviso to section 10 (2) (vii) of the Act ?

5. Whether the capital gain of Rs. 3,94,576 is not liable to tax in view of the third proviso to section 12-B (1) of the Act ?

6. Whether the capital gain made by the Free Press Company is liable to be assessed in the hands of the Express Company under section 26 (2) of the Act ?"

The questions referred substantially fall under three groups. Questions 1 to 3 cover practically the same ground, namely, the validity of the initiation and final assessment under section 34 read with section 26 (2). Question 4, raised at the instance of the Department, relates to the assessability of the sum of Rs. 2,14,090 under the second proviso to section 10 (2) (vii). Questions 5 and 6 relate to the taxability of the capital gain made by the Free Press Company as against the successor, the Express Company.

That the Express Company, the assessee, succeeded to the business of the Free Press of India (Madras) Ltd., is no longer in dispute. There was, however, some controversy on the question as to what exactly was the date of succession, the contention for the assessee being that the succession was only on 1st November, 1946, a day after the sale of the machinery and assets ; this matter does not present much difficulty, as the succession by the assessee to the business of the former company was by virtue of the sale and would, therefore, be co-terminus with it.

On behalf of the assessee, it was contended that the assessment of the Free Press Company on 28th February, 1950, was a valid one, and there could be no justification for proceedings under section 34 for any escape of assessment, as there was none. It was further contended that the non-existence of the former company could not invalidate an assessment lawfully commenced by a valid return made on behalf of the Free Press Company. Even assuming that such an assessment was invalid, it was contended that the Income-tax Officer had no jurisdiction to go behind his own order of assessment, and initiate proceedings, under section 34 read with section 26 (2).

It has, therefore, first to be considered whether the proceedings under section 34 were properly initiated. The power to assess under section 34 (1) would exist where there has been no assessment or where there has been an escape of assessment during the relevant assessment year. An invalid assessment would mean that there was no assessment at all. Such invalidity may be the result of there being no valid return, or there being a valid return, but the assessment thereon being illegal or void. A case where there is no return at all by the assessee will be covered by the terms of section 34 itself. A return which is purported to be filed on behalf of an assessee by a person not entitled so to act, would be no return in the eye of law, and the assessment thereon would be equally invalid. Such a case will have to be treated as one where the assessee had failed to make a return. Has there been a valid return in the present case?

Mr. Ramnath Goenka was the Managing Director of the Free Press Company and there can be no doubt that he could represent the company in the matter of submission of return for income-tax for the company, so long as it was in existence. But, on the liquidation of the company, the liquidator alone could represent it. The liquidator unfortunately did not file the return. No notices, as stated already was served on him under section 22 (2). Whether the notice served on a director of the company would be valid or whether a director could (when the company was in the process of voluntary liquidation) either voluntarily or in response to a notice under section 22 (2) served on him or the company, submit a return would depend on his authority to do so either under the Companies Act or under any power expressly reserved to him by the General Body or delegated to him by the liquidator. Section 208-A, sub-clause (2) of the Indian Companies Act (VII of 1913) stated :

"On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof."

The resolution of the Free Press Company, dated 31st October, 1946, which effected a voluntary winding up of the company, does not indicate that any power was reserved with a director or Managing Director to act on behalf of the com-

pany. Nor is it the case of the assessee that there was a delegation of any power by the liquidator in favour of Mr. Ramnath Goenka. But Mr. Karkania has stated in his order thus:

> "Before the return filed by Shri R. N. Goenka could be said to be an invalid one it must be found as a fact that the liquidator had not sanctioned the continuance of the powers of Shri R. N. Goenka for the purpose of filing the return. This is purely a question of fact. On going through the record I find that no evidence was recorded by the Income-tax authorities on this point. It would not have been difficult for the Income-tax authorities to examine either Shri R. N. Goenka or the liquidator. Therefore before the assessment made on the Free Press of India (Madras) Ltd., was dubbed as nullity the Income-tax authorities should have considered all these facts."

Great reliance is placed on behalf of the assessee on the above observations. We cannot, however, accept the argument. The normal rule is that, on liquidation, all the powers of the directors cease, and that it is necessary that a director while acting on behalf of the company, should either have been authorised by a resolution of the company, or at least by the liquidator. It is, no doubt, true that the authority of the liquidator need not be in writing. But the existence of such authority can never be a matter of assumption. The Appellate Assistant Commissioner held that Mr. Ramnath Goenka had no power to act on behalf of the defunct company in any manner whatsoever, and his submission of the return for the company after it had gone into liquidation was totally unauthorised. There is really no material for coming to any contrary conclusion. The contention that it was for the Department to prove that the return was invalid, cannot be accepted, particularly when the person who could have given evidence is himself the Managing Director of the assessee-company, and he could, if he so chose, have given evidence on the matter. On that conclusion, it follows that there was no valid return to support the assessment made on 23rd February, 1950, on the Free Press Company.

Mr. R. Venkataraman, the learned counsel appearing for the assessee, contended that, independent of the validity of the return, the Income-tax Officer would have jurisdiction to assess the Free Press Company by reason of the publication of notice under section 22 (1) of the Act, and that, notwithstanding the invalidity of the return submitted by Mr. Ramnath Goenka, the assessment should be held to be valid. The learned counsel sought to base his contention on the decisions of the Privy Council in *Maharajadhiraj* v. *Commissioner of Income-tax*[1], where their Lordships of the Privy Council held that the word "assessment" was not confined in the Act to the definite act of making an order of assessment, but would refer to the course of any assessment and that the words "at the time of making assessment" in section 22 (2) would mean "in the course of the process of assessment." A public notice under section 22 (1) was, therefore, claimed as the starting point of an assessment, so as to render all assessments as properly initiated; and once there was a proper assumption of jurisdiction it was contended, subsequent illegality of the assessment would entail only a fresh assessment under section 23 and not warrant proceedings under section 34 as if there had been an escape of assessment. The two assumptions on which the argument was based are: (1) that assessment proceedings with respect to an individual commence with the publication of a public notice under section 22 (1) and (2) that once there has been a proper assumption of the jurisdiction to assess, any illegality in the final order of assessment could only invalidate that portion of the assessment proceedings so as to entitle the officer to start the assessment over again and not to initiate proceedings under section 34, whatever be the nature of the illegality. We shall consider the validity of these assumptions seriatim.

It has been held that the word 'assessment' has been sometimes used in the Act as comprehending the entire procedure prescribed for imposing the tax liability on the assessee. But when does an assessment proceeding actually start? Section 22 (1) enjoins on the Income-tax Officer to issue a public notice in the first month of each financial year requiring every person who had received the minimum taxable income in the previous year to submit a return. The failure on the part

1. (1934) 67 M.L.J. 422 : L.R. 61 I.A. 312 : I.L.R. 13 Pat. 607 : 2 I.T.R. 345 (P.C.).

of an individual having a taxable income to submit a return within the period allowed will expose him to a penalty under section 28 (1) or to a punishment under section 51 (*e*). That, however, has nothing to do with the jurisdiction of the Income-tax Officer to assess an individual. For instance, he cannot assess an individual immediately after the time limited in the notice, unless there is a return or there has been an individual notice under section 22 (2). What, therefore, invests the officer with a jurisdiction is the existence of a voluntary return by the assessee or the service of a notice under section 22 (2) on the individual concerned. In *Commissioner of Agricultural Income-tax* v. *Sultan Ali*,[1] Bench of the Calcutta High Court was concerned with the interpretation of similar provision in the Bengal Agricultural Income-tax Act (IV of 1944). The learned Judges held that the effect of a general notice under section 24 (1) (corresponding to section 22 (1) of the Income-tax Act) was not to commence the assessment. There was a further question in that case, *viz.*, whether, in the absence of an individual notice, under a provision similar to section 22 (2), the Officer could initiate proceeding on the footing of there having been an escape of assessment as under section 34. That question was answered in the negative. This answer to the latter question is not in accord with the decision of this Court in *Govindaraju Iyer* v. *Commissioner of Income-tax*[2]. It is unnecessary to consider which of the two views is correct for the purpose of the decision of this case. The decision of the Calcutta High Court that a mere publication of a general notice under section 22 (1) could not be held to commence assessment proceedings against an individual, is, with great respect to the learned Judges, in our opinion, correct.

The question then arises whether there has been in this case a proper initiation of the assessment proceedings either by reason of the service of notice under section 22 (2) or the submission of a voluntary return. We have held earlier in this judgment that there has been no proper return which could be said to be a voluntary return on behalf of the Free Press Company. The learned counsel for the assessee contended that, there having been an issue of a notice under section 22 (2), that notice, would give sufficient jurisdiction to the Income-tax Officer to make the assessment that he did on 28th February, 1950. That notice, as we have already stated, was not served on the liquidator. Nor was it proved that the manager of the Express Company who accepted the notice, had the authority of the liquidator. There can be no proper assumption of jurisdiction, unless there is a service of notice on the assessee: a mere issue of notice would not be sufficient. It may be that the procedure relating to the assessment of an individual can be said to commence from the time of issue of the notice. But service of notice being an essential pre-requisite for an authority to assess an individual to tax, the absence of such service would nullify the entire assessment proceedings as one without jurisdiction. The case cannot be treated either as one where there was a voluntary return on behalf of the company, as the only return that was purported to be filed on its behalf, was that by Mr. Goenka who, as we held, is not shown to have the necessary authority. There having been no proper initiation of proceedings, the individual concerned should be deemed to have escaped assessment. This conclusion is sufficient to dispose of the contention that there was no jurisdiction in the Income-tax Officer to start assessment proceedings on the footing that there had been an escape of assessment.

But will the exercise of the powers under section 34 be valid even if one were to assume that the return submitted by Mr. Goenka was authorized ?

To answer that question it is first necessary to consider whether the assessment on the basis of the return was valid. The learned counsel for the assessee urged that the assessment could not be held to be invalid for the mere reason that the Free Press Company was not in existence on the date of assessment, and that the rules of abatement of suits under the Civil Procedure Code would not apply to assessment proceedings under the Income-tax Act, as the Income-tax Officer was not a Court:

1. (1951) 20 I.T.R. 432. I.L.R. (1949) Mad. 624.
2. (1948) 2 M.L.J. 436 : 16 I.T.R. 391 :

and that, even if it were to be held that the rules as to abatement would apply to such proceedings, the enquiry in this case having been concluded on 3rd April, 1948, the company then being in existence, the assessment would be valid on the principle recognised in Order 22, rule 6, Civil Procedure Code. We agree that the rules as to abatement laid down by the Civil Procedure Code will not apply to the proceedings before the Income-tax Officer. But the principle of representation applicable to regular suits and proceedings under the Code of Civil Procedure would well apply to such proceedings. Vide *Alfred* v. *Income-tax Officer*[1]. That apart, the existence of an assessee is essential for an assessment. There cannot be an assessment of non-existent person. The definition of the word assessee in section 2 (2) would obviously apply only to a living person. The rule contained in Order, 22, rule 6 cannot, therefore, apply to the assessment proceedings. The assessment in the instant case was made long after the Free Press Company was struck off from the Register of the Companies, and it could not be valid.

The contention on behalf of the assessee was then directed to the procedure to be adopted in case the assessment was found to be invalid. It was said that the Department should first get the Free Press Company restored to the register of the companies, and start assessment proceedings afresh : and if, on account of the law of limitation or otherwise, that could not so be done, there was no remedy for the Department. As a basis for the argument, reliance was placed on *Sir Rajendranath* v. *Commissioner of Income-tax.*[2] In that case Messrs. Burn & Company had submitted a return of their income for a certain year. The Income-tax authorities thought that Messrs. Martin & Company had purchased Burn & Company, and made assessment on Martin & Company, in respect of the income of not merely of that company but of Burn & Company as well. In the subsequent proceedings against the assessment of Martin & Company, it was held that the two companies should have been separately assessed, with the result that the income of Burn & Company was eliminated from that of the assessable income of Martin & Company. Subsequenlty, proceedings were started under section 34 against Burn & Company. The Privy Council held that the income which had been duly returned for assessment could not be said to have escaped assessment, though such income had not been taxed within the assessment year. In *Ranchhoddas Karsondas* v. *Commissioner of Income-tax*[3], a notice under section 22 (1) for the assessment year 1945-46 was published on 1-5-1945. However, no notice was issued to the assessee under section 22 (2). Nearly 4½ years thereafter, the assessee made a return on 5-1-1950, showing less than the taxable income. There was no assessment on that return within the year. The Income-tax Department initiated proceedings under section 34 on the ground that certain monies standing in the name of his wife were not included in the return. It was held that two clear options were open to the Department : (1) to issue a notice under section 22 (2) and if no return was made within the time fixed by that notice, to proceed under section 23 (4) ; and (2) if no return was made within the time prescribed under the notice under section 22 (1) , to proceed under section 34. But if the Department took no action at all and permitted the assessee to make a voluntary return under section 22 (3), it was not open to it to proceed under section 34, and the voluntary return which had been made must be disposed of and the income of the assessee must be assessed, as laid down under section 23. In *Mannalal Modi* v. *Commissioner of Income-tax*;[4] the assessee made a return of income as an individual to the territorial Income-tax Officer. That Officer transferred the assessment papers to the Income-tax Officer, Special Circle, as the joint family to which the assessee once belonged was being assessed by that officer, and as the partition in the family of the assessee had not then been recognised. The partition in the assessee's family was, however, recognised later, and the assessee's individual assessment papers were sent back to the officer from whom it came. In the meanwhile, the time within which the assessment could be made had run out. Thereupon

1. (1957) 2 M.L.J. 290.
2. (1933) 66 M.L.J. 121 : L.R. 61 I.A. 10 : I.L.R. 61 Cal. 285 : 2 I.T.R. 71 (P.C.).
3. (1955) 26 I.T.R. 105.
4. (1955) 29 I.T.R. 30.

a notice was issued under section 34. It was held that the return filed by the assessee was still pending, that it could not be said that the income had escaped assessment, and that, therefore, the Income-tax Officer had no jurisdiction to initiate proceedings under section 34. On the strength of these decisions, it was contended that the effect of the finding that the assessment was invalid, would not necessarily mean that there had been an escape of assessment. It is, however, unnecessary, for the purpose of the present case, to consider the principle laid down in the cases mentioned above, in view of the fact that a fresh assessment is not possible on the original return, as the company itself had ceased to exist. Further the proceedings initiated in this case is against the successor company, and its liability depends on the terms of section 26 (2), to which we shall presently refer. It is undisputed that there has been a succession to the business of the Free Press Company by the Express Company: and if there is succession section 26 (2) would come into operation. Section 26 (2) states:

"Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub-section (4) of section 25, each be assessed in respect of his actual share, if any of the income, profits and gains of the previous year:

Provided that, when the person succeeded in the business, profession or vocation cannot be found, the assessment of the profits of the year in which the succession took place up to the date of succession, and for the year preceding that year shall be made on the person succeeding him in like manner and to the same amount, as it would have been made on the person succeeded or when the tax in respect of the assessment made for either of such years assessed on the person succeeded cannot be recovered from him, it shall be payable by and recoverable from the person succeeding, and such person shall be entitled to recover from the person succeeded the amount of any tax so paid."

The substantive part of the section lays down the rule that the successor is not liable to tax in respect of the business transferred, anterior to the date of transfer. This is but recognition of the principle that a person is liable for tax only on the profits made by him. If, therefore, there has been a succession to the business during the year of account, the transferor or the person succeeded to will be liable on the profits made up to the date of succession, and the transferee or the person succeeding for the profits made thereafter. The proviso, however, recognises two exceptions to the rule: (*a*) when the predecessor cannot be found: in such a case the statute makes it mandatory that the assessment shall be made on the successor for the entire year and the previous year. This would obviously refer to a case where there had been no assessment (valid assessment on the predecessor); (*b*) where the tax assessed on the predecesser cannot be recovered from him, there is similar liability. It is now well settled that whenever there is succession to business, the provisions of section 26 (2) would apply. Vide *Commissioner of Income-tax* v. *Ramaswami Iyengar*[1]. But in order that the first part of the proviso could apply, it should be shown that the person succeeded could not be found. A company which is struck off from the register is one which could not be found. The company, unlike a partnership, has a legal existence independent of its shareholders. In the case of partnership, a mere dissolution of the firm cannot mean that the assessee could not be found so long as the partners could be found. It would be different in the case of a company; if the company is struck off the register it will be a person who could not be found notwithstanding the fact that its members exist. On the date of the notice under section 22 (2), the Free Press Company was in existence, though in liquidation. When, however, it was struck off the register, it had ceased to exist, and the only person on whom the assessment could be made, or should be made under section 26 (2), was the Express Company.

This was, however, not what was done on 28th February, 1950. The Income-tax Officer proceeded to assess the predecessor company contrary to the mandatory provisions of section 26 (2) proviso, whereunder the assessment is to be made only on the successor. The successor, thus, escaped assessment.

1. (1943) 2 M.L.J. 582 : I.L.R. (1944) Mad. 639 : 11 I.T.R. 610.

The learned counsel for the assessee contended that the Income-tax Officer had no jurisdiction to set aside his own order of assessment made on 28th February, 1950, and initiate proceedings under section 34. According to the learned counsel, the Department should have set aside the order of assessment by taking appropriate proceedings under sections 33 and 33-A, before starting proceedings under section 26 (2), and that, in any event, the officer could not himself proceed on the basis that his earlier assessment order was invalid. The order of assessment made on 28th February, 1950 is contrary to section 26 (2), and, therefore, invalid. We are of opinion that the invalidity of that kind could be taken note of by the Officer himself to initiate proceedings under section 34. Further, the liability of the successor arises on the disappearance of the person succeeded. That is a statutory liability, independent of the liability of the latter. If it is found that the successor in such a case has not been assessed, it would be a case of an escape of assessment. The Income-tax Officer would, therefore, have jurisdiction to initiate proceedings under section 34. Our answer to question No. 1 is in the negative, and questions Nos. 2 and 3 in the affirmative.

The next question to be considered is the extent, to which the assessee is liable to be taxed under the provision of section 26 (2) of the Act. There is no doubt that the Express Company would be liable for the actual income of the profits of the business earned by the Free Press Company in the year of account. Earlier in the judgment we have referred to the fact that, in addition to the actual profits of the business, the predecessor company made a profit of Rs. 6,08,666 by the sale of the machinery to the successor company. That profit included an item of Rs. 2,14,090, the difference between the written down value and the original cost price of the machinery. The liability of this amount to be taxed would depend upon the construction of the provision of second proviso to section 10 (2) (*vii*). The balance of the profits, *viz*., a sum of Rs. 3,94,576, would represent the excess of the price realised by the sale of machinery over the original cost price to the Free Press Company. This sum is a capital gain, and would come within the provisions of section 12-B of the Act.

Section 26 only prescribes who in case of a succession to business is liable to pay the tax and provides for a vicarious liability in certain cases, the mode of computation of such income being left to be determined under section 10. In the computation of income from business under that section, certain allowances are made. One such is the depreciation allowance in respect of buildings, machinery, plant, etc. Where, however, there has been a sale of machinery, a balancing allowance representing the deficiency of the sale price over the written down value is allowed as a deduction : *per contra* where the sale results in an excess over the written down value, that excess up to the limit of the cost price would be taxed as a profit. The allowance or assessment is subject to the conditions laid down in section 10 (2) (*vii*). That provision, as it existed during the year of the assessment, ran as follows :—

"(1) The tax shall be payable by an assessee under the head 'profits and gains of business, profession or vocation' in respect of the profits or gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely, (i) to (vi). . . . . .

(vii) in respect of any machinery or plant which has been sold or discarded, the amount by which the written down value of the machinery or plant exceeds the amount for which the machinery or plant is actually sold or its scrap value :

Provided that such amount is actually written off in the books of the assessee :

Provided further that where the amount for which any such machinery or plant is sold exceeds the written down value, the excess shall be deemed to be profits of the previous year in which the sale took place."

(*The rest of the section is omitted as being unnecessary for the present purpose*).

The principle underlying the 2nd proviso to the section is that, depreciation to the limit of the written down value of the building or machinery having been

claimed in previous years and relief from taxation obtained, it is but proper that, if ultimately it were found that there had been actually no such depreciation but something more than the written down value was obtained on the sale of the machinery, that excess over the written down value should be made liable to tax. As pointed out by Mr. Kanga in his Commentaries on the Income-tax Act, at page 355,

> "The Revenue takes back what it had given by way of depreciation allowance in preceding years, for otherwise the result would be to recoup the assessee an amount in excess of his original cost."

When, therefore, a building or machinery belonging to a business is sold, the excess of the price obtained in such sale over the written down value would be deemed to be income up to the limit of the original cost price. Anything obtained over and above the original cost price would be deemed to be capital gain. In *Crown Flour Mills* v. *Commissioner of Income-tax*[1], the Punjab High Court held that the excess of the sale price of depreciable assets over their written down value to the extent of the depreciation allowed in the past, limited to the original cost price, could not be considered as either casual or non-recurring ; but, under the Second Proviso to section 10 (2) (*vii*), it should be deemed to be assessable income. One contention on behalf of the assessee was that under the provisions of section 10 (2) (*vii*) the sale which resulted in the profit should have taken place while the company was carrying on business, and that condition was not satisfied in the present case, as the Free Press Company had ceased to carry on any business on 31st August, 1946. The sale effected on 1st November, 1946 being only one after cessation of the business, any profit obtained thereunder could not be said to be income from business or revenue profits, but a capital one. It was said that the only business of the Free Press Company was to print and publish dailies, and that activity had stopped from 31st August, 1946. The company had, on that date, no doubt, leased its machinery to the new company : what it could do and did do thereafter was only to collect the rents. This, it was contended, would not amount to the carrying on the business. Reference was made to the decision in *Narain Swadeshi Weaving Mills* v. *Commissioner of E. P.T.*[2], to show that letting out of plant and machinery by an assessee could not be held to fall within the definition of the term "business" under section 2 (5). That may be so. But in the present case the sale of the machinery took place during the year of account, and it was used by the Free Press Company for at least a part of the year. This would be sufficient to attract the liability. The learned counsel for the assessee is on a firmer ground when he contended that the sale being made in process of winding up of the company section 10 (2) (*vii*) will not apply. The Second Proviso to section 10 (2) (*vii*) could be invoked only where the sale was one made in the course of business carried on by the predecessor. Where the sale is a closing down sale, that profit could not be brought to tax. In *Liquidators of Pursai Ltd.* v. *Commissioner of Income-tax*[3], the Supreme Court held that, where in a case the sale of machinery and plant was a step in the process of winding up of its business, the intention of the company having been to discontinue the business, such a sale was not an operation in furtherance of the business carried on by the company, but was only a realisation of its assets in the process of gradual winding up of its business which eventually terminated in the voluntary liquidation of the company, and the provision of section 10 (2) (*vii*) would not apply. In the present case, the formation of the new company was to take over the business of the old company. The lease of the machinery, the transfer of the right to carry on the business of publishing newspapers, and the ultimate sale of the machinery were part of the same scheme for winding up the Free Press Company. The sale of machinery was undoubtedly a closing down sale, and the profit earned therein could not come in for assessment under section 10 (2) (*vii*). We, therefore, answer question No. 4 in the negative.

Questions 5 and 6 relate to the profit of Rs. 3,94,576 made by the Free Press Company by the sale of machinery, the amount being the excess of the sale price

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1. (1955) 29 I.T.R. 733.
2. (1955) 26 I.T.R. 765.
3. (1954) S.C.J. 294 : (1954) S.C.R. 767 25 I.T.R. 265.

of the machinery over its original cost price. The Tribunal ultimately held that it was taxable. The question whether the successor company would be liable to be assessed on the capital gain made by the company to whom it succeeded, would depend largely on the construction of section 26 (2). Under section 26 (2), the liability to tax is in respect of profits or gains in the business, profession or vocation, to which there has been succession. The learned counsel for the assessee contended that, where capital gains arose to the predecessor as a result of succession, *i.e.*, by reason of the sale which itself caused the succession, the profit obtained in such sale could not be considered as a business profit, being one which was obtained by giving up the business rather than by doing it. Another reason urged was that, as the profits accrued long after the cessation of business, it could not be a business profit. Incidentally it was also contended that the date of succession was on 31st October, 1946, while the actual sale of the machinery took place on 1st November, 1946, and, the capital profit being a post succession one, the successor company would not be liable to be taxed thereon. This aspect of the matter was not raised before the Appellate Tribunal. The Appellate Assistant Commissioner held that the succession was on 1st November, 1946 ; this was not challenged before the Tribunal. Question No. 6, is, no doubt, wide enough to cover this point as well. It is, however, unnecessary to pursue this matter, as admittedly succession is the result of the sale, being coterminous with it. The profit arose by reason of succession.

It is contended, however, that the only profit that could come in for assessment under section 26 (2), is the profit of the business for the previous year of the business transferred, and not any other kind of profit. On the other hand, the case for the department is that words " income, profits and gains " occurring in section 26 (2) comprise not only those taxable under that head, but also any other income of the profession, all those intimately connected with or related to it, *e.g.*, the capital gain. Under section 6 of the Act, the income of an assessee is classified under six heads according to the character of the source. Income from business, profession or vocation is a distinct head of income dealt with therein. When, therefore, section 26 (2) refers to income from business, profession or vocation, it should *prima facie* be held to relate to that head of income, *i.e.*, that which is referred to in section 6 (*iv*). Capital gain referred to in section 6 (*vi*) is another head of the income independent of profits from business. It is now well settled that income which is chargeable under one head, cannot be so done under a different head, and that the various heads of income specified in section 6 are distinct and mutually exclusive. In *United Commercial Bank Ltd.* v. *Commissioner of Income-tax*[1], a question arose under section 24 (2) as to whether income from securities under section 8 of the Act could be brought under a different head of income, namely, profits or gains in business, profession or vocation under section 10, where the securities formed part of the trading assets in the assessee's banking business. The Supreme Court, after reviewing the scheme of the various charging provisions, held that, although the income of an assessee is one, and the various sections *i.e.*, sections 7 to 12 are modes in which the income-tax is to be levied, the sections are mutually exclusive, and that income received as interest on securities which would come under section 8 could not come under section 10 which deals with profits and gains of business. In *Commissioner of Income-tax* v. *Chugandass & Co.*[2] a similar question fell to be considered for granting relief to an assessee firm under section 25 (3) after its dissolution. The assessee was a dealer in securities, and as such the securities which it possessed constituted the stock-in-trade of its business. The firm had paid income-tax under the Indian Income-tax Act, 1918. The question was whether the interest received on the securities held by the assessee formed part of the assessee's business income for the purpose of claiming relief under section 25 (3). There was difference of opinion between Tendolkar and S. T. Desai, JJ. The case was then referred to K. T. Desai, J. The majority of the Judges held that the interest on the securities which formed the stock in trade of the assessee's

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1. (1958) S.C.J. 46 : (1958) 1 M.L.J. (S.C.) 26 : (1958) 1 An.W.R. (S.C.) 26 : 32 I.T.R. 688.
2. (1958) 38 I.T.R. 241.

business, was part of the income, profits or gains of that business within the meaning of section 25 (3), and the assessee was entitled to exemption to tax in respect thereof under that provision. The substantial question in that case was as to what was the exact meaning to be given to the expression " business " under section 25 (3). It was held that the word would refer to the activity which was styled as business, and the interest earned on the securities which constituted the stock in trade of that business would include the profits and income made in connection with that activity, *i.e.*, the business under whatever head the same might have to be shown. This decision is relied on as supporting the view that the terms " profits of business " employed in section 26 (2) would comprehend all other profits connected with the business, though such profits might fall under different heads for charge. The learned counsel for the assessee, however criticised the judgment of the Bombay High Court as running contrary to the principles laid down in *Kothari* v. *Commissioner of Income-tax*[1] and in *United Commercial Bank Ltd.* v. *Commissioner of Income-tax*[2]. It is, however, not necessary, for the purpose of this case, to consider whether that case was rightly decided. *Commissioner of Income-tax* v. *Chugandass & Co.*[3] was concerned with the interpretation of section 25 (3) of the Indian Income-tax Act in a case where the purchase or sale of securities was as much the assessee's business as earning interest on the securities which constituted part of stock in trade. It was held, that, where the assessee firm had paid tax on its business under the Indian Income-tax Act of 1918, he would be entitled to relief under section 25 (3) on its dissolution, and, for that purpose, the income, profits and gains of a business should include the interest earned on securities, as those securities formed part of the stock in trade. It cannot be said that machinery in the present case was a part of the stock in trade of the Free Press Company. That Company was not a dealer in machinery, and any profit that might be obtained by the sale of such machinery could not be said to arise out of the business activity of the company. We are not prepared to read the decision in *Commissioner of Income-tax* v. *Chugandass*[3], as laying down that the words income, profits and gains of a business would include not merely of the business, etc., as such but also those falling under other distinct heads of income for the mere reason that there is some connection between the two. In our opinion, the Indian Income-tax Act designedly classified and used different words or phrases or nomenclatures for expressing the various heads or classifications of income. It cannot be assumed that the legislature had lost sight of the distinction which it made practically at the beginning of the enactment and intended to convey a different or wider meaning for the term, profits and gains of business in section 26 (2). Those words standing by themselves may perhaps justify an extended meaning, but it is an accepted rule of construction that, in order to ascertain the true meaning, it is right not only to look at the provision, but at similar words employed in the statute which would throw light on it or even show that a more limited meaning was intended. The words, " profits and gains from a business " have a distinct meaning under the Act, and it cannot include another equally distinct concept recognised by the Act, *viz.*, a capital gain. Further, section 26 (2) which makes the successor vicariously liable for the profits earned by the predecessor, should be strictly construed. 'The income, profits and gains of the business' referred to therein should therefore be limited in their meaning to the head of income referred to in section 6 (*iv*), and cannot include a capital gain. The successor would not be liable to be taxed on the capital gain made by the predecessor company.

Learned counsel for the assessee contended that the sale of machinery by the Free Press Company was effected for the purpose of distribution of its capital assets amongst its members, and that, by virtue of the Proviso to section 12-B, such sale could not be held to come within that section so as to render the capital gain assessable. The decision in *Sri Kannan Rice Mills* v. *Commissioner of Income-tax*[4] is against the contention. That point was, therefore, not pursued further; this

1. A.I.R. 1952 Mad. 227 : 20 I.T.R. 579.
2. (1958) S.C.J. 46 : (1958) 1 M.L.J. (S.C.) 26 : (1958) 1 An.W.R. (S.C.) 26 : 32 I.T.R. 688.
3. (1958) 38 I.T.R. 241.
4. (1955) 26 I.T.R. 351

however must not be understood as indicating that the learned counsel gave up that point. In view of our conclusion that capital gain could not be deemed as profits from business, profession or vocation, the assessee would not be liable to be taxed on such profits made by the predecessor.

We answer question 5 in the affirmative, and question 6 in the negative. There will be no order as to costs.

V.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The United Nilgiris Services Ltd., Kotagiri .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 34 (1) (b)—Initiation of proceedings underfor reopening assessment for 1947-48 after the expiry of more than four years in 1954—Whether barred by limitation—Scope and effect of amended Second Proviso to section 34 (3).

The initiation of proceedings under section 34 of the Income-tax Act with the issue of a notice, dated 20th January, 1954, made after four years after 31st March, 1948, when the assessment year 1947-1948 came to a close was barred by limitation. As the amendment of the law of limitation took effect only on 1st April, 1952 and as under the law of limitation which was in force before that date the right of the Department to initiate proceedings against the assessee under section 34 (1) (*b*) had lapsed by 31st March, 1952, the Department could not have the benefit of the amendment, even if the amended Second Proviso to section 34 (3) covered the case of the assessee.

The unamended Proviso did not lift the bar of the four year period of limitation prescribed by section 34 (1) (*b*).

Muhammad Hussain Nachiar Ammal v. *Commissioner of Income-tax, Madras*, (1956) 29 I.T.R 848 : (1956) 2 M.L.J. 139, followed.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras, under section 66 (1) of the Indian Income-tax Act, 1922 (XI of 1922), in R.A. No. 279 of 1955-1956 on its file for decision on the following question of law, *viz.*,

"Whether the re-assessment made on the assessee for the assessment year 1947-48 is valid?"

K. Ramagopal, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax and *S. Ranganathan*, for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The assessment of the assessee-Company, referred to as the new company in the Statement of the case, for the assessment year 1947-48 was reopend under section 34 of the Income-tax Act on the ground, that excessive relief by way of depreciation allowances had been granted to the assessee in the original assessment when it was completed on 22nd November, 1950. The validity of that reassessment, which was the issue raised in the question referred to this Court under section 66 (1) of the Act, was challenged by the learned counsel for the assessee on three grounds : (1) The initiation of proceedings under section 34 with the issue of the notice, dated 20th January, 1954, made four years after 31st March, 1948, when the assessment year 1947-48 came to a close was barred by limitation. (2) The assessee's case did not fall within the scope of the Second Proviso of section 34 (3) of the Act as it now stands amended. (3) If the Proviso did apply, it was an unenforceable statutory provision, as it offended against the fundamental right of equal protection of laws guaranteed by Article 14 of the Constitution and was therefore void under Article 13.

* Case Referred No. 99 of 1955. 23rd March, 1960.
(3rd Chaitra, 1882—Saka.)

Since in our opinion the first contention itself is well founded, we do not propose to deal with the second and third contentions.

The relevant dates for deciding the issue of limitation are as follow. The original assessment was completed on 21st November, 1950, when the alleged excessive relief was granted to the assessee. It was not disputed that, if the case of the assessee did not fall within the scope of the Second Proviso to section 34 (3), as it now stands amended, the period of limitation for reopening the assessment under section 34 (1) (*b*) was only four years, and that period ended on 31st March, 1952. The notice under section 34 (1) (*b*) was issued only on 20th January, 1954. That excessive relief had been granted to the assessee in the original assessment was discovered only on 11th September, 1952, on the termination of the assessment proceedings of the old company, whose business the assessee, the new company, took over. The amended Second Proviso to section 34 (3) came into force on 1st April 1952 (*see* section 1 (2) of the Amending Act XXV of 1953).

Assuming for the present that the assessee's case would fall within the scope of the Second Proviso to section 34 (3), as it now stands amended, and assuming further that it is an enforceable statutory provision, the position is, that it came into force only on 1st April, 1952, that is, after the expiry of the statutory four years' period of limitation, which was the law in force up to and inclusive of 31st March, 1952. The effect of the amended Second Proviso of section 34 (3) would be to abrogate limitation for cases which came within its scope and to prescribe no period of limitation at all, notwithstanding, anything else stated in section 34 (1) of the Act. If the right to reopen the assessment of the assessee under section 34 (1) (*b*) lapsed on 31st March, 1952, under the law of limitation as it stood on that date, the statutory amendment of the period of limitation which took effect only on 1st April, 1952, would not apply to that case. It was as well-settled proposition of law that this Court pointed out in *Muhammad Hussain Nachiar Ammal* v. *Commissioner of Income-tax, Madras*[1]:

"It is well-settled that the law of limitation being procedural law its provisions operate retrospectively in the sense that they apply to causes of action which arose before that enactment. But it is equally well established that if the right to sue has become barred by the provisions of the Act then in force on the date of the coming into force of the later enactment, then such a barred right is not revived by the application of the new enactment."

A similar view was taken by the Bombay High Court in *S. C. Prashar* v. *Vasantsen Dwarakdas*[2], and by the Patna High Court in *Sardar Lakmi Singh* v. *Commissioner of Income-tax*[3]. These two cases dealt directly with the application of the amended Second Proviso to section 34 (3). The learned counsel for the Department did not accept as correct the principle laid down by this Court in *Muhammad Hussain Nachiar Ammal* v. *Commissioner of Income-tax, Madras*[1], but he realised that we are bound to follow that decision as authority binding on us.

The resulting position is that as the amendment of the law of limitation took effect only on 1st April, 1952, and as under the law of limitation which was in force before that date the right of the Department to initiate proceedings against the assessee under section 34 had lapsed, the Department could not have the benefit of the amendment, even if the amended Proviso covered the case of the assessee.

The learned counsel for the Department then urged that even before 31st March, 1952, it was not a four year period of limitation that applied, and that even under the Proviso to section 34 (3), before it was amended with effect from 1st April, 1952, there was no period of limitation.

Before the Proviso was amended by Act XXV of 1953 with effect from 1st April, 1952, it ran:

"Provided further that nothing contained in this sub-section shall apply to re-assessment made under section 27 or in pursuance of an order under section 31, section 33, section 33-A, section 33-B, section 66 or section 66-A."

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1. (1955) 2 M.L.J. 139 : 29 I.T.R. 848.
2. (1956) 29 I.T.R. 857.
3. (1956) 33 I.T.R. 856.

The Proviso as it now stands amended runs :

"Provided further that nothing contained in this section limiting the time within which any action may be taken or any order of assessment or reassessment may be made shall apply to a reassessment made under section 27 or to an assessment or reassessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31, section 33, section 33-A, section 33-B, section 66 or section 66-A.

We are unable to accept the contention of the learned counsel for the Department, that the amendment effected by Act XXV of 1953 was only explanatory, and that the phrase "in pursuance of" in the unamended Proviso was comprehensive enough to include a reassessment made on "the assessee or any other person in consequence of or to give effect to any finding or direction contained in an order under section 31, section 33, section 33-A, section 33-B, section 66 or section 66-A. In the case of the assessee the assessment was not reopened under section 34 of the Act in pursuance of an order under any of the enumerated sections in proceedings to which the assessee himself was a party. To follow up the finding in the assessment proceedings of *A* by taking action against *B* under section 34 cannot be viewed as reassessment "in pursuance of an order" within the meaning of the Proviso as it stood unamended before 1st April, 1952. The expression "pursuance" in that context implies a continuity of operations against the same person. The unamended Proviso therefore did not lift the ban of the four year period of limitation prescribed by section 34 (1) (*b*) in this case of the assessee, and proceedings under section 34 (1) (*b*) could not have been taken against the assessee at any time after 31st March, 1952.

The learned counsel for the Department next submitted that the impugned order of reassessment could be viewed as a case of rectification effected under the enabling provisions of section 35 of the Act. We express no opinion on the question, whether the assessee's was a case that could have been brought within the scope of section 35 at all, had it been dealt with under that section. Factually, the Department invoked and applied only the powers vested in the Income-tax Officer by section 34. It is not open to us at this stage and in proceedings under section 66 to find whether an alternative basis may be found in law for sustaining the reassessment that was ordered by the Department and sustained by the Tribunal. The learned counsel for the Department referred to *Commissioner of Income-tax, Bombay and Aden* v. *Khemchand Ramdas*[1]. Their Lordships of the Privy Council pointed out in that case that the finality of an assessment could, under the provisions of the Income-tax Act, be avoided only either under section 34 or under section 35 of the Act. We are unable to see anything in that decision to support the contention of the learned counsel for the Department, that a ressessment effected under section 34 could be viewed in proceedings under section 66 as a case of rectification under section 35 ignoring the appeal against the order of the Income-tax Officer and the further appeal to the Tribunal . Had it been a case dealt with under section 35 of the Act, recourse to section 66 itself would have been barred.

We are unable to see any support for the contention of the learned counsel for the Department in the other case cited by him, *Commissioner of Income-tax* v. *B.C. Swimming Bath Trust*[2].

We are of opinion, that when the notice was issued to the assessee under section 34 (1) (*b*) of the Act on 20th January, 1954, initiation of the proceedings under section 34 of the Act was barred by the law of limitation applicable to the case of the assessee, and that the further proceedings to reassess the assessee were without jurisdiction. That is sufficient to answer the question referred to us in favour of the assessee.

We express no opinion on the question, whether the amended Second Proviso to section 34 (3) is void under Article 13 of the Constitution, though such was the view taken in *S. C. Prashar* v. *Vasantsen Dwarakdas*[3]. An examination of the

1. (1938) 2 M.L.J. 115 : L.R. 65 I.A. 236 : 6 I.T.R. 414 (P.C.).
2. (1955) 27 I.T.R. 279 at 293.
3. (1956) 29 I.T.R. 857.

constitutional validity of a statutory provision should not be undertaken, if relief could be given to a party without a need for pronouncement on the constitutional validity on the impugned provision. We have also refrained from going into the question, whether the case of the assessee falls at all within the scope of the amended Second Proviso, because we have held that even if it did, it did not save the reassessment from the bar of limitation.

We answer the question in the negative and in favour of the assessee. The assessee will be entitled to the costs of this reference. Counsel's fee Rs. 250.

K.L.B. ——— *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.•

The Ouchterlony Valley Estates (1938) Ltd. .. *Petitioner**

v.

The Government of Madras represented by the Commissioner of Agricultural Income-tax, Madras .. *Respondent.*

Madras Agricultural Income-tax Act (V of 1955), section 5 (g)—Permissible deductions—Expenditure incurred in maintaining immature coffee plants in a plantation—If of a revenue nature.

The expenditure incurred in the upkeep of immature plants in a coffee and tea estate will be expenses of cultivating the crop and will be allowable deductions under section 5 (*g*) of the Madras Agricultural Income-tax Act.

The expression ' cultivating the crop from which the agricultural income is derived' is not restricted in the context to the particular tree or plant from which the yield is derived but the entire plantation consisting of both mature and immature trees and plants.

Petition under section 54 (1) of the Agricultural Income-tax Act praying the High Court to revise the Order of the Agricultural Income-tax Appellate Tribunal, dated 18th July, 1957 and made in A.T.A. No. 30 of 1957 preferred against the Order of the Assistant Commissioner of Agricultural Income-tax, Ootacamund, dated 2nd April, 1957 and made in A.I.T. A. No. 117 (assessment year 1955-56) of 1956-57 in G.I.R. No. 10-T/55-56, dated 8th February, 1957, Agricultural Income-tax Officer, Gudalur.

K. R. Ramamani of Messrs. Subbaraya Iyer, Sethuraman and *Padmanaban,* for Petitioner.

G. Ramanujam, for The Government Pleader (*A. Alagirisami*), for the State.

The Order of the Court was made by

Srinivasan, J.—The question that arises in this revision is, whether the Appellate Tribunal was right in holding that the expenditure incurred by the assessee, which is a tea and coffee plantation, for the upkeep of the immature tea and coffee plants is not allowable under section 5 of the Madras Agricultural Income-tax Act.

It is common ground that the tea plantation consisted of an extent of over 1,000 acres of mature tea bushes and of 123 and odd acres of immature plants. The coffee plantation consisted of nearly 2,500 acres of mature coffee plants as against roughly 300 acres of immature plants. During the year of assessment 1955-56, a revenue expenditure of Rs. 13,37,553 was allowed, but the claim of Rs. 52,420 and Rs. 8,176 respectively, spent on the upkeep of immature tea and coffee clearings, was disallowed. The Agricultural Income-tax Officer rejected the claim on the basis that it was capital expenditure, observing, " All expenditure on new clearings till they come to bearing is capital expenditure." This view was accepted in appeal by the Assistant Commissioner, and also by the Appellate Tribunal, which held that the expenditure could not be deducted either under section 5 (*e*) or under section 5 (*g*) of the Act.

* T.R.C. No. 110 of 1957. • 4th November, 1960. (13th Kartika, 1882—Saka.)

It seems to us that this conclusion of the Tribunal is erroneous. The Appellate Tribunal thought that what is taxed under the Act is agricultural income which is derived from the mature coffee or tea plantations, and that the allowance under section 5 (*g*) in like manner is limited to the expenses incurred in cultivating the crop from which the agricultural income is derived. Such income, in the view of the Tribunal, could not be derived from the immature plants. Nor could section 5 (*e*) apply in the opinion of the Tribunal for the reason that this provision, read with the definition of 'plantation' in the Act, would refer to expenditure incurred in growing the plants which yield the produce. In any case, the Tribunal thought that the expenditure in the present case was of a capital nature which stands excluded from the scope of either section 5 (*e*) or section 5 (*g*).

The decision in *Vallambroza Rubber Co., Ltd.* v. *Farmer*[1], was referred to by the Tribunal and distinguished on the basis that in a case arising under the Agricultural Income-tax Act, what is dealt with is income derived from the land which is used for a plantation and not profits and gains of trade, manufacture, adventure, or concern. The reason upon which the Tribunal purported to distinguish this decision and hold that it was inapplicable to the present case does not appear to be sound. In that case, the assessee was a company, and its profits were derived from the cultivation and sale of rubber. A sum of £ 2,022 was claimed as a proper deduction being the expenses incurred in superintendence, allowances, weeding and so on. Revenue objected to this deduction on the ground that the rubber tree would commence to yield only in the seventh year, and that, therefore, only one-seventh of these expenses would be deductible expenses as relating to trees which actually yielded rubber ; that is to say, the expenses of maintenance and upkeep of the immature trees was thought not to be a proper deduction on the ground that the expenses should be solely referrable to the profit which was reaped within the year. This proposition was characterised by the learned Judge as absurd. They noticed (at page 535) :

"It would mean this that if your business is connected with a fruit which is not always ready precisely within the year of assessment, you would never be allowed to deduct the necessary expenses without which you could not raise that fruit. This very case which deals with a class of thing that takes six years to mature before you pluck or tap it is a very good illustration, but, of course, without any ingenuity one could multiply cases by the score. Supposing a man conducted a milk business, it really comes to the limits of absurdity to suppose that he would not be allowed to charge for the keep of one of his cows because at a particular time of the year, towards the end of the year of assessment, that cow was not in milk, and therefore the profit which he was going to get from the cow would be outside the year of assessment. . . . . . But when you come to think of the expenses in this particular case that is incurred for instance for the weeding which is necessary in order that a particular tree should bear rubber, how can it possibly be said that that is not a necessary expense for the rearing of the tree from which alone the profit eventually comes ? And the Crown will not really be prejudiced by this, because when the trees come to bear, the whole produce will go to the credit side of the profit and loss account....."

Dealing with the aspect relating to whether it was in the nature of a capital or income expenditure, they said at page 536 :

" . . . . . But in a rough way I think it is not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all and income expenditure is a thing that is going to recur every year. Therefore, *prima facie* weeding which does occur once a year seems to me to be an income expenditure."

This decision is in clear support of the view that in the case of income derived from plants or trees, the expenses of maintenance and upkeep of immature trees before they come to bear is not capital expenditure.

This apsect of the matter has also been considered in a decision of the Kerala High Court in *Commissioner of Agricultural Income-tax, Kerala* v. *Pullangode Rubber and Produce Company, Ltd.*[2].

The view taken by the Tribunal that the *Vallambroza Case*[1] is distinguishable on the ground that it related to a business and not to agricultural income is ans-

1. 5 Tax. Cas. 529. 2. I.L.R. (1958) Ker. 660.

wered by the observation contained in that very decision, where the learned Judges say (at page 536) :

"It appears to me that, as at present worked, the trade, manufacture, adventure or concern of the Company is the cultivation and production for sale at profit of rubber and other tropical products. For this purpose land had to be acquired, cleared and drained, roads made, and buildings erected, before the cultivation began. What was expended for these purposes was I think capital expenditure, and not, in the sense of the Income-tax Act, money laid out and expended for the purposes of the trade, etc. But once the cultivation began with the planting, expenditure on cultivation, production and marketing was I think revenue expenditure for the purposes of the trade, etc."

In like manner it was held in *Ponnuswami Pillai* v. *Commissioner of Income-tax*[1] that the income derived from the tea estate attributable purely to agricultural operations, such as cultivating and plucking of the leaf, constituted profits and gains of a business within the meaning of section 4 (2) of the Act. Though this decision proceeded on the principles of the Income-tax Act, it is clear that a business like that of the assessee in the present case, though it relates to agricultural income, is nonetheless income from a business. The applicability of the *Vallambroza decision*[2] in so far as the deduction of expenses relating to immature tea and coffee plants is concerned is not affected by reason of this agricultural income being derived from a business, that is the business of running the plantation.

This should be sufficient to dispose of the present revision petition. We, however, feel that it is necessary to decide whether this expenditure could properly fall within the scope of section 5 (*a*) or section 5 (*g*) of the Act. In a similar case where the question of the deduction of the amount spent on the upkeep and maintenance of immature rubber trees arose, the Kerala High Court in the decision cited above came to the conclusion that the deduction was properly allowable under section 5 (*e*) of the Act. With great respect to the learned Judges who decided that case, we are inclined to hold that section 5 (*g*) would be the more appropriate provision under which such expenses would fall.

Section 5 (*g*) runs thus :

"The agricultural income of a person shall be computed after making the following deductions, *viz.*, ...

(*g*) expenses other than capital expenditure incurred in the previous year of cultivating the crop from which the agricultural income is derived and of transporting such crop to market, including the maintenance of agricultural implements and cattle required for such cultivation and transport or both."

It is followed by a Proviso to the following effect :

"Provided that in any particular year the total replanting expenditure shall not exceed the amount necessary for replanting 2½ per cent. of the acreage if the crop is rubber or coffee, 1-2/3 per cent. if the crop is arecanut or tea and 8-1/5 per cent. if the crop is cardamon and 10 per cent. if the crop is cinchona."

According to this Proviso, the assessee is entitled to a deduction of expenditure with regard to the amount spent for replanting within certain limits. The obvious inference flowing therefrom is that since the main part of the provision excludes capital expenditure, the allowance contained in this Proviso cannot possibly be in the nature of a capital expenditure. Here is an indication in the Act itself that the cost of replanting trees is not capital expenditure. Where a plantation is for the first time laid out, the various items of expenses which go to bring the plantation into being, including the initial planting thereof, would obviously be capital expenditure. But, in a case where trees which have ceased to yield have to be replaced, the Proviso to section 5 (*g*) clearly states that such expenses of replanting shall be regarded as revenue expenditure allowable, of course, within certain limits. If that be the case, then it should necessarily follow that the subsequent upkeep or maintenance of those replanted trees till they come to bearing would also be within the scope of the expression contained in section 5 (*g*), *viz.*, "of cultivating the crop from which the agricultural income is derived". It is impossible for any plantation

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1. 3 I.T.C. 378. 2. 5 Tax Cas. 529.

in the very nature of things to isolate the expenditure of each and every tree according as the tree is bearing or not bearing, in cases where replanting of one or more trees in an existing plantation is in question. The view of the Tribunal that the expression 'cultivating the crop from which the agricultural income is derived' is intended to indicate that the expenses should relate directly to the income seems to us to be opposed to the inference that is naturally derivable from the Proviso to which we have referred. The learned Judges who decided *Commissioner of Agricultural Income-tax, Kerala* v. *Pullangode Rubber and Produce Company, Ltd.*[1] do not appear to have considered the impact which the Proviso has upon the main provision. We accordingly hold that the expenditure incurred upon the clearings containing immature plants would properly be includable in the expenses of cultivating the crop. The crop in the context is not merely with reference to the particular tree from which the yield is derived but the entire plantation consisting of both mature and immature trees.

The petition is accordingly allowed. The assessment is directed to be revised in the light of what has been stated above. The petitioner will be entitled to its costs. Counsel's fee Rs. 100.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Elumalai .. *Petitioner**

v.

Sri Kandaswami Devasthanam, Tiruporur, by its trustee Tiruchidambara Sivaprakasa Swami .. *Respondent.*

Presidency Small Causes Courts Act (XV of 1882), sections 41, 43 and 48—Suit in ejectment—Decree directing delivery of possession by a specified date—If could be executed after the expiry of the date fixed.

Under section 48 of the Presidency Small Causes Courts Act all the provisions of the Civil Procedure Code including the provisions of Order 21 will apply to matters provided for in that chapter. Hence a decree in ejectment made by a Presidency Small Causes Court under section 43 of the Act could be executed like any other decree within the period of limitation. It cannot be said that the Court will have no power to execute the decree for ejectment after the expiry of the date fixed under the order.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of Small Causes, Madras, dated 20th July, 1960 and made in M.P. No. 856 of 1960 in E.P. No. 3165 of 1960 in Ejt. S. No. 56 of 1955.

N. C. Srinivasan and *G. Ramanujam*, for Petitioner.

T. K. Subramania Pillai, S. Chockalingam and *R. N. Kothandaraman*, for Respondent.

The Court delivered the following

JUDGMENT.—The respondent obtained an order for ejectment against the petitioner on 5th December, 1957, under the provisions of sections 41 and 43 of the Presidency Small Causes Courts Act. By that order the petitioner was directed to deliver possession of the property on 30th June, 1957. Later, however, the order was varied presumably by consent of parties by which the time for delivery of possession was fixed as 17th February, 1958. In the meanwhile the petitioner filed O.S. No. 614 of 1958 against the respondent for a declaration that the order of ejectment would not be binding on him. There was an injunction against the respondent executing the order of ejectment pending the suit. That suit was dismissed on 13th February, 1960.

Thereupon the respondent applied to the lower Court for execution of the order directing delivery of possession. During the course of execution obstruction

1. I.L.R. (1958) Ker. 660.

* C.R.P. No. 1488 of 1960. 12th October, 1960. (20th Asvina, 1882-Saka.)

was offered by nine persons along with the petitioner. The lower Court without notice to the petitioner directed the removal of the obstruction. The petitioner seeks to revise that order.

It is contended on his behalf that the Court of Small Causes had no jurisdiction to extend the time fixed for delivery of possession, and that therefore any order in execution that might be passed so as to enable the respondent to obtain delivery of possession after 17th February, 1958, would be invalid. In support of the contention reference is made to the decisions in *Jamshedji Hormusji* v. *Gordhandas Gokuldas*[1] and *Commissioner for Port of Calcutta* v. *Anil*[2]. In those decisions it was held that it was not competent for the Presidency Court of Small Causes to amend or alter the terms of a decree or order for possession once passed under section 45 of the Presidency Small Causes Courts Act, 1882. I cannot see how those cases can apply to the present case. No question of amendment of the *original order at all* arises in this case. What the respondent applied for is the execution of the decree in the Ejectment Suit No. 56 of 1955. Under the provisions of section 48 of the Presidency Small Causes Courts Act all the provisions of the Civil Procedure Code including those contained in Order 21 will apply to matters provided for in that chapter. It would follow that the respondent would be entitled to execute the order which directed delivery of possession. I do not read the decisions aforesaid as establishing that a Court would have no power to execute the decree for ejectment beyond the time fixed by the order for ejectment. In my opinion as the provisions of the Civil Procedure Code apply to the decrees in ejectment passed under section 43 of the Presidency Small Causes Courts Act, it would be competent for the decree-holder to apply for execution as in the case of any other decree within the period of limitation prescribed by law. There are therefore no merits in this petition.

The petition is dismissed with costs.

R.M. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN, JJ.

Dr. P. Vadamalayan, Madurai .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 10 (2) (xv)—Applicability—Capital or revenue expenditure—Expenditure incurred by surgeon in undertaking tour abroad to maintain his efficiency in profession—Deduction—Permissibility.

The dividing line which marks off revenue from capital expenditure, either for a profession or for a business, is, in some cases, thin but, it is a clear and perceptible one. The question what is the inference to be drawn from the facts established in a given case, is the expenditure of a capital nature, is a question of law.

Expenditure incurred by a surgeon on a tour abroad undertaken to keep abreast of the latest technique of the profession in surgery and treatment in order to maintain his efficiency in his chosen profession as a surgeon cannot be said to be of a capital nature, even if it results in a mental equipment enabling him to carry on his profession as a surgeon in a better and more scientific way, but is a permissible deduction under section 10 (2) (*xv*) of the Income-tax Act.

Assam Bengal Cement Co., Ltd. v. *Commissioner of Income-tax, West Bengal,* (1955) S.C.J. 205 : (1955) 1 M.L.J. (S.C.) 118 : 1955 S.C.R. 972 : 27 I.T.R. 34, followed.

Gunn's Commonwealth Income-tax Law and Practice, Fourth Edition, paras. 1277 and 1278, page 440, referred to.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (XI of 1922), in R.A. No. 61 of 1956-57 on its file for decision on the following questions of law, *viz.* :—

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1. (1920) I.L.R. 45 Bom. 1048.
2. (1951) 55 C.W.N. 305.

*Case Referred No. 87 of 1956. 15th September, 1960. (24th Bhadra, 1881—Saka).

"Whether the outlay of Rs. 9,689 on the foreign tour of the assessee is capital in nature not allowable as a deduction under section 10 (2) (*xv*) ?"

T. V. Balakrishnan, for Applicant.

C. S. Rama Rao Sahib and *S. Ranganathan*, Special Counsels for Income-tax on behalf of the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The assessee, a leading surgeon of Madurai with a lucrative practice, undertook a tour abroad in 1953, in the course of which he visited a number of hospitals and clinics in the United States of America and the United Kingdom, to study the latest technique in surgery and treatment. The tour cost him Rs. 19,538 the whole of which he claimed as a deduction under section 10 (2) (*xv*) of the Income-tax Act, in computing his assessable income in the assessment year 1954-55. The Income-tax Officer disallowed the claim in its entirety. He held that the expenditure was of a capital nature, incurred by the assessee to secure to himself a benefit of an enduring nature. The Assistant Commissioner differed and found that no portion of the expenditure was of a capital nature. He, however, held that only one-half of the expenditure satisfied the test of having been wholly and exclusively incurred for the purpose of the assessee's profession. The other half was treated as the personal expenses of the assessee while abroad. The Assistant Commissioner allowed a deduction of Rs. 9,769. The Department appealed to the Tribunal. The Tribunal agreed with the Income-tax Officer that the expenditure of Rs. 9,769 was of a capital nature, but did not disturb the finding of the Assistant Commissioner that that half of the expenditure incurred by the assessee did satisfy the other requirement of section 10 (2) (*xv*); that it had been incurred wholly and exclusively for the purposes of the assessee's profession.

The Tribunal recorded in its order on appeal :

"The assessee's case is that he, a specialised surgeon, undertook a study tour in advanced countries, so as to bring his already expert knowledge in line with modern developments in his branch of surgery. It was not a study tour undertaken specifically with reference to or in connection with any particular professional engagement or engagements of his, undertaken by him in the course of his carrying on of his profession in India. By undertaking this tour, he hoped to perfect his surgical knowledge to stand him in good stead on his return to his native country in the competitive field that he had to face. The mental equipment obtained by the tour is, therefore, of a general and enduring nature and the benefit of such tour is expected to be far-reaching and not merely confined to a short span. The amount in question is, therefore, only capital in nature and not allowable as a deduction under section 10 (2) (*xv*)."

At the request of the assessee, the Tribunal referred the following question to this Court under section 66 (1) of the Act.

"Whether the outlay of Rs. 9,769 on the foreign tour of the assessee is capital in nature, not allowable as a deduction under section 10 (2) (*xv*) ?"

The scope of the question is limited to the issue whether the expenditure was of a capital nature. The amount involved is not in issue. It is Rs. 9,769, the amount estimated by the Assistant Commissioner. That the expenditure of that amount satisfied the other test of section 10 (2) (*xv*) and that it was expended wholly and exclusively for the purpose of the assessee's profession as a surgeon, is not in issue either.

We do not propose to embark upon the task eminent Judges in England and India have declined consistently to undertake. We shall not attempt to evolve a formula, infallible and of universal application, to decide what marks off revenue from capital expenditure either for a profession or for a business. The dividing line in some cases may be thin, but it is a clear and perceptible one. Courts have always addressed themselves to the comparatively less difficult task of deciding whether a given item of expenditure falls on one side or the other of that dividing line. We need not embark either on a review afresh of the case-law on the subject, when practically nothing new can be added. The case-law was reviewed at length

by the Supreme Court in *Assam Bengal Cement Co., Ltd.* v. *Commissioner of Income-tax, West Bengal*[1].

" It should be taken as well-settled that the question what is the inference to be drawn from the facts established in a given case, is the expenditure of a capital nature, is a question of law.

The Tribunal obviously accepted the assessee's claim, that he had undertaken the study tour to bring the expert knowledge he already had in line with modern developments in his branch of surgery, but the Tribunal held that the mental equipment which resulted from this tour was a benefit of an enduring nature. Certainly the expenditure incurred by the assessee did not bring him any tangible asset, capital or otherwise. Th question is, whether an expenditure incurred by a surgeon to keep abreast of the latest technique of the profession in surgery and treatment is expenditure of a capital nature. The expenditure was not incurred to initiate any new business or profession, nor even to enlarge the scope or character of the profession that the assessee was already practising. He was and continued to be a surgeon, one of the leading surgeons of Madurai. The expenditure was not incurred to obtain any additional qualifications to practise his profession. The Department could claim at best, in the circumstances of this case, that the assessee incurred the expenditure to maintain his efficiency in his profession. As in the Australian case noted in paragraph 1278, at page 440, in Gunn's Commonwealth Income-tax Law and Practice, Fourth Edition, it would be much less correct to say that the assessee gained an enduring benefit by his study tour abroad than to say that he took steps to maintain his efficiency in his chosen profession as a surgeon.

Suppose, a surgeon at Madurai, less fortunately placed than the assessee, incurred periodical expenditure for a refresher course of study at a place like Madras surely it would be incorrect to view it as an expenditure of a capital nature incurred to obtain any enduring benefit. If, without a defined refresher course, the surgeon periodically visited the larger institutions at Madras to study the technique and keep himself abreast of the latest professional knowledge available, the expenditure he incurred for that purpose would not be expenditure of a capital nature. That he made such a study at more places than one, say at Madras, Bombay and Delhi, can make no difference. That the study tour was outside India, again, could make no difference in the principle by which to judge whether the expenditure incurred was of a capital nature. All these would be cases of expenditure incurred by the surgeon to maintain his efficiency, even if it resulted in a mental equipment which enabled him to carry on his profession as a surgeon in a better and more scientific way.

During the arguments before us we were referred to passages in paragraphs 1,277 and 1,278 at page 438 following in Gunn's Commonwealth Income-tax Law and Practice, Fourth Edition. The reports of the cases on which those passages were based are not available, and that handicaps us. The details of the cases are, however, instructive and help us to keep in view the distinction between expenditure incurred for example, in launching on a profession or adding to it, and expenditure incurred on gaining income from an existing professional practice. The latter is not expenditure of a capital nature, and the doctrine of enduring benefit cannot apply to such an expenditure. It is in that class that the assessee's claim fell. It was not an expenditure of a capital nature.

We answer the question in favour of the assessee. The assessee will be entitled to the costs of this reference. Counsel's fee Rs. 250.

P.R.N. *Reference answered in favour of assessee.*

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1. (1955) S.C.J. 205 : (1955) 1 M.L.J. (S.C.) 118 : (1955) S.C.R. 972 : (1955) 27 I.T.R. 34.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Madhanavalli *alias* Sowbagyammal .. *Appellant**

v.

Thangavelu Padayachi and others .. *Respondents.*

Hindu Widows' Re-marriage Act (*XV of* 1856)—*Forfeiture of widow's rights of inheritance on re-marriage—When would apply—Widow's re-marriage invalid under law—If attracts the forfeiture—Madras Hindu Prevention of Bigamy and Divorce Act* (*V of* 1949), *section* 4 (1) (*since repealed by Hindu Marriage Act, XXV of* 1955)—*Marriage void under.*

Where a Hindu widow's re-marriage is contrary to a statute like the Madras Act VI of 1949 (since repealed by Central Act XXV of 1955) and is void and non-est she cannot incur the forfeiture under the Hindu Widow's Re-marriage Act, 1856, notwithstanding the purported re-marriage.

Appeal against the Decree of the District Court, South Arcot at Cuddalore, in Appeal Suit No. 279 of 1957 preferred against the Dectee of the Court of the District Munsif of Tirukoilur in Original Suit No. 310 of 1955.

K.S. Desikan and *K. Raman*, for Appellant.

M.S. Venkatarama Iyer, S. Nagaraja Iyer and *V. Krishnan,* for Respondents.

The Court delivered the following

JUDGMENT.—The property forming the subject-matter of this second appeal originally belonged to one Govinda Padayachi. He died, leaving behind his daughter, the plaintiff in O.S. No. 310 of 1955 on the file of the Distirct Munsif's Court, Tirukoilur, and a widow, the second defendant in that suit. The second defendant having inherited the property as the limited heir under the Hindu Law, alienated the property in favour of the first defendant under Exhibit B-2, dated 7th August, 1940. The third defendant in the suit was impleaded as a person who had married the second defendant after the death of Govinda Padayachi. The plaintiff's case was that the alienation by the second defendant in favour of the first defendant was not for a purpose valid and binding upon the reversioners of the estate of Govinda Padayachi, and that, though normally she, as the presumptive reversioner of the estate of Govinda Padayachi, could not sue for recovery of possession of the property, she was entitled to recover possession by reason of the second defendant's marriage with the third defendant, which, according to her, attracted the provisions of the Hindu Widows' Re-marriage Act (XV of 1856), causing forfeiture of her rights as a Hindu widow.

The learned District Munsif of Tirukoilur who tried the suit found that the alienation impugned by the plaintiff was not valid and binding upon the plaintiff and that the marriage of the second defendant with the third defendant caused a forfeiture of her rights as a Hindu widow by reason of the provisions of Hindu Widows' Re-marriage Act, and accordingly, granted a decree in favour of the plaintiff as prayed for.

The first defendant preferred an appeal (A.S.No.279 of 1957) on the file of the District Court, South Arcot. The learned appellate Judge concurred with the finding of the trial Court on the question of the validity of the alienation by the second defendant in favour of the first defendant. But the learned District Judge was of opinion that the plaintiff was not entitled to recover possession of the suit property from the alienee (the first defendant) as the provisions of the Hindu Widows' Re-marriage Act cannot be invoked, the marriage of the second defendant with the third defendant being a void marriage under Madras Act VI of 1949.

In this view of the matter, the learned Judge granted a mere decree for declaration in favour of the plaintiff that the alienation by the second defendant in favour of the first defendant was not valid and binding on the plaintiff, but nega-

* S.A. No. 1161 of 1958. 11th October, 1960. (19th Asvina, 1882—Saka).

tived the relief for recovery of possession sought for by the plaintiff. The plaintiff has filed this Second Appeal seeking to have the decree of the trial Court restored.

Learned counsel for the appellant contended that the plea raised under Madras Act VI of 1949 was not pleaded or put in issue during the trial of the suit and that it was sprung as a surprise at the time when the appeal was heard by the learned District Judge. There is no doubt some force in this contention of the learned counsel. If the applicability of Madras Act VI of 1949 raised in this case were to depend upon disputed questions of fact, I would have had no hesitation in remitting the case back for re-trial to have the necessary facts investigated. But, unfortunately for the plaintiff, her definite case in the plaint was that the third defendant and the second defendant were married some time in April, 1949. Madras Act VI of 1949 came upon the statute book on 23rd March, 1949. Not being content with having raised a specific case of marriage in April, 1949, the plaintiff also examined the third defendant as her witness who swore in the witness-box that he married the second defendant some time in 1949. Of course, his evidence is not clear as to whether the marriage took place before the Madras Act VI of 1949, or, after. No doubt, the learned District Judge has discussed the evidence and the probabilities of the case to fix the date of the marriage. But this was wholly unnecessary. So long as the averment in the plaint relating to the time of marriage stood and no attempt was made by the plaintiff to have the date altered, it was not open to the plaintiff to adduce evidence to show that the marriage took place before 1949. On the admission of the plaintiff, it is clear that the marriage of the second defendant and the third defendant took place after the commencement of Madras Act VI of 1949.

There is no difficulty in holding that, under the Hindu Widows' Re-marriage Act of 1856, the marriage which the second defendant admittedly contracted with the third defendant caused a forfeiture of her rights as a Hindu widow in respect of the estate of her deceased first husband (Govinda Padayachi) and, if such forfeiture was brought about by the operation of the statute, it is clear that the plaintiff will be entitled to recover possession of the suit property from the alienee, now that the alienation has been found to be not valid and binding upon the plaintiff. Section 4 (1) of Madras Act VI of 1949 is as follows :—

"Notwithstanding any rule of law, custom or usage to the contrary, any marriage solemnized after the commencement of this Act between a man and a woman, either of whom has a spouse living at the time of such solemnization, shall be void, whether the marriage is solemnized within or outside the Province of Madras."

I have already held that, on the admission of the plaintiff herself, the marriage of the second defendant with the third defendant was one solemnized after the commencement of the Act. The only other question that has to be decided before this provision can apply, is whether, at the time of the third defendant's marriage with the second defendant, he had a wife living. The evidence of the third defendant, as P.W. 4, is that his wife, is one Pavanambal. He has deposed as follows :—

"I have married her sister, Dhanabagyam, after the death of her husband, Govinda Padayachi ....After the death of Govinda Padayachi, Dhanabagyam became entitled to the suit land.. ...... After the death of Govinda Padayachi, Dhanabagyam was living with her parents in Natham Village. I used to visit her very often, and I had illicit connections with her. Thereafter, I married her in 1949."

It seems to me that this evidence of defendant 3 can only be read as to mean that, on the date when he contracted the second marriage with Dhanabagyam (defendant 2), he had already married Pavanambal, who is alive. Section 4 of the Act therefore governs the case. The marriage of the third defendant with the second defendant is therefore void in law. The forfeiture under the Hindu Widows' Re-marriage Act of 1856 can result only in a case where a Hindu widow re-marries. That word can only mean that there must be a valid marriage contracted by the widow before the law can penalise her by causing forfeiture of the estate which she inherited from the first husband. Notwithstanding a purported marriage by the

widow, if the marriage is not valid by reason of another statute, she cannot incur the forfeiture. The provisions of the Hindu Widows' Re-marriage Act of 1856 can only apply to a case of a valid re-marriage. A marriage which is declared to be void by a statute is no marriage and *is non est.* I am therefore of opinion that the conclusion of the lower appellate Court is correct and that the plaintiff will not be entitled to recover possession of the property from the alienee during the lifetime of the second defendant.

The Second Appeal fails and is dismissed. There will be no order as to costs in this Second Appeal.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASAN.

Thayyan Padayachi and another .. *Petitioners**

v.

Veluswami and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 148 and Order 21, rules 84 and 85 and 86—Time for payment of balance of purchase price in Court auction—If Court has power to extend—Section 148—Applicability.

The scheme of Order 21, rules 84 to 86 of the Code of Civil Procedure is quite clear. Where property is sold in Court auction the auction-purchaser is to deposit 25 per cent. of the sale price under rule 84 and the balance is to be deposited within the time fixed under rule 85. In default of such payment the Court is empowered under rule 86 to forfeit the deposit less the expenses of the sale and the property should be resold. The rule does not authorise the Court to grant any extension of time for the payment of the balance of purchase price. Section 148 of the Civil Procedure Code does not apply to the case.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Salem, dated 11th November, 1959 and made in I.A. No. 880 of 1959, in I.A. No. 881 of 1954, in O.S. No. 210 of 1949.

N. R. Raghavachari, for Petitioner.

N. C. Srinivasan, for Respondent.

The Court delivered the following

JUDGMENT.—Certain properties concerned in a partition suit O.S. No. 210 of 1949 on the file of the Subordinate Judge of Salem were directed to be sold so that the proceeds thereof could be distributed in adjustment of the shares of the parties entitled to partition. Apparently those properties were not capable of division in any other manner. The sale was accordingly held on 9th October, 1959 and the successful auction-purchaser was a third party; the properties were knocked down in his favour for Rs. 16,000. As required by Order 21, rule 84, the auction-purchaser deposited 25 per cent. of the amount of the purchase money. Rule 85 requires further that the full amount of the purchase money has to be deposited before the Court closes on the fifteenth day from the date of sale of the property. Such a deposit was not made. An application was put in by the auction-purchaser on 21st October, 1959, seeking for extention of time by one month for making the deposit of the balance. Though this application was opposed, the learned Subordinate Judge granted the time prayed for. The matter comes up in revision challenging the validity of the order made by the lower Court.

It seems to me that Order 21, rule 86, is quite clear on the point. It states that in default of payment within the period mentioned in Order 21, rule 85, the Court may, if it thinks fit, forfeit the deposit less the expenses of sale, to the Government, and the rule proceeds to lay down that the property shall thereafter

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* C.R.P. No. 2098 of 1959. 17th October, 1960. (25th Asvina, 1882—Saka).

be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold. This rule does not authorise the Court to grant any extension of time for the payment of the balance of the purchase price. The only discretion that is available to the Court under this rule relates to the extent to which it is called upon to deal with the 25 per cent. of the purchase price which had been deposited under rule 84. In so far as that is concerned, the Court may order its forfeiture after deducting the expenses of the sale. If it does not do so, obviously that amount would normally be held to the credit of the auction-purchaser to be returned to him. But the Court is not competent to extend the time for payment of the balance of the amount for which time has been fixed by rule 85. There is ample authority for this position in *Monni Aidruz* v. *Mira Mohideen*[1] in which an earlier decision of the Allahabad High Court in *Nawal Kishore* v. *Buttu Mal*[2] has been relied upon and approved.

On behalf of the respondents, section 148 of the Code of Civil Procedure has been sought to be invoked in support of the lawful exercise of the powers of the learned Subordinate Judge in granting extention of time. The section in terms does not apply. It relates to a case where a period is fixed or granted by the Court in its discretion for the doing of an act which is prescribed or allowed by the Code. In such an event, the Court's discretion in enlarging the priod is not fettered. But here is a case where the period is not fixed or granted by the Court but is fixed by the Code itself. It makes a fundamental difference to the application of section 148. This provision of law will not apply to the present case.

The petition is accordingly allowed. There will, however, be no order as to costs.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VEERASWAMI.

The Employees' State Insurance Corporation with its Regional Office at Coimbatore .. *Appellant**

v.

Ganapatia Pillai and others .. *Respondents.*

Employees' State Insurance Act (XXXIV of 1948), section 2 (9)—Employee—Meaning of—If includes secretary, clerk or typist in Managing Agent's Office of a Mill—Right to demand contribution.

Having regard to the definition of the term 'employee' in section 2 (9) of the Employees' State Insurance Act, 1948, it is only persons who are in some manner or another connected with the work of a factory, *viz.*, the manufacturing process, that can be said to be employees within the meaning of the definition. The words ' incidental or preliminary to' in the definition has to be read in conjunction with the words ' with the work of the factory' so that the work done by the employee in question should be work of or incidental or preliminary to the work of the factory. Hence persons employed as secretary, clerk or typist in the Managing Agent's Office of a mill, purely attending to administrative work will not come within the definition of ' employee ' in the Act. But where such a person is in charge of disbursing payment of wages to the workers in the mill or maintaining the accounts of the mill, he will come within the definition as such work will, in a sense be, incidental to or connected with the work of the factory.

Appeal against the Order of the Employees' Insurance Court, Coimbatore, dated 1st October, 1956 and made in Proceedings No. 1 of 1955.

The Government Pleader on behalf of the Appellant.

T. R. Sangameswara Iyer, for Respondents.

Basheer Ahmed Sayeed, J., before whom the Appeal came on for hearing made the following

1. (1938) 2 M.L.J. 833 : A.I.R. 1939 Mad 57. 2. A.I.R. 1935 All. 243.

*A.A.O. No. 18 of 1957. 1st August, 1960. (10th Sravana, 1882—Saka).

ORDER.—This is an appeal against the Order of the learned District Judge of Coimbatore in Proceedings No. 1 of 1955 under the Employees' State Insurance Act (XXXIV of 1948).

The respondents in this appeal who are employees of the Lotus Mills, Ltd., Podanur, made an application under section 75 and Regulation 40 of the Employees' State Insurance Act for a declaration that the applicants-respondents were not employees liable to pay any contribution under the provisions of the Employees' State Insurance Act. They also prayed for an order directing the Employees' State Insurance Corporation to refund the contributions till now erroneously collected from the applicants till the date of the application. The first of the opposite parties was the Lotus Mills, Ltd. and the second was the Employees' State Insurance Corporation. The Lotus Mills seem to have remained *ex parte*, while the Employees' State Insurance Corporation filed a written statement raising various contentions as to the untenability of the application filed by the employees.

The learned District Judge framed three issues. The first one related to the question as to whether the applicants were the employees of the Lotus Mills, Ltd. as defined in section 2 (9) of Central Act XXXIV of 1948. The second issue related to the liability of the applicants to pay contributions under section 38 of the Act and the third one was whether the applicants were entitled to the refund claimed by them. Giving his findings on all the three issues in favour of the applicants, the learned District Judge held that the applicants were not employees within the meaning of section 2 (9) of the said Act XXXIV of 1948 and that they were not liable to pay any contributions under the provisions of the said Act. In regard to the third issue, however, the learned District Judge held that there was no scope for directing the refund of the amount already collected from the applicants, but merely confined himself to giving a declaration to the effect that the applicants were not entitled to contribute anything under sections 38 and 39 of the Act and directing the applicants to take out appropriate proceedings for getting a refund of the contributions collected from them. The Employees' State Insurance Corporation dissatisfied with this order has preferred this Civil Miscellaneous Appeal.

The learned Government Pleader, appearing on behalf of the Employees' State Insurance Corporation, has contended that the term "employee" is of a much wider scope than the construction that has been placed by the learned District Judge on the said term. He has contended that the term "employee", as defined in the Act, need not be restricted to mere workmen who are engaged in some form or other in the process of manufacture that is carried on in a factory, but that the scope and definition as given in section 2 (9) (*i*) to (*iii*) should comprehend not merely the technical staff that is employed in the actual manufacturing process, but that it should also include the non-technical staff, such as clerks and other members of the staff and establishment in the factory, who are not directly concerned with any manufacturing process. He further contended that there was no reason why the benefits that are sought to be conferred under the Act should be confined only to the technical staff, whereas in any factory there is also a large number of non-technical staff working in the non-technical departments of the factory. It could not be that the intention of the Legislature was that the benefit contemplated under section 46 should be limited only to the technical staff as defined in the Factories Act but that the Employees' State Insurance Act is of a far wider scope. Therefore, the argument of the learned Government Pleader was that the term "employee" should be interpreted in a liberal manner, especially in view of what is contained in the terminology employed in section 2 (9) (*i*) to (*iii*) of the Act. In the three sub-clauses it has been provided that an employee would be one who is put on any work by the employer incidental or preliminary to or connected with the work of the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere. The learned Government Pleader also relied on the terminology in sub-clause (*ii*) of sub-clause (9) of section 2, where it is stated that an employee is one who

is employed on work which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment. The main purport of his argument was that any person who works in any capacity in a factory was intended by the Legislature to be conferred upon him the medical benefit, sickness benefit, maternity benefit, disablement benefit, dependence benefit and so forth. There is no reason why when the workmen are to be conferred these benefits, the other clerical staff which is non-technical, should not be conferred these benefits so long as they were employees in the factory and doing work in connection with the work of the factory or doing work incidental or preliminary to such work of the factory. It is true that in the actual manufacturing process, the men employed are technical. But a factory is not confined merely to manufacturing process alone. There is lot of other work that is carried on in relation to manufacturing process, such as correspondence, watch and ward, health and sanitation and so forth. So, the learned Government Pleader's point was that the Legislature intended that the benefits which are sought to be conferred by the Act should be made available to all persons employed in any capacity whatsoever in the factory, irrespective of any distinction as to technical or non-technical work that may be done by such employees in so far as no such distinction has been made anywhere in the Act.

The learned Government Pleader also invited my attention to the definition of the word "employment" and the words "employed person" as found in Stroud's Judicial Dictionary (3rd edition) page 943, in addition to citing the decisions reported in *Emperor* v. *Manilal Bhogilal*[1], and *Emmens* v. *Elderton*[2]. The main question that has to be kept in view in interpreting the word "employee" is whether there is a relationship of master and servant established between the owner of the factory and those who work in the factory in any capacity whatsoever, and when such relationship is established and when a person is doing work under the guidance and supervision of one who employs him and pays him wages, the definition of the term "employee" must be deemed to comprehend every such person. The definition of "wages" has also been made very comprehensive in this Act. It includes any remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes other additional remuneration, if any (paid at intervals not exceeding two months), but does not include (*a*) any contribution paid by the employer to any pension fund or provident fund, or under this Act; (*b*) any travelling allowance or the value of any travelling allowance; (*c*) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or (*d*) any gratuity payable on discharge.

On the other hand, Mr. Sangameswaran, appearing on behalf of the respondents, contended that the definition of the term "employee" in the Act cannot be understood to include within its scope persons who are not actually connected with the work of the factory, which work is nothing other than manufacturing raw or finished articles for the market. In so far as the clerical staff, who are the respondents in the present case, are not actually connected with any manufacturing process but are doing work which is outside the scope of manufacturing process, notwithstanding the fact that they are working under the control and supervision of the owner of the factory and are also paid wages as contemplated under the Act, they cannot be deemed to be employees coming within the scope of the Employees' State Insurance Act XXXIV of 1948. His contention was that the intention of the Legislature was mainly to restrict the benefits of the Act to such people and such persons as are doing hazardous work and where there is likelihood of injuries to the person or impairment to the health of the employee working in the factory. The clerical staff not being subject to such hazards, it could not have been the intention of the Legislature to include such clerical staff who are not in any way likely to be affected by anything that happens in the process of manufacture that is carried on in a factory. Therefore, it is too much to say that these clerical staff were intended to get the benefits of the Insurance Act in the matter

1. (1909) 1 I.C. 102.
2. 10 E.R. 624 at 660.

of sickness or the medical benefit or the disablement benefit. But, it has to be noted that throughout the provisions of the Act, it has not been set out anywhere that the sickness or the disablement or the maternity benefits that are sought to be conferred by the Act should be claimed only by reason of any activity on the part of the employee directly connected with the manufacturing process. On the other hand, the provisions only lay down that when the employee falls ill or when there is maternity entered into by any woman worker or when any employee is disabled from doing his work, the benefits of the Insurance Act should be made available to such a person. In the absence of any direct connection having been established by the provisions of the Act that the person entitled to the benefits should become disabled or become sick as a result of his work connected with the manufacturing process, it is difficult to say that the benefits were intended to be restricted merely to the technical staff.

The Government Pleader, however, has invited my attention to the Report of the Select Committee on this Act which has stated that the original Preamble, which stated that the benefits were to be conferred only upon workmen, was altered by the Committee so as to enlarge the scope of the benefits to be available also to all employees in a factory. The final Preamble, however, that is found in the Act does not mention this fact, specifically but it states that the Act is intended to benefit only employees against sickness, disablement, etc. It is the contention of the learned Government Pleader that in interpreting the term " employee " as defined in this Act, reference may be had to the proceedings of the Select Committee.

It has also been brought to my notice by counsel on both sides that the question as to whether the term " employee " as defined in Act XXXIV of 1948 does or does not comprehend non-technical staff such as clerks of the type of the respondents in this appeal is bereft of any authority and that no decision of this Court or of any other Court has been available so far and it is also stated by counsel on both sides that there are several applications pending before Courts in this State which involve the interpretation of the term " employee " as defined in the Employees' State Insurance Act and that the matter is one of considerable importance for employees and also the factories where these technical and non-technical staff work.

In view of these facts, I consider that this matter deserves to be considered by a Bench so that the question as to whether the term " employee " as defined in the Act includes also within its scope non-technical staff such as clerks as well in addition to the technical staff actually employed in the process of manufacture in a factory may be decided and set at rest so far as this Court is concerned. This matter will therefore be placed before my Lord the Chief Justice for necessary orders.

[In pursuance of the above Order of Reference, the Appeal came on for hearing before a Bench, *Rajamannar, C.J.* and *Veeraswami, J.*]

The Government Pleader (*A. Alagirisami*), for Appellant.

T. R. Sangameswaran, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—The decision of this appeal turns on the application of the definition of " Employee " in the Employees' State Insurance Act, 1948, to seven persons employed in the office of the Managing Agents of the Lotus Mills Limited, Coimbatore. Lotus Agency (Private) Limited are the Managing Agents. The learned District Judge of Coimbatore decided that they were not " employees."

" Employee " is defined in section 2 (9) of the aforesaid Act thus :

" ' employee ' means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and—

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere."

For the purpose of this appeal "sub-clauses (ii) and (iii) are not material. " Factory " is thus defined :

" 'Factory' means any premises including the precincts thereof whereon twenty or more persons are working or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but does not include a mine subject to the operation of the Indian Mines Act, 1923 or a railway running shed."

As it was not clear to us what was the exact work which the seven persons from whom contribution was demanded under the provisions of the said Act were doing, we asked both the learned Government Pleader and the counsel appearing for the employees to file before us statements setting out the particulars of the work which had been allotted to each of them. We have now been given the requisite information which we set out below :

1. *Ganapathia Pillai (who has since died on 9th January,* 1958)—General supervision of the work in the Managing Agents' Office.

2. A. N. Venkatachalam Chettiar: Assistant Secretary in charge of the Managing Agents' Office, in status next to the Secretary, entrusted with the overall responsibility for running the Managing Agents' Office.

3. C. V. Vaidyalingam: Supervisory official in charge of the Managing Agents' Office. After Ganapathia Pillai's death he has been doing the work of general supervision of the Managing Agents' Office also.

4. T. N. Kanthanathan: Cashier for disbursement of pay to all officers and staff and wages to workers of the mill.

5. R. Rangaswami Rao: Typist, attending to all typist's work in the Managing Agents' Office.

6. V. Radhakrishnan: Clerk attending to general clerical work in the Managing Agents' Office.

7. A. R. Ramaswami Chettiar: Ledger clerk in charge of the maintenance of the ledgers and the cash book of the Managing Agents' Office.

The learned Government Pleader contended that the definition of " employee " in section 2 (9) of the Act should be broadly construed and it should be held that persons employed in the office of a Managing Agent for an industrial or manufacturing establishment must be deemed to be employed on any work incidental or preliminary to, or connected with the work of the factory or establishment.

Now, ' the work ' which is the prime factor is the work of the factory. " Factory " means the premises wherein a manufacturing process is being carried on. It follows that only persons who are in some manner or another connected with the said work, *viz.*, manufacturing process, that can be said to be " employees " within the meaning of the definition. There are no doubt the words " incidental or preliminary to ", but both these have to be understood in conjunction with the words " with the work of the factory ". So, the work done by the person in question should be work incidental or preliminary to the work of the factory as such. No decided case of this Court was cited to us which has a direct bearing on the point. A ruling of a Division Bench of this Court in *Regional Director, E. S. I. Corporation* v. *Sriramulu Naidu*[1], was referred to us. It was there held that if within the same premises or compound a number of departments are situate and the departments are engaged in the work in connection with or incidental to a manufacturing process of the factory, they would *prima facie* all form part of the factory. The main question which was raised before the learned Judges in that case was whether a cinema studio could be described as a factory. There were several departments engaged in different kinds of work in the studio, namely, (1) electrical, (ii) camera, (iii) sound, (iv) setting (v) moulding, (vi) carpentry, etc. There was a controversy whether any of these departments would come within the term of "factory" under the Act. The learned Judges held that it would be. Therefore the provisions of the Employees' State Insurance Act would apply to it. In that case there was no question as to whether a person was or was not an employee. The contribution was demanded from the proprietor of the studio as an " employer ". The defence of the employer was that the studio was not a factory and therefore he was not liable. That plea was not upheld. In the course of the judgment of the Division Bench delivered by Ramachandra Iyer, J., there are observations to the

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1. (1960) 1 M.L.J. 257.

effect that the object of the Employees' State Insurance Act is more comprehensive and its scope designedly wider than those of the Factories. Act. The learned Judge said :

> " The Employees' State Insurance Act is the outcome of a policy to provide a remedy for the widespread evils arising from the consequences of national poverty. It is a piece of social security legislation, conceived as a means of extinction of the evils of society named by Lord Beveridge (in his report which inspired this type of legislation in all countries), namely, want, disease, dirt, ignorance and indigence."

While we recognise that there is a difference between the definition of 'worker' in the Factories Act and the definition of " employee " in the Employees' State Insurance Act, what we have to decide in each case is whether a particular person is one who will fall within the definition in the Employees' State Insurance Act. Of the seven persons from whom contribution is demanded, in our opinion, only one of them, namely, Sri T. N. Kanthanathan, can be brought under the definition interpreting its language as widely as we can. Sri Kanthanathan, disburses not only the pay of the officers and staff, but also the wages to the workers of the mill. It may be said that the payment of wages to the workers employed in the factory is in a sense incidental to, or connected with the work of the factory. We hold that Sri T. N. Kanthanathan will be liable for insurance contribution. We had at one time a doubt about Sri A. R. Ramaswami Chettiar because it was alleged that he keeps the ledger not only for the Managing Agents' Office but also for the factory accounts. An affidavit has since been filed by him that he does not attend to the accounts of the factory as such. His work is confined to the accounts of the Managing Agents' Office. Of the other persons sought to be made liable, it cannot be said in any sense that they are employed on any work of or incidental or preliminary to, or connected with the work of the factory. They are all persons employed in the Managing Agents' Office. A private copy of a judgment of the Division Bench of the Bombay High Court (F.A. No. 610 of 1955) was furnished to us by the learned Government Pleader. The judgment of the Bench was delivered by Gajendragadkar, J. The question raised in that case was whether a person employed in the administrative office of the J. K. Chemicals Limited, was an 'employee' within the meaning of the Act. The learned Judge held he was not and observed :

> " Nevertheless, before the respondent can be said to be an employee within the meaning of section 2 (9) (i), it must be shown that he has been employed on any work of, or incidental or preliminary to, or connected with the work of the factory. It is necessary to emphasise that on the facts admitted in this case it is not shown that the work of the factory was to sell the products of the factory. The work of the factory in the present case began with the collection of raw materials and ended with the production of finished articles. If that be so, it would be difficult to accede to the argument that the work of selling the products of the factory was connected with the work of the factory. The work of selling cannot be said to be incidental or preliminary to the work of the factory. It is obviously not preliminary, and it cannot be incidental in that sense. It is true that the expression 'connection with' may be larger in its denotation than 'incidental' or 'preliminary'. But this expression also must be construed in the light of the facts as to which there is no dispute in the present case. "

Applying these observations to the present case, it is obvious that the persons from whom contribution was demanded, except Sri T. N. Kanthanathan, are not employees. In paragraph 2 of the affidavit filed by Sri C. V. Vaidyalingam on behalf of the respondent it is definitely stated that :

> " the Managing Agents' Office is concerned purely with the administrative side of the mills and sale of finished products and are not in any way connected sith the manufacturing process or with the work of the factory."

This is not denied.

In the result, the appeal is allowed in part regarding the fourth respondent, namely, Sri T. N. Kanthanathan, but is dismissed otherwise. There will be no order as to costs.

R.M. ——— *Appeal allowed in part regarding fourth Respondent and dismissed otherwise.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Loganatha Naicker .. *Petitioner**

v.

Kuppammal .. *Respondent.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), section 72 (xiii)—Applicability—Accused sentenced to fine and in default to imprisonment—Revision Petition to High Court under sections 435 and 439, Criminal Procedure Code (V of 1898)—Court-fee—Claim to exemption—Sustainability.

A petition for revision under sections 435 and 439 of the Criminal Procedure Code, against a sentence of fine and imprisonment in default of payment thereof does not fall under section 72 (xiii) of the Madras Court-fees and Suits Valuation Act, 1955, and is not exempt from payment of the prescribed Court-fee.

The duress contemplated by the section is a duress by reason of the petitioner being a prisoner in jail or a person in duress or under any restraint of any Court or officer. A duress which results in his being sent to jail in default of payment of fine is not the sort of duress contemplated by section 72 (xiii). That section covers only petitions by prisoners in jail or other persons in actual custody.

Petition sought to be presented under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Special Honorary Presidency Magistrate of the Court of the Presidency Magistrate, G. T. Madras in C.C. No. 1772 of 1960.

K. N. Subramaniam, for Petitioner.

G. Ramanujam, for The Government Pleader on behalf of the State.

OFFICE NOTE.—*The Hon'ble Mr. Justice Somasundaram.*

U.S.R. No. 4535/60 on the file of the High Court is a petiion filed to revise the Order in C.C. No. 1772 /60, Special Honorary Presidency Magistrate, G. T. Madras, in which the accused was fined Rs. 50 (in default) R.I. for one month.

The petition was returned for payment of necessary Court-fees. The Advocate on record did not comply with the requirement but has requested the matter be posted for orders of Court on the ground that the petitioner is under duress and therefore exempt from payment of Court-fee in view of section 72 (xiii) of the Court-fees Act.

Section 72 (xiii) exempts from Court-fees "petition by prisoner or other person in duress or under restraint of any Court or its officer."

This has been all along interpreted as exempting only petitions by prisoners in jail or other persons in actual custody for the purpose of levying Court-fees.

Duress has not been defined in the Indian Penal Code or in the Criminal Procedure Code. It is defined as follows in the Oxford Dictionary, "forcible restraint; imprisonment, compulsion especially imprisonment, threats or violence illegally used to force person to do something" (for avoiding contracts so made). For the meaning of the word the Advocate relies on the ancient authority of Coke on Littleton 2536 and states that it means, 'threat of bodily harm which is present in the sentence of the Court'.

Invariably in all cases in which fine sentences are imposed on the accused, time for payment of fine is also granted; as such no question of the free will being curbed arises.

In the present case it appears the accused has paid the fine and there is no question of any default sentence of imprisonment being imposed on him. Therefore the present petitioner (accused), it seems, must be deemed to be not in duress, and therefore liable to pay the necessary Court-fee.

Submitted for orders.

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* U.S.R. No. 4535 of 1960.

27th July, 1960.
(5th Sravana, 1882—Saka).

The Court made the following

ORDER.—The Office has put up the papers for orders as to whether the accused who has been sentenced only to a fine and in default to imprisonment should affix Court-fee stamps when he files a revision against the conviction and sentence. The learned Advocate who has preferred this petition on behalf of the accused contends that his case falls under section 72 (xiii) of the Court-fees Act, under the clause, "other persons in duress". His contention seems to be that when he is not able to pay a fine he will have to go to jail as ordered by the Court. He considers this as duress and therefore he claims exemption under this clause. But the order passed is in accordance with the law of the land. There can be no duress when the Court observes the provisions of the law as laid down by the Legislature. The duress contemplated in the section, as pointed out by Mr. Ramanujam appearing for the Government Pleader, must be considered *ejusdem generis* with the other phrase used in the section. It must be construed as under a disability to pay the Court-fee. The clause refers to a petition by a prisoner or other person in duress or under any restraint of any Court or Officer. When the person is a prisoner he will not be able to buy the stamps himself. Similarly when a person is under restraint of any Court he will not be able to buy the stamps himself. Under these circumstances therefore the law has exempted him from buying the Court-fee stamps himself and affixing the same to the petition. Similarly the section exempted a person who may be under duress by other person. Duress contemplated in this section is therefore not duress which results in his being sent to jail in default of payment of fine but duress by some other person, which act will be contrary to law.

The petitioner in the circumstances therefore has to pay the Court-fee stamps and if the Court-fee stamps are not affixed, the petition will not be entertained by the Office.

P.R.N. ——— *Court-fee ordered to be paid.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASAN.

Pahalajmal Khatumal .. *Petitioner*.*

v.

K. Govindarajulu Power of attorney agent of T. V. & Bros. and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (7)—*Eviction proceedings by power agent of the landlord—General power of attorney containing power to take steps in eviction—No separate written consent necessary.*

The expression in section 7 (7) of the Madras Buildings (Lease and Rent Control) Act 'merely as the agent of the landlord' has necessarily to be read along with the earlier clause 'who is receiving or is entitled to receive the rent.' 'Merely' therefore qualifies the extent of the power of the agent and where such power is limited only to receiving the rent or to be entitled to receive the rent, such an agent cannot apply for the eviction of tenant unless he is armed with the further power in the shape of previous written consent of the landlord. It does not mean that notwithstanding that the agent holds a general power which specifically includes the power to take steps in eviction proceedings on behalf of the landlord, even then, there should be a separate written consent for that purpose.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Coimbatore, dated 7th January, 1960 and made in C.R.P. No. 217 of 1959 (C.M.A. No. 46 of 1958, Principal Sub-Court, Coimbatore R.C. O.P. No. 167 of 1958, Principal District Munsif Court, Coimbatore).

M. Srinivasa Chari, for Petitioner.

K. Rajah, for Respondent.

* C.M.P. No. 692 of 1960.

17th October, 1960.
(25th Asvina, 1882—Saka).

The Court made the following

ORDER.—Two grounds were raised before the Rent Controller. One was that the agent of the landlord who filed the petition for eviction of the tenant (Petitioner), was not authorised to file that petition. The second was that there was no wilful default in the payment of rent. The learned Rent Controller found both the points against the tenant. On appeal, the Appellate Authority went into the first question in some detail and came to the conclusion that, notwithstanding that the agent was armed with a general power, which power specifically included the right to take steps in eviction in civil, criminal, revenue or rent control Courts, that was not sufficient compliance with section 7 (7) of the Act. He thought that there should be a specific authorisation in respect of the proceedings launched by the agent. This matter was taken in revision before the learned District Judge who disagreed with the Appellate Authority and concluded that the general power-of-attorney conferred the necessary power upon the agent and was not against the tenor of section 7 (7) of the Act. Accordingly, the learned District Judge remanded the appeal to the Appellate Authority for disposal of the second question which had been left undecided by it, namely, whether there was wilful default. It was found by the Appellate Authority that the default was wilful. Accordingly, we have the concurrent findings of all the Courts below that the default in this case was wilful, and that concludes that question.

In this revision before me, the first ground has been pressed, learned counsel for the petitioner-tenant arguing that the interpretation placed on section 7 (7) of the Act by the Appellate Authority is incorrect. Section 7 (7) states :

> " Notwithstanding anything contained in this section, no person who is receiving or is entitled to receive the rent of a building merely as an agent of the landlord shall, except with the previous written consent of the landlord, be entitled to apply for the eviction of a tenant. "

The plain purport of this section appears to be nothing more than that no person who is collecting the rent or is entitled to collect the rent of the premises on behalf of the landlord and whose power in that connection is limited only to such collection of rent shall be entitled to take any steps for the eviction of the tenant except with the previous consent of the landlord. The expression " merely as an agent of the landlord " has necessarily to be read along with the earlier clause " who is receiving or is entitled to receive the rent." " Merely " therefore, qualifies the extent of the power of the agent, and where such power is limited only to receiving the rent or to be entitled to receive the rent, such an agent cannot apply for the eviction of the tenant unless he is armed with the further power in the shape of previous written consent of the landlord. This, to my mind, is the proper interpretation to be placed on this section. It does not mean, as argued on behalf of the petitioner, that notwithstanding that the agent holds a general power which specifically includes the power to take steps in eviction proceedings on behalf of the landlord, even then, there should be a separate written consent for that purpose. The learned District Judge, in dealing with the revision petition, has referred to the rules framed under the Act, and pointed out that a recognised agent as defined in the rule would include a person holding the power-of-attorney authorising him to act on behalf of the principal. The power-of-attorney produced in the case established that the agent was rendered competent to appear, continue, prosecute and defend all legal proceedings in civil, criminal, revenue and rent control Courts. The power accordingly, included the right to take eviction proceedings against the defaulting tenants. I agree with the learned District Judge that this complies with the requirements of section 7 (7) of the Act, and accordingly, the competency of the agent of the landlord cannot be questioned.

It was somewhat vaguely pointed out that the tenant had been in occupation of the premises for the last 14 years and that the power-of-attorney itself was executed some time in 1945. I do not see how this has any relevancy whatsoever. It is quite clear that, even at the time of the execution of the power-of-attorney, Rent Control Courts had come into existence and the landlord was competent to arm his agent with the necessary powers to take all proceedings under the Act.

The petition is without substance and is dismissed with costs. Time to vacate: three months, provided the tenant pays all the arrears upto the end of October, 1960 before the end of the month and continues to pay rents for the succeeding months in time, failing which he will be evicted immediately.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

The Management of Murugan Transport .. *Petitioner**

v.

The Workers employed in The Murugan Transport represented by the Motor Transport Workers' Union and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947)—Industrial dispute—Union of workers—Authority to Secretary to sponsor the cause of workers and to make a demand upon the employer—Necessity.

Where the rules of the Workers' Union do not confer on the Secretary power to raise an industrial dispute on behalf of the union and where there is no satisfactory, in fact no proof, whatever to show that the General Body authorised its Secretary or any of its office-bearers to make the demand on the employer on behalf of the individual employees, the dispute referred to the Industrial Tribunal would not be an industrial dispute but individual disputes only.

Kandan Textiles Limited v. *The Industrial Tribunal, Madras*, (1949) 2 M.L.J. 789, referred.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the Labour Court, Madurai, in I.D. No. 69 of 1957, dated 30th April, 1958 and quash the said order.

M. K. Nambiyar and *K. K. Venugopal*, for Petitioner.

V. S. Ramakrishnan, for 1st Respondent.

R. C. Rajan, for the Additional Government Pleader (*M. M. Ismail*), for 2nd Respondent.

The Court made the following

ORDER.—In November, 1956, the Murugan Transport, Cuddalore, dismissed six of its employees. The Labour Officer, Tiruchirapalli, initiated conciliation proceedings, but these failed. He reported the failure in a letter dated 10th January, 1957. Some time later, in January, 1957, the Management of the Murugan Transport dismissed a seventh employee and refused to take back an eighth employee who had everstayed his leave. The Labour Officer initiated conciliation proceedings in respect of these two workers also, but now too his efforts failed. He reported that in a letter dated 27th March, 1957. On 16th July, 1957, the General Body of the Motor Transport Workers' Union, Cuddalore, passed a resolution in certain general terms. They were to the effect that the requests of the employees of the Murugan Transports had been considered, that the requests should be forwarded to the Management for consideration and that if the Management failed to grant redress, notice of strike to take effect from 17th August, 1957 or some later date be given. The only point that has to be noticed here is that the resolution does not specify or even indicate what the grievances or the requests of the employees of the Murugan Transport were. On 21st July, 1957, a notice of strike was served on the Management in which a demand was made for the reinstatement of the eight persons. On 31st July, 1957, the Management replied that the matter was pending with the Government. On 29th August, 1957, the Government referred to the

* W.P. No. 424 of 1958. 17th August, 1959. (26th Sravana, 1881—Saka).

Labour Court, Madras, for adjudication the question whether the dismissal of the seven employees and the refusal to take back the eighth employee was justified and to what relief the persons were entitled. Before the Labour Court, the point was taken that the dispute referred to it was not an industrial dispute but consisted only of individual disputes and that, therefore, it has no jurisdiction to enquire into the matter. The Labour Court overruled the objection and decided to go into the merits of the case. The Management has now come to this Court for the issue of an appropriate writ to quash this decision of the Labour Court.

The letter, dated 21st July, 1957, which was addressed to the Management and in which the demand was made that all the eight individuals concerned should be taken back was issued by the Secretary of the Union. The Labour Court was apparently inclined to take the view that the Secretary could make such a demand on behalf of the Union without express authority in that behalf. Now, an examination of the rules of the Motor Transport Workers' Union, Cuddalore, shows that the authority of its Secretary is extremely limited. The relevant paragraphs of the rules are paragraphs 16 and 22. The former in general terms authorises the Secretary to exercise general supervision and control over the affairs of the Union. Going into particulars the rule says that he shall be responsible for conducting all correspondence on behalf of the Union, for recording the minutes of the meetings of the committees and the general body, for maintaining registers, for convening in consultation with the President meetings of the Union and of the Executive Committee and issuing notices and agenda therefor, and submitting the statements and other documents required to be submitted under the statutes. Under this paragraph, the position of the Secretary is made analogous to that of the Head Clerk of an office where there are more than one clerk or of the sole clerk where there is only one clerk. Paragraph 22 authorises the Secretary to incur urgent expenditure not exceeding Rs. 10 between two meetings of the Executive Committee. Therefore, it is clear that the rules of the Motor Transport Workers' Union do not confer on the Secretary power to raise an industrial dispute on behalf of the Union. Reference may be made to the decision of a Bench of this Court in *Kandan Textiles Limited* v. *The Industrial Tribunal, Madras*[1], wherein it is explained at page 794 that

"In the absence of any definite particulars as to the membership of this union, and its representative character, and in the absence of anything to show that it was decided by the workmen members of this Union by resolution or otherwise to take up the cause of the aggrieved workmen and in the absence of evidence to show that the aggrieved workmen put forward the President of this Union as their representative and spokesman, it is impossible to hold in law that an industrial dispute existed between the employer and the workmen to enable the Government to make an order under section 10 (1) of the Act........In our opinion, it was incumbent on the union by production of the relevant records to positively establish the fact that the union is entitled to represent and that it is as a matter of fact representing these 36 aggrieved workers"

It was however contended that the meeting of the General Body which was held on 16th July, 1957, authorised the strike. I have already referred to the resolution that was then passed. It is general in its terms and does not say anything about the claims of the eight individuals whose names are mentioned in the order of reference which Government made to the Tribunal. No letter addressed to the Union or any other document which one may presume was considered by the General Body on 16th July, 1957 and in which the claim of any of these workers was raised was produced before me. It was however stated that the claims of these individuals were put forward in the strike notice issued on 21st July, 1957. But the point is that the notice does not say that the claims made on behalf of these eight individuals was being put forward in pursuance of the resolution passed by the General Body on 16th July, 1957. No doubt, there is an explanatory statement attached to the demand. But in some respects it is so manifestly erroneous that one will not be justified in assuming from it that the General Body had authorised that any demand should be made on behalf of these eight individuals.

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1. (1949) 2 M.L.J. 789.

The net position is that there is no satisfactory, in fact, no proof whatever, to show that the General Body authorised its Secretary or any of its other officers to make this demand on behalf of these eight individuals on the Management. There was, therefore, no evidence whatever to show that this was an industrial dispute.

In the circumstances, this petition is allowed and the order complained of is quashed. There will be no order as to costs.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VEERASWAMI.

Chinnaswami Pillai and another .. *Appellants**

v.

Thyagaraja Nainar .. *Respondent.*

Civil Procedure Code (V of 1908), section 96 (3) and Order 23, rule 3—Suit dismissed in view of adjustment pleaded—If appealable.

Although the terms of a compromise between the parties to a suit was found established in a separate order on an application under Order 23, rule 3, Civil Procedure Code and the suit is dismissed, the basis of the decree in the suit is really the consent so established and the decree is not appealable as it is one passed by consent. The fact that one of the parties denied the consent in the proceedings under Order 23, rule 3 could make no difference when once the Court holds that the consent has been established and the remedy of the aggrieved party is to file an appeal against that order. Hence a decree passed on the basis of an order under Order 23, rule 3, Civil Procedure Code, recording the terms of compromise is also a decree passed with the consent of parties and is not appealable.

Govindaswami v. *Kaliaperumal*, (1922) 16 L.W. 155, followed.

Ayyagiri Virasalingam v. *Koovur Basivi Reddi*, (1915) 27 M.L.J. 173, differed and explained.

Case-law referred.

Appeal against the order of the Court of the Subordinate Judge of Cuddalore, dated 11th April, 1959 and made in A.S. No. 164 of 1958 preferred against the decree of the Court of the District Munsif of Cuddalore, dated 5th March, 1958 and passed in O.S. No. 142 of 1957.

M. R. Narayanaswami and *S. Natarajan*, for Appellant.

K. S. Desikan and *K. Raman*, for Respondent.

The Court delivered the following

JUDGMENT.—The substantial point in this Civil Miscellaneous Appeal is whether the appeal filed in the lower appellate Court was maintainable. Pending the suit for possession, the defendant-appellant filed an application under Order 23, rule 3 of the Code of Civil Procedure, for an order recognising an adjustment of the dispute out of Court. The plaintiff-respondent contested this application but eventually the application was ordered on a finding that the adjustment pleaded by the respondent was proved. In view of the order made in the application under Order 23, rule 3, Civil Procedure Code, the trial Court dismissed the suit. The respondent filed an appeal against the decree in the suit but not against the said order. The lower appellate Court overruled an objection and held that the appeal was maintainable on the view that the order accepting the petition to record the compromise and the dismissal of the suit were one and the same. The lower appellate Court then went into the other points and ultimately allowed the appeal remanding the suit for fresh trial on the merits.

Sri M. R. Narayanaswami, the learned counsel for the appellant, contends before me that the view of the lower appellate Court that the appeal before it was maintainable is erroneous. He urges that as the compromise was found proved in the application under Order 23, rule 3, Civil Procedure Code, the basis of the decree

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* A.A. O. No. 142 of 1959. 7th October, 1960.
(15th Asvina, 1882—Saka.)

dismissing the suit was really the compromise so proved ; and that for purposes of section 96 (3) it did not make any difference that the consent to the compromise was given not at the time when the decree was passed by the trial Court, but earlier. In support of his contention the learned counsel has relied on the decision in *Govindaswami* v. *Kaliaperumal*[1]. On the other hand, Sri K. S. Desikan, the learned counsel for the respondent, relies on the decision in *Ayyagiri Veerasalingam* v. *Koovur Basivi Reddi*[2] and contends that a decree passed on the basis of an independent order recognising a compromise, cannot be said to be a decree passed by the Court with the consent of the parties. Sri Desikan has stressed that in this case the plaintiff as a matter of fact denied he ever gave his consent to any compromise and that whether there was a compromise or not was itself the issue in the application of the defendant under Order 23, rule 3, Civil Procedure Code. When there was a protest on the part of the plaintiff that he ever gave his consent, so ran the argument, the decree cannot be said to have been passed with the consent of the parties.

In *Ayyagiri Veerasalingam* v. *Koovur Basivi Reddi*[2] the material facts were more or less similar to those in the present case. In that case there was an order made under Order 23, rule 3, Civil Procedure Code recognising a compromise. On the foot of that order a decree followed in the suit. An objection was taken to the maintainability of the appeal against the decree on the ground that it was one passed with the consent of the parties within the meaning of section 96 (3), Civil Procedure Code. In repelling the objection, Sadavisa Ayyar, J. and Tyabji, J., held that the decree itself was not one passed with the consent of parties but the Court having found earlier that there was consent of the parties to the terms of the compromise agreement which was recorded, it passed a decree in accordance therewith, notwithstanding the objection of one of the parties. In other words the learned Judges considered that the fact that consent for the terms of the compromise had been found to be true on an application under Order 23, rule 3, Civil Procedure Code was not the same as a consent to a decree being passed in the suit. If this view is to be followed, the objection to the maintainability of the appeal in the lower appellate Court has got to be overruled. But then on almost similar facts the learned Judges in *Govindaswami* v. *Kaliaperumal*[1], reached a diametrically opposite conclusion on the maintainability of the appeal. One of the learned Judges in that case was Sadasiva Ayyar, J., who was a party to the decision in *Ayyagiri Veerasalingam* v. *Koovur Basivi Reddi*[2]. Referring to the earlier decision Sadasiva Ayyar, J., expressed that although there was force in the view upheld in that case, nevertheless, the learned Judge on a reconsideration thought that the better view would be to hold that a decree passed in circumstances similar to those mentioned above, should be regarded as one passed by the Court with the consent of the parties. Sri Desikan for the respondent urges that in view of the conflict between the two decisions, I must refer this Civil Miscellaneous Appeal to a Division Bench, if not a Full Bench, for final disposal. But, on a careful consideration of the question, it seems to me that it is not necessary to follow this course for the following reasons.

The substance of the matter is that although the consent to the terms of the compromise was found established in a separate order on an application under Order 23, rule 3, Civil Procedure Code, the basis of the decree in the suit was really the consent so established. It is no doubt true that the plaintiff in the suit denied the consent. But that, in my opinion, can make no difference in view of the fact that the consent had been established or proved in the application under Order 23, rule 3, Civil Procedure Code. So long as that order stands, one has to proceed upon the footing that the terms of the compromise have been consented to ; and that is the foundation for the decree in the suit. The proper remedy in such a case for the party aggrieved against the order recognising the compromise is to file an appeal against it which has been provided for by the Code. It is this view, which

1. (1922) 16 L.W. 155. 2. (1915) 27 M.L.J. 173.

I think is the correct one, that found favour in *Govindaswami* v. *Kaliaperumal*[1]. As I have said, Sadasiva Ayyar, J., who was a party to the decision in *Ayyagiri Veerasalingam* v. *Koovur Basivi Reddi*[2], himself on a reconsideration, accepted the view that a decree passed on the basis of an order under Order 23, rule 3, Civil Procedure Code, recognising the terms of a compromise, was one passed by the Court with the consent of the parties. In my view this fact, with due respect to the learned Judges, considerably weakened the authority of the decision in *Ayyagiri Veerasalingam* v. *Koovur Basivi Reddi*[2]. Apart from that, the balance of judicial authority in subsequent decisions not only of this Court but also of other High Courts appears to be on line with the view held in *Govindaswami* v. *Kaliaperumal*[1]. Reference may be made to the decisions in *Ramnarayana Rao* v. *Ramakrishna Rao*[3]; *Satyanarayanamurthi* v. *Butchayya*[4]; *Umiashankar Naranji* v. *Shivshanker Prabhashanker*[5] and *Fateh Din* v. *Bal Mukand*[6].

In view of what I have said above, it follows that the appeal preferred by the plaintiff to the lower appellate Court was not maintainable because of the bar under section 96 (3), Civil Procedure Code.

Sri K. S. Desikan wanted to address to me an argument based on section 105, Civil Procedure Code but, as I have held that the appeal to the lower appellate Court was itself not maintainable I do not think it necessary to consider that argument.

The result is this Civil Miscellaneous Appeal is allowed, but in the circumstances I make no order as to costs.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

The Weavers Mills Ltd., Rajapalayam through Managing Agents Jayam & Co., Ltd., represented by the present Managing Director A. M. Chinna Guruswami Moopnar .. *Petitioner**

v.

Balkis Ammal and others .. *Respondents.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), section 40—Scope of—Decree in a claim suit under Order 21, rule 63, Civil Procedure Code (V of 1908)—Suit to set aside—Valuation for purposes of Court-fees.

A claim suit under Order 21, rule 63 of the Civil Procedure Code is a continuation of the execution proceedings and in such a suit the valuation of the property will be the value of the decree in execution of which the property was sold. A suit to set aside a decree in a claim suit on the basis of fraud or collusion will have to be valued on the amount of the decree in execution of which the property was sold and which was sought to be set aside in the earlier claim suit.

Petition under Section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Ramanathapuram at Madurai, dated 15th July, 1960 and made in O.S. No. 40 of 1959.

R. Gopalaswami Ayyangar, for Petitioner.

G. Ramanujam for the Government Pleader (*A. Alagiriswami*), for the State.

R. Ramasubbu Ayyar, for Respondents.

The Court made the following

ORDER.—This revision petition is directed against the order of the Subordinate Judge of Tuticorin calling upon the petitioner, the plaintiff in O.S. No. 40 of 1959,

1. (1922) 16 L.W. 155.
2. (1915) 27 M.L.J. 173.
3. A.I.R. 1936 Mad. 385.
4. (1924) 48 M.L.J. 249.
5. I.L.R. (1944) Bom. 405.
6. A.I.R. 1936 Lah. 963.

* C.R.P. No. 1510 of 1960.

3rd November, 1960.
(12th Kartika, 1882—Saka.)

to pay an additional Court-fee on the plaint. O.S. No. 40 of 1959 was instituted by the petitioner for a declaration that the suit properties belonged to him and for an injunction restraining the first respondent from proceeding against the properties for the debt payable by respondents 2 and 3 in pursuance of the decree passed in O.S. No. 16 of 1949.

The following facts are necessary to appreciate the question involved in the present case. According to the petitioner, the properties belonged to it having been purchased on 17th June, 1945. The second respondent was the Managing Director of the petitioner-mills. While he was acting as such Managing Director, the first respondent obtained a money decree against him personally in O.S. No. 16 of 1949. In execution of the decree in that case the first respondent attached the suit property in E.P. No. 60 of 1955. The second respondent thereupon filed E.A. No. 301 of 1956 under Order 21, rule 58, Civil Procedure Code, claiming that the property belonged to the petitioner-mills of which he was only the Managing Director, and that the first respondent had no right to attach the same in execution of a decree against him personally. The claim was rejected. The second respondent thereupon instituted O.S. No. 3 of 1958 to set aside the claim order. That suit was valued at Rs. 5025 as representing 1/4th of the market value of the attached properties and a Court-fee of Rs. 337.25 under section 41 of the Court-Fees Act was paid. It is unnecessary to consider now whether that suit has been properly valued or not. On 10th March, 1959, that suit was taken up for trial and dismissed. It is stated, the suit was dismissed by reason of the collusion between the first and second respondents. O.S. No. 40 of 1959 out of which the Civil Revision Petition arises was thereafter instituted by the succeeding Managing Director representing the mills on the allegation that the decree in O.S. No. 3 of 1958 should be set aside as that was the result of the collusion between the first and second respondents. The suit was valued under section 25 (*b*) of the Court-Fees Act at Rs. 5,500. A Court-fee of Rs. 412.50 was paid. The valuation was objected to by means of the check slip by the Court-fee Examiner. The learned Subordinate Judge held that the subject-matter of the suit should be considered to be the entire property which was the subject-matter of O.S. No. 3 of 1958 and as that according to the plaintiff in that case was worth Rs. 20,100, the present suit should also bear the same value and a court-fee on that amount should be paid. The learned Subordinate Judge's view was that the Court-fee was payable under section 40 of the Court-Fees Act. There can be no doubt that section 40 would apply to the present case. But the substantial question that arises for consideration is as to what is the amount of Court-fee payable. Section 40 states :

> "In a suit for cancellation of a decree for money or other property having a money value .... fee shall be computed on the value of the subject-matter of the suit and such value shall be deemed to be if the whole decree or other document is sought to be cancelled, the amount or value of property for which the decree was passed or other document was executed."

It is necessary to ascertain the value of the decree in the previous case. The decree as I stated was the dismissal of the suit under Order 21, rule 63, Civil Procedure Code. Section 41 of the Court-Fees Act would apply to such a suit. In C.R.P. No. 1925 of 1958, I had to consider what the subject-matter of a suit was in respect of a case to which section 41 would apply. Under section 40 the question would not be exactly the same but rather what would be the value of the decree which was sought to be set aside namely the decree in O.S. No. 3 of 1958. The learned Subordinate Judge took that value to be the same value as the value of O.S. No. 3 of 1958.

Indeed Mr. Ramanujam appearing for the State also contended for acceptance of the same value. I am not able to accept the same. Section 40 says that the subject-matter of the suit will be the amount of value of the property for which the decree was passed. Now it is well-known that a suit under Order 21, rule 63, Civil Procedure Code is a continuation of the execution proceedings. In *Narasimhachariar*

v. *Raghava Padayachi*[1] it was held that the finality of the adjudication in a claim suit would only enure to the execution proceedings of that suit. It would follow that if the petitioner has any title to the property the effect of the decree in O.S. No. 3 of 1958 would only be that he will be precluded from contesting that the decree-holder in O.S. No. 16 of 1949 could not proceed against that property so far as the amount due to him is concerned. Subject to that, his title to the property will remain unaffected. Therefore the amount or value of the property for which the decree was passed should be held to be the decree amount in O.S No 16 of 1949. The plaintiff will, therefore, revise the valuation of ths suit by giving the value of the decree in O.S. No. 16 of 1949 and paying the requisite Court-fee. It is needless to point out that the plaintiff will be entitled to take credit for whatever amount he has paid in O.S. No. 49 of 1959. No order as to costs.

R.M. —— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Alagarisami Kone .. *Appellant**

v.

T. J. Andhoni .. *Respondent.*

Equitable Estoppel—Doctrine of—What is—Landlord and tenant—Right of tenant to claim compensation for improvement—When arises.

The doctrine of 'equitable estoppel' familiarly known as the rule in *Ramsdon* v. *Dyson*, L.R. 1 H.L 129, is outside the statutory provisions of the Transfer of Property Act and its applicability is not excluded by section 51 of the said Act. The foundation upon which reposes the right of equity to intervene is either contract or the existence of some facts which the legal owner is estopped from denying.

A claim for compensation by a tenant against his landlord for improvements effected to the demised property may be rested on the doctrine of equitable estoppel though the law does not generally recognise any right in a lessee to improve the lease-hold estate and claim compensation from the lessor for the same after the expiration of the lease. But mere standing by and failure to object by the lessor when the tenant builds on the demised land is not sufficient to attract the doctrine. What is required is that there should be active encouragement by the landlord and an implied promise that in case the tenant was ejected he would be paid compensation.

Appeal against the Decree of the Court of the Subordinate Judge of Sivaganga, in Appeal Suit No. 34 of 1958 preferred against the Decree of the Court of the District Munsif of Ramanathapuram, in O.S. No. 5 of 1953.

M. Natesan, for Appellant.

K. Parasaran, for Respondent.

The Court delivered the following

JUDGMENT.—The appellant in this second appeal claims compensation, for the value of the superstructure erected by him on a vacant site in which he was let into possession under certain terms and conditions invoking the doctrine of equitable estoppel as enunciated in *Ramsdon* v. *Dyson*[2].

C. A. Subramania Iyer obtained an assignment of a bit of property from the Ramnad Samasthanam as it was before the enactment of the Madras Estates Abolition Act. As owner of the property Subramania Iyer let into possession Alagirisami Kone enabling him to occupy an extent of 1½ cents on his paying a monthly rental of Rs. 3. Alagirisami put up a hut in the year 1946 and conducted a grocery business therein. In 1948, according to Alagirisami, there was an agreement between him and Subramania Iyer under which he was allowed to build a pucca masonry structure on the demised land at his own cost with a definite promise on the part of Subramania Iyer not to evict him so long as he continued to pay the ground rent of Rs. 3 per month and also to sell the site to him in case he wanted to sell away the

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1. (1945) 2 M.L.J. 89 (F.B.) 2. L.R. 1 H.L. 129.

* S.A. No. 1184 of 1958. 16th September, 1960. (25th Bhadra, 1882—Saka).

property. On this assurance on the part of Subramania Iyer arising out of the agreement referred to, Alagiriswami constructed a structure of substantial value on the property. The relationship between Subramania Iyer and Alagirisami continued cordially till Subramania Iyer sold the property under Exhibit A-1 dated 20th September, 1951 in favour of one T. J. Antony. The purchaser Antony caused a notice to be issued through his Counsel to Alagirisami to quit and deliver possession of the property as evidenced by Exhibit B-1 dated 18th February, 1952. A reply to this was sent by Alagirisami under Exhibit A-9 dated 27th February, 1952, setting out the circumstances under which he was in possession of the property.

O.S. No. 5 of 1953 on the file of the District Munsif's Court, Ramnad, was instituted by Antony for recovery of possession of the said 1½ cents of property from Alagirisami impleaded as the defendant in the suit. The plaintiff averred that after he purchased the property from C.A. Subramnia Iyer for Rs. 750 under the registered sale deed dated 20th September, 1951, he orally leased out the suit site together with the building thereon to the defendant on a rental of Rs. 5 per month. He complained that the defendant failed to pay the rent and that he also failed to deliver possession on notice to quit. The plaintiff also claimed a sum of Rs. 68-5-4 stated to be arrears of rent from 20th September, 1951 the date of purchase, to 10th November, 1952, at the rate of Rs. 5 per month. This amount was claimed by the plaintiff alternatively, in the event of the Court finding that there was no letting out of the property by him to the defendant, as damages for use and occupation of the presmises by the defendant.

The defendant resisted the suit and based himself entirely on the oral agreement between himself and the plaintiff's vendor under which he claimed to be a perpetual tenant not liable to be evicted. He also claimed the right of pre-emption. He denied the oral lease as alleged by the plaintiff of his having let out the property to him on a rental of Rs. 5 per month after his purchase. He further contended that in any event he is not liable to be evicted without being compensated for the value of the superstructure put up by him on the property under the terms of the agreement betweeen himself and the said Subramania Iyer.

At the trial of the suit before the learned District Munsif of Ramnad, the defendant practically gave up the plea of permanent tenancy and the plea based upon the right of pre-emption. He was willing to be evicted from the suit property provided adequate compensation was afforded to him in respect of the superstructure erected by him on the demised property. The learned District Munsif found that the case of the plaintiff of an oral lease between him and the defendant was untrue. He also found that the oral agreement pleaded by the defendant between himself and Subramania Iyer relating to the terms and conditions under which the superstructure came to be erected was true. He assessed the value of the superstructure in the sum of Rs. 611-10-0. He found that the plaintiff will be entitled to damages for use and occupation from the defendant only at the rate of of Rs. 3 per month. Accordingly a decree for possession of the suit properties conditional on payment by the plaintiff of Rs. 611-10-0 to defendant by way of compensation for the superstructure and for recovery of a sum of Rs. 41 by way of damages for use and occupation by the defendant for the period of 20th September, 1951 to 10th November, 1952 was passed.

The plaintiff preferred an appeal in A.S. No. 34 of 1958 on the file of the Sub-Court of Sivaganga. The learned Subordinate Judge confirmed the finding of the trial Court that the oral lease put forward by the plaintiff was absolutely untrue. He also concurred with the finding of the trial Court that the superstructure was put up by the defendant at a cost of Rs. 611-10-0. He did not upset the finding of the trial Court on the question of the agreement between the defendant and Subramania Iyer. But the learned Subordinate Judge however held that the plaintiff was not liable to pay any compensation to the defendant for the value of the superstructure on the ground that neither the provisions of section 51 of the Transfer of Property Act nor the rule of equitable estoppel had any application to the facts and circumstances of the case. The learned Subordinate Judge there-

fore granted an absolute decree for possession in favour of the plaintiff but granted three months time to the defendant for removal of the superstructure.

This second appeal has been preferred by the aggrieved defendant. The only question for consideration is whether the lower appellate Court was right in holding that the defendant was not entitled to the compensation for the value of the building erected by him on the demised property. It is clear that section 51 of the Transfer of Property Act cannot help the defendant to get the compensation. The applicability of section 51 is confined to transferees who in good faith believes himself to be absolutely entitled to the property in respect of which he makes any improvement. A lessee simpliciter is of course not a person absolutely entitled to the demised property and it cannot be said that any improvement made by a lessee was made under the belief that he was absolutely entitled to the property. Section 108, clause (*h*) of the Transfer of Property Act provides that the lessee may even after the termination of the lease remove at any time whilst he is in possession of the property leased but not afterwards all things which he has attached to the earth provided he leaves the property in the state in which he received it. The ordinary incidents of the relationship between a landlord and tenant cannot extend beyond what is provided for under section 108 (*h*) of the Transfer of Property Act in respect of the superstructure that may come up on the lease-hold property at the instance of the lessee. There cannot be any right on the part of the lessee to compel the lessor to pay compensation to him at the expiration of the lease for improvements made on the land as otherwise it may help the lessee to improve the land beyond all the means of the lessor to get back the property. The law does not recognise the lessee's right to improve the lease-hold estate from out of the lessor's estate which may in some extreme cases cause the lessor deprivation of the estate itself.

There is a long line of authority of this Court, too numerous to be cited, taking the view that a lessee is not entitled to the benefits of section 51 of the Transfer of Property Act. Indeed the very language of the statute is so clear and explicit that it is impossible for a lessee to claim the benefit of that provision.

But the doctrine of equitable estoppel, or the rule in *Ramsdon* v. *Dyson*[1], as it may be called, lies outside the statutory provisions of the Transfer of Property Act. That rule goes far beyond the principle embodied in section 51 of the Transfer of Property Act. That rule is not excluded by section 51 of the Act. I shall first refer to the rule in *Ramsdon* v. *Dyson*[1]. The headnote in that report sets out the principles laid down therein as follows :—

"If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake abstains from setting him right, and leaves him to persevere in his error, a Court of equity will not afterwards allow the real owner to assert his title to the land.

But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it.

So if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined.

If the tenant, being a mere tenant at will, builds on the land in the belief that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, knowing that he is acting in that belief and does not interfere to correct the error, Semble, that equity will interfere to compel the grant of a lease."

On the facts in the said case there was a difference of opinion between Lord Kingsdown, the only dissenting learned Law Lord, and the other learned Law Lords in the case. But so far as the principle of law was concerned, there was a consensus of legal opinion. Lord Wensleydale enunciated the rule thus at page 168 :—

"If a stranger built on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profit. But if a stranger build knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land, with all the additional value which the occupier has imprudently added to it. If a tenant of mine does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build."

1. L.R. 1 H.L. 129.

Lord Kingsdown at page 170 observed as follows :

"The rule of law applicable to the case appears to me to be this : If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation......"

Lord Kingsdown further observed at page 171 :

"If, on other hand, a tenant being in possession of land, and knowing the nature and axtent of his interest lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of law or equity can enforce. This was the principle of the decision in *Pilling* v. *Armitage*[1], and like the decision in *Gregory* v. *Mighell*[2], seems founded on the plain rules of reason and justice."

The Judicial Committee in *Beni Ram* v. *Kundan Lal*[3], referred to *Ramsdon* v. *Dyson*[4], and stated the principle thus at page 502 :

"In order to raise the equitable estoppel which was enforced against the appellants by both the appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner whether consisting in abstinence from interfering, or in active intervention was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation."

In *Forbes* v. *Ralli*[5], the Judicial Committee extracted the above observations of Lord Kingsdown in *Ramsdon* v. *Dyson*[4], and referred to it with approval. In that case in 1894 the appellant agreed to give in writing to the respondent a lease of a plot of land for the purpose of erecting buildings. The lease was from year to year at an annual rental of Rs. 180. In 1903, the respondents wanted to build a pucca house upon the land and the appellant wrote a letter stating that the lease was a permanent lease, though the rent was liable to enhancement. Acting upon that letter the respondent built a house ; the appellant knew of the building and also received a bonus in respect of it. In 1916 the appellant sued to eject the respondent from the land. It was held that whether or not the letting was a permanent one, the statement in the letter that it was so was a representation of fact, and that the appellant was estopped under section 115 of the Indian Evidence Act from denying that the letting was of that character.

In *Plimmer* v. *Mayor, etc., of Wellington*[6], the Judicial Committee had occasion to consider the rule in *Ramsdon* v. *Dyson*[4], in great detail. In that case the appellant claimed compensation under the Public Works Act, 1882 (New Zealand) on the ground of their having some estate or interest therein within the meaning of that Act. The lessor who demised the property to the appellant had in 1848 created a wharf on the land with the permission of the Government, and had also put up a jetty in 1855. In 1856 at the request and for the benefit of the Government he incurred large expenditure for the extension of the jetty and for the erection of a wharehouse. It was held that the lessor must be deemed to have occupied the ground from 1848 under a revocable licence to use it for the purpose of wharfinger, that by virtue of some transactions in 1850 such licence ceased to be revocable at the will of the Government whereby the lessor acquired an indefinite, that is, practically a perpetual right to the jetty. The equitable right so acquired was held to be an estate or interest in, to or out of the land within the meaning of the Act of 1882 which directed that on ascertainment of title to compensation the Court should not be bound to regard strict legal rights only but should do what is reasonable and just. This case of course dealt with the provisions of a particular enactment. But the ground of the decision of the Judicial Committee was really based on the doctrine of equitable estoppel in the light of the rule in *Ramsdon* v. *Dyson*[4]. At page 713 Sir Arthur Hobhouse stated thus :

1. 12 Ves. 78.
2. 18 Ves. 328.
3. (1898) L.R. 26 I.A. 58 : I.L.R. 21 All. 496 (P.C.).
4. L.R. 1 H.L. 129.
5. (1925) 49 M.L.J. 48 : L.R. 52 I.A. 178 (P.C.).
6. L.R. 9 A.C. 699.

"The question still remains as to the extent of interest which Plimmer acquired by his expenditure in 1856. Referring again to the passage quoted from Lord Kingsdown's Judgment, there is good authority for saying that appears to their Lordships to be quite sound in principle, that the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated."

The legal conception underlying the term equitable estoppel was explained thus by the Judicial Committee in *The Canadian Pacific Railway Co.* v. *The King*[1] :

" It is a doctrine which is sometimes alluded to under the name of 'equitable estoppel'. Whether there can be any estoppel which is equitable as distinct from legal and whether 'equitable estoppel' is an accurate phrase, their Lordships do not pause to enquire. The foundation upon which reposes the right of equity to intervene is either contract, or the existence of some facts which the legal owner is estopped from denying."

In a decision of this Court in *Thavasi Ammal* v. *Arumuga Nattar*[2], this question of a claim for compensation by a tenant against a landlord based upon the doctrine of equitable estoppel came in for consideration. It was a Letters Patent Appeal and the Bench consisted of three learned Judges, Sir John Wallis, C.J., and Oldfield and Seshagiri Iyer, JJ. At page 190, Seshagiri Iyer, J., observed as follows :—

" In the well-known case of *Ramsdon* v. *Dyson*[3], it was distinctly laid down that mere standing by would not compel the landlord to pay compensation at the time of eviction. What is actually required is that there should be encouragement by the landlord to build and an implied promise that, in case the tenant was ejected, he would be compensated. Estoppel of this kind must be based upon something more substantial than failure to object. If, for example, the evidence given in this case by some of the witnesses to the effect that when the building operations commened, the landlord was asked whether he would turn the tenants out after the expenditure of a large sum of money, and that he promised that they would not be disturbed, were believed, the landlord should not be allowed to eject the defendant without paying compensation."

With respect I agree with this observation and I am of opinion that this should be the governing test in deciding this appeal.

The learned District Munsif has found as a question of fact that the defendant built the shop on the suit property as a result of an understanding between him and Subramania Iyer examined as P.W. 2 in the case. He has found that P.W. 2 had full knowledge of the erection of the building, and that he acquiesced in it. He has also pointed out that there was evidence to show that the plaintiff was also present at the time of the agreement between P.W. 2 and the defendant and that he knew about it. The finding of the learned District Judge is recorded as follows :—

"Thus on an examination of the authorities produced by both sides I have come to the conclusion that the defendant built the pucca shop under an agreement and *bona fide* belief that he will not be evicted from the shop in view of his constructing the shop. From the circumstances and the evidence placed before Court it will not be difficult to imply an agreement to pay compensation as it would otherwise be inequitable, to turn out the defendant. The plaintiff cannot be in a better position than the vendor. He is bound by the equities that were existing between his vendor and the defendant."

The learned Subordinate Judge has not disagreed with this finding of the trial Court as there is no express finding contra. If this finding of fact is accepted by this Court, and I see no reason why it should not be accepted, the claim for compensation put forward on behalf of the appellant is well founded and supported by the decisions referred to above.

This is not a case where the tenant is claiming compensation against the landlord merely on the ground that he put up a superstructure to the knowledge of the landlord who failed to protest or to dissuade him from putting up any such structure. The tenant put up the superstructure in pursuance of an agreement with the landlord Subramania Iyer that he will not be evicted, and that he will also have a right of pre-emption, namely, the first option to purchase the property from the landlord if and when he was inclined to sell. It is implicit in this agreement which has now been found as a fact by the Court below that the tenant will not lose the value of the superstructure in any event. The rule of estoppel enunciated in *Ramsdon* v. *Dyson*[3], is really based on a presumption of a contract between

1. (1931) 61 M.L.J. 958 at 971.
2. 7 L.W. 178.
3. L.R. 1 H.L. 129.

the parties or what may be called an implied contract. I am satisfied that on the facts of this case it is possible to infer as was rightly done by the Courts below that the tacit agreement between the parties was that the tenant should not be compelled to surrender the superstructure to the landlord, if he were to be evicted but that he should be paid compensation if he were to quit and deliver possession of the site and the superstructure.

The Second Appeal is allowed; the judgment and decree of the learned Subordinate Judge are set aside and the decree of the trial Court is restored. The appellant will get his costs in this appeal and in the lower appellate Court.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Messrs. K. S. Venkataraman & Co., Ltd. .. *Appellants**

v.

The State of Madras represented by the Collector of Madras .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), *(see now Madras Act I of* 1959), *section* 18-*B—Bar of suit under—Scope of—Suit to recover sales tax paid under mistake of law—If maintainable.*

The Madras General Sales Tax Act provides a complete machinery in which the question of legislative competence in respect of the particular matter involved could be considered and decided. When once assessment proceedings are commenced under the Act, the jurisdiction of the Civil Court to examine the validity of the assessment order is ousted under section 18-A of the Act and it makes no difference in principle whether the legislative provisions under which the tax was levied or purported to be levied was *intra vires* or *ultra vires* of the legislature. A suit to recover sales tax paid, even though it is under a mistake of law, is barred under section 18-B of Madras General Sales Tax Act, 1939 (*see* now Madras Act I of 1959) so long as the assessment order stood. In such a suit though no specific prayer is made for setting aside the assessment order the suit necessarily involves the setting aside of the assessment order and such a relief is barred under section 18-B of the Act.

Appeal against the decree of the City Civil Court of Madras in Original Suit No. 2272 of 1955.

T. T. Srinivasan and *A. N. Rangaswami,* for Appellants.

The Government Pleader and *N. S. Srinivasan,* for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The plaintiffs-appellants were building contractors. For the assessment years 1948-1949 to 1952-1953 the appellants were assessed to sales tax under the Madras General Sales Tax Act on the turn-over of their works contracts computed in accordance with the rules framed under that Act. Subsequently, in *Gannon Dunkerly's case*[1], this Court held that the legislative provision in the Sales Tax Act for treating works contracts as involving taxable sales was *ultra vires* the legislature and that there was therefore no valid legislative sanction for taxing the turn-over of such works contracts with reference to buildings. That was confirmed by the Supreme Court in *The State of Madras* v. *Gannon Dunkerly & Co.*[2]. After the declaration of the law on the validity of the legislative provision to tax works contracts by this Court, the plaintiffs instituted the suit, out of which this appeal arises, for recovery of the amounts paid by them for the assessment years we have referred to above. That claim was resisted by the State.

The learned trial Judge upheld the pleas of the defendant-State. The learned Judge upheld the claim that section 72 of the Indian Contract Act did not authorise the plaintiff to recover the payments because these were payments made not under a mistake of fact but under a mistake of law. The learned Judge further upheld the plea of the State, that section 18-A of the General Sales Tax Act barred the jurisdiction of the Civil Court to investigate the claim for refund of the tax paid by the plintiffs, though it now transpires there was no legal basis

* C.C.C. Appeal No. 90 of 1957. 10th October, 1960. (18th Asvina, 1882—Saka.)

1. (1954) 5 S.T.C. 216.
2. (1958) S.C.J. 696 : (1958) 2 M.L.J. (S.C.) 66 : (1958) 2 An.W.R. (S.C.) 66 : (1958) 9 S.T.C. 353.

for the levy or collection of those taxes. The learned Judge also took the view, that the plaintiffs' claim was governed by Article 62 of the Limitation Act.

The plaintiffs, whose suit was dismissed, appealed.

The first of the contentions of the State will have to be negatived in view of the authoritative pronouncement of the Supreme Court in *The Sales Tax Officer, Banares* v. *Kanyalal Mukundlal Saraf*[1], which explained the scope of section 72 of the Contract Act. That covers payments made under a mistake of law as well.

The second of the defences we have mentioned above is however well founded, and we are of the view that the learned Judge was right in applying the principle laid down by the Privy Council in *Raleigh Investment & Co.* v. *Governor-General in Council*[2]. The Madras General Sales Tax Act provided a complete machinery, which included a revision to the High Court under section 12-B of the Act, in which the question of the legislative competence to enact the definition of works contracts could be considered and decided. As pointed out by the Privy Council in *Raleigh Investment & Co.* v. *Governor-General in Council*[2], though it might not be a conclusive factor it helped to a considerable extent in defining the scope of the ban imposed by a statutory provision like section 67 of the Income-tax Act, or what we have to consider now, section 18-A of the Madras General Sales Tax Act.

Learned counsel for the appellants contended that in the absence of a valid legislative sanction for the levy of sales tax on the turn-over of works contracts the assessments should be treated as nullities, and that section 18-A of the Sales Tax Act did not cover such cases. It was precisely such a contention that was negatived by their Lordships of the Privy Council in *Raleigh Investment & Co.* v. *Governor-General in Council*[2]. They pointed out that it made no real difference in principle whether the legislative provision under which a tax was levied or purported to be levied was *intra vires* or *ultra vires* the legislature. The assessment was made. The commencement of the assessment or as their Lordships called it the provenance of assessment proceedings, was under the Act, which by one of its express provisions, ousted the jurisdiction of the Civil Court to examine the validity of the assessment made after such a commencement. The position is just the same under section 18-A of the General Sales Tax Act. As we pointed out earlier the constitutional validity of the purported legislative sanction for taxing the turn-over of works contracts could have been decided under the provisions of the Act itself, in proceedings under section 12-B of the Act, by the High Court. Therefore section 18-A of the Act came into play, and it barred the jurisdiction of the Civil Court from dealing with the question of refund, which necessarily involved an assessment being set aside. There can be no question of the refund being granted so long as the assessment stood and though no specific request was made for setting aside the assessment, the suit necessarily involved the assessment being set aside before the relief claimed could be granted. Such an investigation section 18-A of the Act barred.

Learned counsel for the appellants referred to *Bhailal Bhai* v. *State of Madhya Pradesh*,[3] and particularly to the observations of the learned Judges at page 522. The learned Judges referred to *Raleigh Investment & Co.* v. *Governor-General in Council*[2], as explained by the Supreme Court in *The State of Tripura* v. *The Province of East Bengal*[4]. Their Lordship of the Supreme Court affirmed the correctness of the principle laid down in *Raleigh Investment & Co.* v. *Governor-General in Council*[2], but pointed out that that would not apply to a case, where preventive action was sought by way of an injunction *to levy* assessment under an illegal statutory provision. With all respect to the learned Judges of the Madhya Pradesh High Court we are unable to accept as correct what they laid down :

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1. 1959 S.C.J. 53 : (1959) 1 M.L.J. (S.C.) 35 : (1959) 1 An.W.R. (S.C.) 35 : (1958) 9 S.T.C. 747.
2. (1947) 2 M.L.J. 16 : A.I.R. 1947 P.C. 78.
3. (1959) 11 S.T.C. 511.
4. 1951 S.C.J. 70 : 1951 S.C.R. 1.

"It however seems to us that in principle no real distinction can be drawn between a suit for a declaration that any of the provisions relating to assessment are *ultra vires* and for an injunction restraining the taxing authority from making assessment and a suit for the same declaration seeking the relief of repayment of the tax already paid".

It should be noted the learned Judges of the Madhya Pradesh High Court dealt with the claim of refund under Article 226 of the Constitution and these observations, that a suit for a refund would have been permissible, constituted only *obiter dicta.* Even as *obiter dicta* we are unable to accept the correct principle was laid down there. As we pointed out the Supreme Court certainly did not differ from the Privy Council, which explained the position with reference to section 67 of the Indian Income-tax Act in its decision already cited. The principle laid own in *Raleigh Investment & Co. v. The Governor-General in Council*[1], applies in enforcing the ban enacted by section 18-A of the Madras General Sales Tax Act.

In view of what we have said above, that the plaintiffs' suit was barred by section 18-A of the Act, it is not necessary for us to pronounce any concluded opinion of ours on the question raised by learned counsel for the appellants, that it is not Article 62 but Article 96 of the Limitation Act that should govern the plaintiffs' case.

The appeal fails and is dimissed with costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

S. R. Sathappa Chettiar .. *Petitioner**

v.

The Vth Additional Income-tax Officer, Coimbatore, and another .. *Respondents.*

Constitution of India (1950), *Article 226—Applicability—Application for stay of sale of properties for recovery of arrears of Income-tax under Revenue Recovery Act—Competency—Other remedy open—Effect.*

Article 226 of the Constitution cannot be invoked for the sole purpose of obtaining an interlocutory order, such as an order for stay of sale of properties under the Revenue Recovery Act for arrears of income-tax especially when that remedy could be obtained in an application under section 66 (2) of the Income-tax Act pending before the High Court.

Pattisam, In re, (1954) 1 M.L.J. 165: I.L.R. (1954) Mad. 592, *The State of Orissa* v. *Madan Gapal Rungta,* (1952) S.C.R. 28 and *Polisetti Narayana Rao* v. *Commisssioner of Income-tax, Hyderabad,* (1956) 29 I.T.R. 222, referred to.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records from the District Collector, Coimbatore, relating to the attachment and auction of the properties being the houses of the petitioner, situate in Balagopalapuram, Pollachi Town (in respect of which an order of assessment has been made by the V Additional Income-tax Officer, Coimbatore) and relating to which notice of attachment under section 27 of the Revenue Recovery Act, dated 29th October, 1959 has been issued by the Special Deputy Tahsildar (Income-tax), Coimbatore and to quash the proceedings of the District Collector, Coimbatore District thereof.

T. S. Rangarajan, for Petitioner.

The Court made the following

ORDER.—This petition under Article 226 of the Constitution is taken out for the purpose of staying the sale of the properties belonging to the petitioner under the Revenue Recovery Act for the purpose of collecting the income-tax due by the peti-

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1. (1947) 2 M.L.J. 16 : A.I.R. 1947 P.C. 78.

*W.P. No. 145 of 1960. 18th February, 1960.

tioner and to quash the proceedings of the District Collector of Coimbatore in regard thereto.

This petitioner filed an application in this Court under section 66 (2) of the Income-tax Act against the decision of the Income-tax Tribunal which upheld the assessment. The learned counsel for the petitioner contends that no order for stay could be obtained in that proceeding and that therefore the petitioner has no adequate alternative remedy. In support of that contention he relies on the decision of the Andhra High Court in *Polisetti Narayana Rao* v. *Commissioner of Income-tax, Hyderabad*[1]. The Bench in that case held that in a proper case the High Court has power under section 151, Civil Procedure Code and under Article 227 of the Constitution to issue an order for stay of collection of Income-tax arrears. The Bench further held that section 66 (7) of the Indian Income-tax did not limit the scope of such powers. On the facts of that case they declined to grant a stay because the only reason put forward was the inability of the petitioner to pay the tax. During the course of that judgment the Bench relied upon a passage from the judgment of Rajamannar, C.J., in *Pattisam*, In re[2]. The learned Chief Justice there held that Article 226 of the Constitution could not be invoked for the sole purpose o obtaining an interlocutory order. As authority for this position the learned Judge relied upon the Supreme Court decision in *The State of Orissa* v. *Madan Gopal Rungta*[3].

What the petitioner seeks to obtain in this proceeding is only an interlocutory order to stay the sale of his properties for realisation of tax. Apart from the fact that this remedy could be obtained in the proceeding now pending before the Income-tax Bench of this Court, the remedy that is sought by this proceeding is really an interlocutory order. The petition is therefore dismissed.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Janakamma and another .. *Appellants**

v.

A. Govindaraj Mudaliar and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 11 and Order 21, rule 63—Constructive res judicata—*No suit under Order 21, rule 63 within one year from the date of an order rejecting a claim—Effect—Subsequent regular suit barred by constructive* res judicata.

An order rejecting a claim petition for belatedness, is, in effect an order rejecting the claim itself to which the provisions of Order 21, rule 63 would apply. The order will become final and conclusive, if no suit under Order 21, rule 63, is filed within a year from the said order. In view of such finality of the order a regular suit by the claimant for declaration of his rights would be barred by constructive *res judicata.*

Appeal against the Decree of the District Court of Chittoor in Appeal Suit No. 141 of 1959 preferred against the decree of the Court of the District Munsif of Tiruttani, in Original Suit No. 210 of 1957.

P. N. Venugopalan, N. Sivamani and *N. K. Mitra* , for Appellants.

The Court delivered the following

JUDGMENT.—The facts with reference to which this Second Appeal is sought to be filed have been set forth clearly both in the judgment of the first Court, and the judgment of the learned District Judge in appeal. We are now concerned with the question which originally arose under issue 5, whether the suit was barred by the principle of constructive *res judicata* in view of the order on E.A.No.114 of 1956.

As the learned District Munsif observes E.A. No.114 of 1956 was a petition filed by the first plaintiff and an order was passed dismissing it on 5th March, 1956.

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1. (1956) An.W.R. 729 : 29 I.T.R. 222.
2. (1954) 1 M.L.J. 165 : I.L.R. (1954) Mad. 592.
3. (1951) S.C.J. 764: (1952) S.C.R. 28.

*S.A. No. 692 of 1960. 15th July, 1960. (24th Asadha, 1882, Saka).

Admittedly, the first plaintiff did not come forward with a suit under Order 21, rule 63, Civil Procedure Code, within a year from the date of this order. The first Court relied upon the following decisions : *Aisamma* v. *Moideen Kunhi Behari*,[1], *Narasimha Chariar* v. *Raghava Padayachi*[2], and *Cannanore Bank, Ltd.* v. *Madhavi*[3], for the view that the order would be conclusive, and would bar any further suit of this character, unless the order is challenged within a year as provided for by the processual law. In dealing with the same point, the learned Additional District Judge dealt with the contention that the order passed in E.A.No.114 of 1956 was not on the merits, but that that application had been dismissed upon the ground that the petition was belated. The learned Judge has set forth two passages, the first from *Venkata Ratnam* v. *Ranganayakamma*[4], and the second from *Mt. Asiz Jahan* v. *Sardar Singh*[5]. In the Full Bench decision of this Court referred to earlier, it has been very clearly stated that an order rejecting a claim petition for belatedness is, in effect, an order rejecting the claim itself, to which the provisions of Order 21, rule 63 would apply. This second appeal is sought to be filed upon the basis that the view of the law taken by the two Courts below is erroneous. The ground of appeal is that a somewhat different view of the law has been taken in other decisions of this Court to which attention has not been paid, particularly in *Manicka Mudali* v. *Abdul Karim*[6], and *President, Co-operative Credit Society, Kaikaran* v. *Narasimha Rao*[7]. I shall immediately turn to these decisions, in order to see whether in any manner they affect the applicability of the principles of the Full Bench decision in *Venkata Ratnam* v. *Ranganayakamma*,[4], to facts of this character.

Manicka Mudali v. *Abdul Karim*,[6] was a decision of a single Judge (Varadachariar, J.) in which the order passed by the executing Court was both vague and difficult to classify as a final order upon the claim petition. In terms, that order declared that the claim would be notified, and that the petition was recorded subject to that notification. The learned Judge Varadachariar, J., expressed his regret at this kind of practice, and finally observed that even if a dismissal of a claim petition should be interpreted as an implied adjudication against a claim, the order passed in the particular case could not even be considered as a final order on the claim-petition, and that it did not preclude the executing Court on a later occasion from investigating the claim on the merits.

In the present case, this decision has no application at all to the facts. Here it is not the executing Court which is later investigating the claim on the merits, but the plaintiffs have come forward with an actual suit for a declaration of their rights. Again, the order on the claim petition in this case was definitely a final and conclusive order, though the actual ground on which the claim petition was dismissed was one of belatedness. The other decision relied on by learned counsel *President, Co-operative Credit Society, Kaikaran* v. *Narasimha Rao*[7], is not relevant to this context at all. That decision held that where the order in execution merely directed that the existence of a mortgage should be brought to the notice of the bidders at the auction, the order did not fall within the purview of Order 21, rule 63, Civil Procedure Code, so as to attract the applicability of Article 11 of the Limitation Act.

Consequently, I am clearly of the opinion that both the Courts below took the correct view of the law, and that the position that a suit of this character is barred by constructive *res judicata* is very well settled by authority, and not in doubt. The second appeal is accordingly dismissed, *in limine*.

K.L.B. ——— *Appeal dismissed.*

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1. (1923) 45 M.L.J. 690.
2. (1945) 2 M.L.J. 89 (F.B.).
3. (1941) 2 M.L.J. 956.
4. (1918) 35 M.L.J. 335 : I.L.R. 41 Mad. 985 (F.B.).
5. A.I.R. 1955 All. 241.
6. A.I.R. 1935 Mad. 1015.
7. (1940) 2 M.L.J. 402.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Krishnaswami Thevar .. *Appellant**

v.

Perumal Konar .. *Respondent.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—*Object and scope of—Effect on pre-existing rights of ryots and zamindars—Rival claims to the title of the landholder—Jurisdiction of civil Court.*

The Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) was enacted for the acquisition of the rights of landholders of certain estates in order to introduce the ryotwari tenure instead of the pre-existing zamindari or inam tenure. Hence all the incidents of the pre-existing tenure, which is abolished, will disappear with the abolition of the estate. It cannot be contended that the kudiwaram interest of ryots in ryoti land or the rights of the zamindar in private lands will be kept intact merely because under the Act the ryots in the quandom estate as well as the zamindar may be respectively entitled to patta in respect of kudiwaram or pannai lands. The special machinery provided under the Act is only to decide the nature and character of the lands for purposes of issuing patta. But where there are rival claims there is no power in the Settlement Officer or the Tribunal to adjudicate as to who among them would have a preferential right to the issue of patta. Such disputes will have to be decided by the civil Court. The fact that the settlement officer has granted patta under section 11 of the Act to one of the contending parties or even to a stranger cannot affect the jurisdiction of the civil Courts to adjudicate on the rival claims to title of the erstwhile ryoti land in a notified estate.

Appeal against the Order of the District Court of West Thanjavur at Thanjavur, dated 16th November, 1959 and made in A.S. No. 205 of 1959 (O.S. No. 437 of 1958, District Munsiff's Court, Pattukottai).

K. Raman, for Appellant.

R. Ekambaram, for Respondent.

The Court delivered the following

JUDGMENT.—This appeal is against the order of remand passed by the District Judge of West Tanjore in A.S. No. 205 of 1959 directing O.S. No. 437 of 1958 on the file of the District Munsif's Court of Pattukottai to be disposed of on its merits. The defendant is the appellant. One Karuppa Konar owned certain agricultural lands in Vathalaikadu village in the Tanjore District. The village was originally part of an inam estate and was notified and taken over by the Government under the provisions of Act XXVI of 1948. Karuppa Konar died in 1948 leaving behind him his second wife Chellayee and six daughters through his pre-deceased first wife. On 7th January, 1955, Chellayee purported to execute a sale of the suit lands in favour of the respondent, who, on the strength thereof, instituted a suit for declaration of his title and for recovery of possession of the same from the appellant. The latter contested the claim stating that Karuppa Konar had even during his lifetime effected a partition of the suit property amongst the six daughters and that two of them had subsequently created an usufructuary mortgage in his favour which entitled him to remain in possession thereof. The appellant also relied on the circumstance that subsequent to the notification his mortgagor was granted a ryotwari patta in respect of the suit lands. The plea of the defendant was really two-fold : first, that by virtue of the grant of the patta and even otherwise his mortgagor had superior title to the properties, superior to that of the respondent, and second that as patta had been granted under the provisions of the Abolition Act in favour of his mortgagor, the Civil Court would have no further jurisdiction to entertain the suit. Amongst the several issues that were framed in the suit, issue 5 was "whether the suit was barred by Act XXVI of 1948?" That issue was tried as a preliminary issue by the learned District Munsif and he held that, on the notification of the estate the title of Chellayee, if any, had become extinguished and the appellant's predecessor-in-title having received a patta in respect of the suit lands would have superior title. On that finding, the suit was dismissed. The respondent took the matter on appeal. The learned

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* A.A.O. No. 293 of 1959. 8th August, 1960. (17th Sravana, 1882, Saka).

District Judge held that the mere fact that the daughters obtained a ryotwari patta under the provisions of section 11 of the Abolition Act could not conclusively show that they had title to the property, that that question could be determined only after a proper adjudication of the antecedent title of the rival claimants and that in the circumstances the dismissal of the suit on the preliminary point could not be sustained. In that view, the appellate Court set aside the dismissal of the suit and directed its disposal on its merits. The present appeal contests the correctness of the conclusions arrived at by the learned District Judge.

It is contended for the appellant that, on the abolition of an estate under section 3 of Act XXVI of 1948, the title of all persons interested in the lands situate in the village, namely, the Zamindar or Inamdar and also of the ryots, would be extinguished and the entire property having vested in the Government, it could grant patta to whomsoever it chose and that no other person except the one to whom the patta was given, could have any title to the land covered therein. On that assumption it was urged that the appellant deriving title as he did from the pattadar would have superior right to the property.

There is an obvious fallacy underlying the contention. Madras Act XXVI of 1948 was enacted for the acquisition of the rights of the landholders of certain estates in order to introduce the ryotwari tenure in the place of the pre-existing Zamindari or Inam tenure. Section 3 (*a*) and (*b*) provide that on notification the entire estate, freed from encumbrances, shall stand transferred to the Government and that rights and interests created in or over the estate shall cease and be determined. Clause (*c*) states that no person shall be entitled to any rights and privileges except those recognised and conferred by the Act. Sections 24 to 37 provide for the determination of the compensation payable to erstwhile landholder. They show clearly that the compensation is calculated only on the basis of the rent collected by the Zamindar or Inamdar from the ryots; there is no provision made for the payment of compensation in respect of the pannai or private land of the landholder or for the kudiwaram lands for the ryots. The reason is that under the Act the landholder would obtain patta for his pannai or private land and the ryot would obtain patta for the ryoti lands in his occupation. Indeed, the Proviso to section 3 (*d*) states that the Government shall not even dispossess any person of the land in which *prima facie* he would be entitled to patta. Sections 11 to 14 provide for the grant of ryotwari patta to the ryot and to the landholder, the former in respect of the ryoti land and the latter in respect of the private land. Section 11 states that every ryot in an estate is entitled to ryotwari patta in respect of all ryoti lands which immediately before the notified date were properly included or ought to have been included in his holding excepting certain category of lands specified in the section. Section 12 declares the right of the landholder in a Zamindari to obtain ryotwari patta in respect of private lands other than those specified in clause (*b*) thereof. Section 13 makes similar provisions for a landholder in an inam estate. Section 14 deals with the case of an under tenure estate. These provisions cannot be understood as implying that the kudiwaram interest in the ryoti land is kept intact any more than the private lands could be held to remain with the landlord as such after the abolition. The kudiwaram right and the right to private lands are all incidents of a tenure which had been expressly abolished by the Act. In the place of the old system the ryotwari system has come into being. It will therefore be incorrect to say that the kudiwaram still vested in the ryot and the effect of the grant of patta is only to add to or augment the rights already held. What the Act intended to do was to effect a conversion of the erstwhile Zamindari and inam estates into ryotwari system of tenure. The features of ryotwari system are too well known to require recapitulation. Recently I had occasion to consider the features of that system in two cases, viz., *Gopalan* v. *State of Madras*[1], and *Rajagopalachariar* v. *State of Madras*[2]. Shortly stated, the ryotwari system was conceived as a system of land revenue administration without the aid of middleman. A ryotwari pattadar is treated as the proprietor he being made to pay

1. (1958) 2 M.L.J. 117. 2. (1959) 2 M.L.J. 344.

the assessment directly to the Government. The assessments are fixed periodically. There has been some controversy as to whether such assessments should be held to partake the character of a rent or were really in the nature of a tax. The preponderance of authority is now in favour of the view that the assessments are in the nature of taxes. The effect of sections 11 to 14 is to declare that the ryots in the quondam estate as well as the Zamindar or inamdar as the case may be, would be respectively entitled to patta in respect of the kudiwaram or pannai lands. Section 11 read with section 3 (*d*), Proviso 1 would show that the ryotwari patta in respect of ryoti lands would be granted to the ryot by the Settlement Officer. There is no provision in section 11 for the ascertainment of even the character of the land. Nor is there any machinery to decide whenever a dispute arises between the rival claimants for the patta. Section 15 however provides for the examination of the nature and history of the private or pannai land in respect of which the landholder would be entitled to a ryotwari patta under the provisions of sections 12 to 14. There is also a provision for appeal and for the finality of the decision in the appeal in respect of that matter. It may be noticed that under section 15 it is only the nature and character of the land that has got to be decided by the special machinery created by the Act. Patta would be given to the landholder if the land is of the category mentioned in sections 12 to 14. But if there are rival claims to the title of the landholder himself there would be no power in the Settlement Officer or the Tribunal to adjudicate as to who among them would have a preferential right. This is more so in a case under section 11 where no question of any decision at all can arise. There is no provision for any adjudication amongst the rival claimants to patta in respect of a particular land. It would therefore follow that the statute having declared that the erstwhile ryot (that is the ryot lawfully entitled to be in possession of the holding) would be entitled to patta and not having designated a Tribunal or machinery to decide as to who amongst the several claimants would be entitled to patta, the dispute if and when it arises will have necessarily to be decided by the civil Court.

Now is there anything in the nature of the patta itself to show that it conferred title. Under the Estates Land Act the patta granted by a landholder to a ryot contains the names of parties, the description and extent of land held by the ryot, the amount and nature of rent, tax, cesses, fees, etc., payable with the rent and certain other terms. The counter-part executed by the ryot is known as the muchilika. They in substance specify the engagement between the landholder and the ryot.

A ryotwari patta is however different. It is nothing more than a mere bill for the assessment made by the Government. There is no question of any counterpart for it. It is not a grant or conveyanee. In *The Secretary of State for India in Council* v. *Kasturi Reddi*[1], Bhashyam Ayyangar, J., observed at page 272:

> "A reference to the form and wording of a patta will show that as correctly characterised by the District Judge, it is in the nature of a mere bill and is not nor does it purport to be in the nature of a grant or conveyance."

This view was accepted in *Muthu Veera Vandayan* v. *The Secretary of State for India in Council*[2], and *Secretary for State* v. *Raghavachariar*[3]. In *The Official Assignee of Madras* v. *Badri Narayan Doss*[4], it was held that a ryotwari patta was a document of title, but not a title deed. Srinivasa Ayyangar, J., observed at page 457:

> "I use the words 'documents of title' and not 'title-deed' because it may be that there is some plausible distinction between the two expressions."

It will follow that the mere fact that a ryotwari patta stands in the name of a particular individual cannot show that he was the grantee of the land. As the object of the Abolition Act is only to introduce the ryotwari system by granting patta to the ryots in respect of the erstwhile ryoti lands and to landholders in respect of their private lands, the patta granted under sections 11 to 14 cannot be anything more

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1. (1902) 12 M.L.J. 453 : I.L.R. 26 Mad. 268.
2. (1906) I.L.R. 29 Mad. 461.
3. (1924) 47 M.L.J. 503 : I.L.R. 47 Mad. 454.
4. (1924) 48 M.L.J. 423 : I.L.R. 48 Mad. 861.

than a ryotwari patta of the kind mentioned by Bhashyam Ayyangar, J. in *The Secretary of State for India in Council* v. *Kasturi Reddi*[1]. Not being thus a grant it cannot by itself confer any title.

The Abolition Act as originally enacted contained section 56 which conferred in terms a power to decide any dispute as to who the lawful ryot of a holding is. Sub-section (2) provided for an appeal from such a decision. If that provision were still to exist, it can be said that as the question whether the person was the lawful ryot or not was one to be decided by the Settlement Officer, the issue of ryotwari patta by him presumably after such decision could not be challenged in a civil Court; to that extent there would be an ouster of the jurisdiction of the civil Court. But section 56 (1) has been repealed by Act XXXIV of 1958. There is now no machinery to decide the case of a disputed claim to patta. Thus, if a ryot is entitled to the ryoti land before the notification, he would by virtue of that right be entitled to the grant of ryotwari patta. There is nothing in the procedure to be adopted for the grant of patta under section 11, to justify an adjudication of title. Nor is there anything in the nature of the patta itself to show that there must have been an adjudication of title in favour of the pattadar.

It is a familiar rule that the evidentiary value of a patta is in regard to the possession of the land and not in regard to the title. To hold otherwise will lead to inconvenient results. Take a case where some years before the notification of an estate a trespasser got into possession of a ryoti land and continued to be in such possession on the date of the notification. The lawful ryot who had been dispossessed for six years could not possibly obtain the patta, because the Settlement Officer would have no jurisdiction to adjudicate on his title. The trespasser might get patta as the person in possession. As section 11 declares that the lawful ryot would alone be entitled to the patta, it must be held that it would be open to the aggrieved party to get the matter adjudicated in a civil Court notwithstanding the fact that ryotwari patta has been granted under the provisions of section 11. If the Civil Court in such a suit gives a declaration as to who is the party that will be entitled to the rights created under section 11, it will be the duty of the Government to cancel the previous patta issued to the trespasser and grant it to the real ryot.

Learned counsel for the appellant seeks to derive support for his argument in certain observations of mine in *Soosai Udayar* v. *Andiyappan*[2], in that case a suit was filed for recovery of possession of a ryoti land in an estate on the ground that the defendant had trespassed into the same. The defendants pleaded that as the estate had been notified and taken over by the Government under Act XXVI of 1948, the plaintiff would no longer have title to sustain the suit. The precise question for determination in that case was whether having regard to section 56 (which had not been repealed by then) the suit for possession of a ryoti land in a notified estate could be entertained by a civil Court. That question was answered in the affirmative. The view taken in that case was approved by a Bench in *Adakalathammal* v. *Chinnayan Panipundar*[3]. In the course of the judgment in the former case, I had to deal with the question whether irrespective of any question of title, the plaintiff could base his title on his antecedent possessory title. During the course of the discussion the following observations occur:

> "It may be that during the course of the suit if the defendant is able to obtain the patta from the authorities he can produce that patta as an answer to the plaintiff's claim that he has got superior title against whom a decree for possession cannot be granted."

That is but an illustration of the familiar rule of law that mere possessory title would avail against the rest of the world except the true owner. Having regard to the provisions of section 56, the holder of a patta was deemed to be the owner. Those observations should not be understood as laying down that even after the repeal

1. (1902) 12 M.L.J. 453 : I.L.R. 26 Mad. 268.
2. (1959) 1 M.L.J. 195.
3. (1959) 1 M.L.J. 314 at 317.

of section 56 the grant of a patta under secton 11 would be conclusive on the question of title in respect of the land referred to therein. This matter is made clear in *Adakalathammal* v. *Chinnayan Panipundar*[1], where the learned Chief Justice after referring to the repeal of section 56 observed :

"Henceforward the question has really become academic because with the disappearance of section 56 there can be no basis for the plea that the jurisdiction of the civil Court has been ousted."

It is unnecessary to refer to the decision in *State of Madras* v. *Karuppiah Ambalam*[2], which concerned the right of a ryot to contest a survey conducted under the Abolition Act. That decision was also rendered with reference to section 56.

The result is that under the Abolition Act a statutory right is created in favour of the ryot in respect of the erstwhile ryoti land in the landlord in respect of the private lands. There is no machinery for adjudicating the questin as to who amongst the rival claimants (if there be rival claimants) should be given the patta, although the statute specifically says that the patta should be given to the lawful ryot under section 11 and to the landholder under sections 12 to 14. In *Soosai Udayar* v. *Andiyappan*[3], I referred to the judgment of Willes, J., in *Wolverhampton New Water Works Co.* v. *Hawkesford*[4], and extracted the follwing passage :

"There are three classes of cases in which a liability may be established founded upon a statute. One is where there was a liability existing at Common Law and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at Common Law ; there, unless the statute contains words which expressly or by necessary implication exclude the Common Law remedy, the party suing has his election to pursue either that of the statutory remedy. The second class of case is where the statute gives the right to sue merely, but provides no particular form of remedy. There, the party can only proceed by action at Common Law. But there is a third class, *viz.*, where the liability not existing at Common Law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed and it is not competent to the party to pursue the course applicable to cases of the second class."

If the Abolition Act provided a machinery for the adjudication of such disputes as under section 56 (since repealed) there would be no doubt that the third rule in the above passage would apply and the remedy of the party would only be to pursue the course prescribed by the statute. But if there is no such machinery provided by the statute the case will come under the second category of cases specified in the above passage. In such a case an action in a civil Court will lie.

It follows that it will be competent for a civil Court to adjudicate the rival claims to title of the erstwhile ryoti land in a notified estate notwithstanding the fact that the Settlement Officer had granted patta under section 11 to one of the contesting parties or even to a stranger. I am therefore of opinion that the view taken by the learned District Judge is the correct one and that the order of remand passed by him cannot be assailed.

The appeal fails and is dismissed. There will be no order as to costs. Leave refused.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Chandrasekaram Pillai .. *Appellant**

v.

Thangavelu Pillai .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938), section 13—Scaling down under—Scope of—Debt contracted after the Act—Stipulation to pay interest at a rate higher than the limit prescribed under the Act—Scope of relief.

Section 13 of the Madras Agriculturists' Relief Act, 1938, is no doubt different in pattern from sections 8 and 9 of the Act and it applies to all interest due on any debt incurred after the commence-

1. (1959) 1 M.L.J. 314 at 317.
2. (1959) 1 M.L.J. 185.
3. (1959) 1 M.L.J. 195.
4. (1859) 6 C.B. (N.S.) 336 and 356.

* S.A. No. 1166 of 1958.

5th October, 1960.
(13th Asvina, 1882—Saka).

ment of the Act. The scheme of the Act and the language of the section make it clear that a creditor is not entitled to take advantage of payments made by the debtor and deny him the beneficial effects of the Act. The words in section 13 of the Act that ' the Court shall scale down all interest,' are of sufficiently wide amplitude to give jurisdiction to the Court to reappropriate amounts paid by the debtor in excess of the statutory rate of interest so as to bring the transaction between the parties in conformity with the statute.

Srinivasa Rao v. *Abdul Rahim Sahib*, (1956) 2 M.L.J. 189, approved and followed.

S. M. Tharaganar v. *Sankarapandia Mudaliar*, (1958) 2 M.L.J. 568 : I.L.R. (1959) Mad. 97 (F.B.), explained.

Case-law reviewed.

Appeal against the Decree of the District Court, West Thanjavur at Thanjavur in Appeal Suit No. 308 of 1957, preferred against the Decree of the Court of the District Munsif of Thanjavur in Original Suit No. 104 of 1957.

V. Kunchithapatham, for Appellant.

V. C. Viraraghavan, for Respondent.

The Court delivered the following

JUDGMENT.—What is the measure of relief which an agriculturaist debtor is entitled to under the Madras Act IV of 1938 when the debt is incurred after the Act with a stipulation to pay interest at a rate exceeding the prescribed limits of the statute and when payments towards interest are made and appropriated in terms of the contract of loan and the creditor sues to recover the balance due is the question that arises for decision in this Second Appeal. Judicial opinion in the matter is conflicting. One view is that whatever payments are made and appopriated implementing the contract between the parties, being voluntary, they cannot be ripped open to help the debtor to get the benefits of the Act. The other view is that such payments though volunary in the sense that the debtor abstained from claiming the statutory concessional rate of interest must be deemed to have been made by mistake of law warranting the readjustment of the rights of the parties in accordance with law. Much can be said in support of both the views, and it is not surprising to find a sharp cleavage of opinion on the subject between eminent Judges.

Thangavelu Pillai, the plaintiff in O.S. No. 104 of 1957, on the file of the District Munsif's Court, Thanjavur, executed a deed of simple mortgage, Exhibit B-1, dated 13th December, 1945, in favour of Chandrasekaran Pillai, the first defendant for a sum of Rs. 1,700. The deed provided for payment of interest at 9 per cent. per annum. The plaintiff is admittedly an agriculturist entitled to the benefits of Madras Act IV of 1938 and Madras Act I of 1955. There was an endorsement of payment of a sum of Rs. 250-7-0 dated 20th July, 1947 on the mortgage document. There was a second endorsement of payment dated 11th April, 1951 of a sum of Rs. 1,070-13-0 on the document. The first endorsement of payment, Exhibit B-2, recites that the amount paid was towards the interest due on the mortgage upto the date of endorsement. The second endorsement, Exhibit B-3, recites that a sum of Rs. 570-13-0 was paid towards the interest due upto the date of endorsement and that the sum of Rs. 500 was paid and appropriated for the principal. The plaintiff claimed that notwithstanding the express recitals in the endorsements, Exhibits B-2 and B-3 stating that the payments were towards interest they should be deemed to be " open " payments entitling the debtor to have the amounts readjusted in accordance with the terms of the statute which prescribe that an agriculturist debtor shall not be made liable to pay interest at any rate more than 5½ per cent. per annum. The plaintiffs filed O.P. No. 82 of 1956 on the file of the District Munsif's Court, Thanjavur, under section 83 of the Transfer of Property Act depositing the sum of Rs. 1,125 stated to be the correct amount due as scaled down by the provisions of the Act. The first defendant refused to receive the amount, and the petition was acordingly dismissed on 24th December, 1956. The suit was therefore filed for redemption of the mortgage, Exhibit B-1.

The first defendant alone contested the suit. The second defendant remained absent and was set *ex parte*. The first defendant contended that on 11th April, 1951 the date of the second endorsement, Exhibit B-3, it was settled between the

parties that the balance of principal amount due to him was a sum of Rs. 1,200. There was a partition suit between the first defendant and his brother, Rajamani Pillai, O.S. No. 1 of 1951 on the file of the Subordinate Judge's Court of Thanjavur. In the final decree in that suit accounts were taken till 22nd February, 1953 and the principal amount of Rs 1,200 due under Exhibit B-1 with interest at 6 per cent. from 11th April, 1951 to 22nd February, 1953 was allotted as an asset due to the first defendant. The final decree in that suit is marked as Exhibit B-4 in the case. The first defendant pleaded that he will be entitled to the principal of Rs 1,200 as on 11th April, 1951, with subsequent interest thereon at 5½ per cent.

The learned District Munsif of Thanjavur who tried the suit upheld the contention of the first defendant and granted a decree for redemption in favour of the plaintiff on his paying to the first defendant the amount of Rs 1,200 with subsequent interest from 11th April, 1951 at 5½ per cent. per annum.

The plaintiff preferrd an appeal, A.S. No. 308 of 1937, on the file of the District Court of West Thanjavur at Thanjavur challenging the correctness of the Judgment and decree of the trial Court The learned District Judge allowed the appeal and modified the decree of the trial Court by substituting for the amount decreed by the trial Court the amount due as per the provisions of section 13 of Act IV of 1938.

This Second Appeal has been preferred by the first defendant who seeks to have the decree of the trial Court restored.

The learned District Munsif was of the opinion that there was in effect a settlement of accounts between the parties as on 11th April, 1951 and that settlement precluded the plaintiff from falling back upon the provisions of the statute when he was sued for recovery of the balance due under the suit mortgage, giving effect to the settlement between the parties. The learned District Judge was of the opinion that there was no settlement of accounts as found by the trial Court but there were only payments made by the plaintiff to the first defendant towards interest and towards the principal also. After having found that there was no settlement of accounts, the learned District Judge followed the decision of a Division Bench of this Court in *Srinivasa Rao* v *Abdul Rahim Sahib*[1], and held that section 13 of Madras Act IV of 1938 permitted reappropriation and readjustment of amounts paid by the debtor in accordance with the terms of the loan, so that the excess interest paid by the debtor can be made available for adjustment towards the principal.

I agree with the learned District Judge in his finding of fact that there was no settlement of accounts between the parties. Exhibit B-5, relied upon by the first defendant to prove the settlement of accounts, shows that only penal interest was given up. It is therefore clear that what all happened between the parties was that the debtor-plaintiff paid certain specific sums of money to the creditor, the first defendant, towards interest which was calculated by the creditor at the rate provided for in the mortgage document and appropriated as such. Such payments having been made and appropriated, will it be open to the plaintiff to have the accounts recast so that the creditor the first defendant, will not be entitled to anything more by way of interest than the statutory rate of 5½ per cent. fixed as per the notification of the State Government of the year 1947?

The object of the Madras Agriculturists Relief Act of 1938 as indicated by the Preamble to the statute is to provide for the relief of indebted agriculturists in the State of Madras. Section 8 of the Act provides the machinery for scaling down debts incurred before 1st October, 1932. In respect of those debts all interest outstanding on 1st October, 1937 shall be deemed to be discharged. Section 9 of the Act deals with debts incurred on or after 1st October, 1932 and provides that interest upon those debts shall be calculated upto the commencement of the Act at the rate applicable to the debt under the law, custom, contract or decree of Court or at 5 per cent. per annum simple interest whichever is less, and credit shall be given for

1. (1956) 2 M.L.J. 189.

all sums paid towards interest and only such amount as is found outstanding if any shall be deemed payable together with the principal amount. Section 13 governs debts incurred after the Act. That section reads as follows :

" In any proceeding for recovery of a debt, the Court shall scale down all interest, due on any debt incurred by an agriculturist after the commencement of this Act, so as not to exceed a sum calculated at 6¼ per cent. per annum simple interest that is to say, one pie per rupee per mensem simple interest or one anna per rupee per annum simple interest."

Though the section prescribed the rate of interest at 6¼ per cent. by a subsequent notification of the State Government, it has been reduced to 5½ per cent.

It must be noted that section 13 is different in pattern from sections 8 and 9 of the Act. Sections 8 and 9 use the expression "interest outstanding" while section 13 uses the expression "all interest due on any debt."

Whether payments made and appropriated towards interest, as such, at a rate in excess of the prescribed statutory rate can be re-appropriated in an action by the creditor for recovery of the balance of the debt due came in for consideration in the decision in *Srinivasa Rao* v *Abdul Rahim Sahib*[1]. In that case the debt was incurred under a promissory note dated 2nd April, 1944 which provided for payment of interest at 12 per cent. per annum. On 13th March, 1947 the debtor made a payment of Rs. 70 and endorsed it on the pronote, expressly stating that the payment was towards the interest due. On 8th June, 1949 there was another payment of Rs. 50 specifically towards interest. There were further payments of Rs. 35 on 23rd February, 1950 and Rs. 50 on 1st September, 1952 towards interest as such. Appropriating these payments towards interest at the contract rate the creditor sought to recover the balance. The debtor contended that the payment already made should be appropriated in the manner contemplated under section 13 of the Act and that no rate of interest higher than 5½ per cent. per annum should be charged against him. The facts of the case are thus clearly indistinguishable from the facts of the present case. The learned Judges of this Court, Govinda Menon and Ramaswami, JJ., upheld the debtor's contention. An earlier decision of this Court in *Ramalakshmi* v. *Gopalakrishna Rao*[2], was relied upon on behalf of the creditor before the learned Judges who decided *Srinivasa Rao* v. *Abdul Rahim Sahib*[1]. But the learned Judges observed that in view of the decision of the Privy Council in *Shiba Prasad Singh* v. *Srish Chandra*[3], the foundation on which the decision in *Ramalakshmi* v. *Gopalakrishna Rao*[2], rested became shaky. Their Lordships at page 191 observed thus :

" It is not a universal principle of law that money paid under a mistake of law cannot be recovered. Where a statute provides and regulates payments in a particular manner, and to a particular extent a person paying amounts in excess of that should be considered not to have done it willingly or voluntarily and with the object of making a present, but he must be deemed to have acted in ignorance of the law, and therefore, should be entitled to get back the amount."

In *Nainamul* v. *B. Subba Rao*[4], a Full Bench of the Andhra Pradesh High Court considered the following question which was referred to it :

" Whether in the case of a debt incurred after the Act came into force a payment made expressly towards interest at the contract rate can be reopened and reappropriated towards interest payable under the provisions of section 13 of the Act " ?

Subba Rao, C.J., as he then was, who delivered the opinion of the Full Bench accepted the decision of this Court in *Srinivasa Rao* v. *Abdul Rahim Sahib*[1], as laying down the correct rule of interpretation of section 13 of the Act. At page 550 the learned Chief Justice observed as follows :

" Unhampered by decided cases I shall proceed to consider the scope of section 13 having regard to the aforesaid declared object of the Act and the express words used in that section. The object of section 13 is to give relief to agriculturists, in the matter of interest in respect of a debt incurred after the Act. If such a debt is sought to be enforced, it is caught in the net of the scaling down process.

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1. (1956) 2 M.L.J. 189.
2. (1944) 2 M.L.J. 285.
3. (1949) 2 M.L.J. 657 : L.R. 76 I.A. 244 : I.L.R. 28 Pat. 913 (P.C.).
4. (1957) 2 An. W.R. 53 : A.I.R. 1957 Andh. Pra. 546 (550) (F.B.).

At that stage all the interest due on the debt is reduced to the statutory level or, to put it differently whatever may be the contract rate of interest, it is replaced by the statutory rate. If the appropriations made earlier are not reopened, the intention of the statute would be defeated for the contract rate prevails over the statutory rate upto a stage."

At page 552, the learned Chief Justice summed up the position thus :

"But, under the provisions of section 13 a creditor cannot recover interest at a rate higher than that prescribed thereunder. If a debtor pays interest at a higher rate than that which he is bound to pay under section 13 he pays it by mistake within the meaning of section 72 and therefore, he is entitled to recover it back or to set off the excess payments against the subsequent interest."

I shall now refer to a Full Bench decision of this Court in *S. M. Tharaganar* v. *Sankarapandia Mudaliar*[1]. The occasion for constituting the Full Bench is set out by the order of reference by the learned Chief Justice as follows :

"There can be no doubt that there are two decisions of two Division Benches of this Court taking different views on the main question which arises in this appeal. The two decisions are *Ramalakshmi* v. *Gopalakrishna Rao*[2] and *Srinivasa Rao* v. *Abdul Rahim Sahib*[3]. The learned Judges, in the latter case were inclined to the view that the decision in the earlier case was considerably shaken by certain observations in a subsequent Privy Council case. Even if that be so, the proper course would be to refer the question for decision by a Full Bench and this is referred accordingly."

The appeal before the Full Bench arose out of dealings between the parties which were in the nature of a banker advancing moneys to his customer and the customer repaying the advances in instalments. The dealings were entered in a pass book. The dealings commenced on 2nd December, 1943, when a sum of Rs. 7,000 was advanced by the creditor to the debtor who agreed to pay interest at 10½ per cent. per annum. Subsequently payments were made. At the end of each year of account (the end of the month of Adi according to the Tamil Calendar) interest at the contract rate was debited against the borrower. There were also periodical settlements of accounts between the parties, by which the amounts due to the creditor were ascertained and an acknowledgement as to the correctness of the amount was also recorded in the pass book by the debtor signing in it in token of his assent. The last of such settlements was on 17th August, 1951, by which the debtor agreed to pay the creditor the sum of Rs. 19, 513-13-3 with interest thereon at 12 per cent. The creditor sought to recover from the debtor this sum of money by instituting the suit out of which the appeal arose. The debtors claimed that they were agriculturists entitled to the benefits of Madras Act IV of 1938 and that the settlement of accounts would not bind them and should be reopened and that they would not be liable to pay anything more than the principal amount actually advanced less payments calculating the interest at 5½ per cent. per annum. It was held by this Court that the defendants would not be entitled to relief by way of a reopening of the settled accounts and that the last of the settlements on which the suit was based should be deemed to be the debt incurred within the meaning of section 13 of the Act. Their Lordships held that the interest payable on that settled amount will alone be scaled down in accordance with that section.

The real question that arose for consideration in that case was what was the debt which was sought to be recovered by the creditor from the debtor. The creditor founded himself on the last settlement of accounts. But the debtor wanted to have that settlement reopened. Their Lordships pointed out, rightly, if I may say so with respect, that there was no machinery provided for under section 13 of the Act to have settled accounts reopened and to trace back the debt to its inception. The actual decision of the Full Bench does not in any way conflict with the decision in *Srinivasa Rao* v. *Abdul Rahim Sahib*[3]. At page 570 Ramachandra Iyer, J., who delivered the judgment of the Full Bench, observed thus :

"The matter which then would arise for consideration would be as to how far an agriculturist debtor who voluntarily agrees to pay interest at a rate higher than that prescribed by the Act, would be entitled to be relieved against his own agreement. The Act does not render the payment o or a contract to pay interest on a debt at a rate higher than that prescribed for each of the various cate-

1. (1958) 2 M.L.J. 568 : I.L.R. (1959) Mad. 97 (F.B.).
2. (1944) 2 M.L.J. 285.
3. (1956) 2 M.L.J. 189.

gories, illegal. Nor is there any question of public policy involved when a higher rate of interest on a loan is agreed to by an agriculturist. Under the provisions of the Act relief to agriculturist debtors was granted by the Act itself discharging the whole or a portion of the interest on debts incurred prior to the Act. Section 8 discharged all outstanding interest on a debt incurred prior to 1st October, 1932, while in regard to debts incurred after that date but before the Act, section 9 discharged that portion of the interest which was above simple interest at 5 per cent. per annum. Future interest on those debts were regulated by section 12. Section 13 dealt with debts incurred after the Act. Under that section there is no provision for any statutory or automatic discharge of interest stipulated at a rate higher than that prescribed therein; such excess interest was only made irrecoverable if the creditor sought to enforce the debt in a Court of law. There being thus neither a prohibition against a stipulation for payment nor an automatic discharge of higher rates of interest agreed to be paid by an agriculturist debtor, it cannot be said that when a creditor with the assent of his debtor added to the principal loan the interest accrued in terms of the contract, and the debtor entered into a fresh contract treating the consolidated amount as principal for the fresh loan, there would be anything illegal or even a failure of consideration in regard to the new loan."

It is obvious that the learned Judge was only dealing with the question whether a settlement of accounts which involved an acknowledgment of liability by the debtor to pay interest at a rate higher than the statutory rate is liable to be reopened on the ground that it was unlawful. I am therefore of opinion that the authority of the decision in *Srinivasa Rao* v. *Abdul Rahim Sahib*[1] was not in any way undermined by the Full Bench decision.

The Andhra High Court again considered the question in the decision in *Punyavatamma* v. *H. V. Satyanarayana*[2]. The learned Chief Justice, Chandra Reddy C.J., agreed with the Full Bench ruling in *Nainamul* v. *B. Subba Rao*[3], which had approved the decision of the Division Bench of this Court in *Srinivasa Rao* v. *Abdul Rahim Sahib*[1]. In referring to the decision of this Court in *S. M. Tharaganar* v. *Sankarapandia Mudaliar*[4], the learned Chief Justice at page 338 observed as follows:

"In *Sheik Mansoor Tharaganar* v. *Sankarapandia Mudaliar*[4], the learned Judges thought that when a creditor renewed a promissory note, the debtor entered into a fresh contract treating the consolidated amount as principal for the fresh loan and that the new loan would constitute a debt incurred on the date of renewal. With great respect to the learned Judges we are unable to concur in this proposition. We do not regard a renewal as a fresh loan or as incurring debt within the purview of section 13 of the Act. A debt is incurred only when the borrowing is made. It cannot be postulated that a debt is incurred each time a promissory note is renewed. The learned Judges also failed to appreciate the distinction between the expression 'all interest due on any debt' occurring in section 13 and the expression 'all interest outstanding' in section 8. The former expression connotes 'the interest that has accrued on the original debt', while the latter conveys the idea of 'the interest remaining to be paid'."

I find myself completely in agreement with the judgment of Govinda Menon, J. in *Srinivasa Rao* v. *Abdul Rahim Sahib*[1]. The scheme of Madras Act IV of 1938 and the language of section 13 of the Act leave no doubt in my mind that the creditor is not entitled to take advantage of payments made to him by the debtor and deny the beneficial effects of the Act to the debtor. The words in section 13 of the Act, 'the Court shall scale down all interest' are of sufficiently wide amplitude to give jurisdiction to the Court to reappropriate amounts paid by the debtor in excess of the statutory rate of interest so as to bring the transaction between the parties in conformity with the statute.

Apart from the statute I am also of opinion that the claim of the debtor to have excess payments made by him readjusted can be rested on the doctrine of mistake of law as embodied under section 72 of the Indian Contract Act. The Judicial Committee in *Sri Sri Shiba Prasad Singh* v. *Maharaja Srish Chandra Nandi*[5] held that where a lessee had made over payments of royalties to the lessor under the mistaken belief that it was legally due, he was entitled to recover the payments so made and have them adjusted or set off in accordance with the true nature of the transaction.

1. (1956) 2 M.L.J. 189.
2. (1960) 1 An. W.R. 336.
3. (1957) 2 An. W.R. 53 : A.I.R. 1957 Andh. Pra. 546 (F.B.).
4. (1958) 2 M.L.J. 568 : I.L.R. (1959) Mad. 97 (F.B.).
5. (1949) 2 M.L.J. 657 : L.R. 76 I.A. 244 : I.L.R. 28 Pat. 913 (P.C.).

At page 254 Lord Reid observed thus :

" In this case there was not sufficient evidence to show why the lessee and his agents made the over payments. They may have acted on inadequate information, they may have taken a wrong view of their legal rights or they may have continued paying at the old rates without giving any thought to the matter. But it is clear that there was no intention to make a present to the lessor of money which was not due. The money was paid under the belief that it was legally due. This belief was mistaken. In their Lordships' view that is sufficient to bring the case within section 72 and therefore the cross-appeal must succeed."

In *The Sales Tax Officer, Banaras* v. *Kanhaiya Lal*[1], the question arose whether payments of sales-tax made by an assessee which were not legally and properly due from the assessee could be recovered under section 72 of the Indian Contract Act on the ground that the payment was originally made under a mistake of law. Their Lordships referred to the decision of the Judicial Committee above cited with approval. At page 143, Bhagwati, J., observed as follows :

"On a true interpretation of section 72 of the Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money back are that the monies must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the monies and the party receiving the same is bound to repay or return them irrespective of any consideration whether the monies had been paid voluntarily, subject however to questions of estoppel, waiver, limitation or the like. If once that circumstance is established the party, is entitled to the relief claimed."

The vital consideration therefore is what was the mistake which occasioned the payment. In every case where a payment is made by a person thinking that it is legally due by him while in fact it is not so due a clear mistake of law arises. There may be circumstances, in a particular case, which might show that the debtor who makes the payment made it deliberately intending to waive the benefit of a particular enactment in his favour. In a case governed by Madras Act IV of 1938 the debtor though an agriculturist might consider the fulfilment of the terms of his contract with the creditor as being more proper and just than to claim the benefit of the Act. Where that is so the debtor having waived the right, it may not be open to him at any stage later than the waiver to rely upon the statute for benefit in his favour. The doctrine *Ignorantia juris neminem excusat* will not stand in the way of the debtor from pleading a mistake of law entitling him to recover money mistakably paid. In a recent decision of the Judicial Committee in *Kriri Cotton Co., Ltd* v. *Dewani*[2], Lord Denning referred to the said doctrine and observed as follows :

" It is not correct to say that every one is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter, *Ignorantia juris neminem excusat.* Nor is it correct to say that money paid under a mistake of law can never be recovered back."

I may also refer to the following observation of Lord Chelmsford in *Earl Beauchamp* v. *Winn.*[3]

" With regard to the objection, that the mistake (if any) was one of law, and that the rule ' *ignorantia juris neminem excusat* ' applies, I would observe on the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law. And there are many cases to be found in which Equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake."

It must be pointed out that the English Law governing the rights of parties arising out of a mistake of law is different from that embodied under section 72 of the Indian Contract Act and this has been very clearly pointed by their Lordships of the Supreme Court in *The Sales Tax Officer, Banaras* v. *Kanhaiya Lal.*[1]

In my judgment there is no impediment in the way of the plaintiff to have the amounts paid by him reappropriated and readjusted in conformity with section 13 of Madras Act IV of 1938. The Judgment and Decree of the Lower Appellate Court are correct and this Second Appeal fails and is dismissed with costs. Leave granted.

R.M. —————— *Appeal dismissed.*

1. (1959) 1 M.L.J. (S.C.) 35 : (1959) 1 An. W.R. (S.C.) 35 : (1959) S.C.J. 53 : A.I.R. 1959 S.C. 135.
2. L.R. (1960) A.C. 192.
3. L.R. 6 H.L. 234.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN.

The Express Newspapers (Private) Ltd., Mount Road, Madras-2 .. *Petitioner**

v.

The Regional Provident Fund Commissioner, III Mount Road, Madras-6 and another .. *Respondents.*

Employees Provident Fund Act (XIX of 1952), *sections* 8, 15 *and Paragraph* 28 *of the Scheme under the Act—Scope—Lawfully constituted trustees in charge and management of the Provident Fund—Liability to transfer the accumulations to the Authority constituted under the Act—Notice under Madras City Land Revenue Amendment Act (VI of* 1867) *demanding the employer to pay the amount—Legality—Writ of* mandamus *under Article* 226 *of the Constitution.*

The petitioner company formed in 1946 had a Provident Fund Scheme for its employees and the Fund and its assets were entrusted to three trustees. The petitioner company had borrowed a sum of about nine lakhs from the Fund on a promissory note and also had effected an equitable mortgage. The provisions of Act XIX of 1952 were extended to the petitioner with effect from 31st December, 1956 and on 20th November, 1958, the trustees transferred to the authority under the Act the Fund including the promissory note for nine lakhs and the mortgage documents in respect of it. That transfer was accepted by or on behalf of the Commissioner of the Regional Provident Fund. A notice to the petitioner was issued under section 4 of the Madras City Land Revenue Amendment Act (VI of 1867) demanding the payment of the nine lakhs.

Held : Section 8 of Act XIX of 1952 by itself subjects the employer who is liable to pay, that is liable to transfer the accumulations of the Provident Fund to the provisions of the Revenue Recovery Act, for example, whatever is lawfully due from the employer under the head if it remains unpaid and is in arrear can be recovered in the same manner as an arrear of land revenue.

Section 15 (2) of the Act creates the liability to transfer the fund but does not specify whose is the liability to effect that transfer. Section 15 (2) however in express terms subjects the liability it creates to the provisions contained in the Scheme referred to in section 5 of the Act. Paragraph 28 of the Scheme laid that liability to transfer on every authority in charge of or entrusted with the management of the Fund.

Where an employer had divested himself lawfully of the charge and the management of the Provident Fund and had lawfully vested the assets, charge and management of the Fund in trustees lawfully constituted, the employer is no longer under the liability created by section 15 (2), of the Act read with sub-paragraphs (1) and (2) of the paragraph 28 of the Scheme framed under the Act.

The contention that the plea put forward on behalf of the petitioner was belated and that the discretion should not be exercised in his favour would not avail because neither of the statutory authorities concerned had any jurisdiction to demand of the petitioner that he should transfer the assets of which he is not in charge as assets and to issue a demand notice under the provisions of section 4 Madras Act (VI of 1867).

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* forbearing the respondents from taking proceedings against the petitioner under section 8 of the Employees' Povident Fund Act, read with the Madras Revenue Recovery Act, 1867.

V. P. Raman, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*), on behalf of the Respondents.

The Court made the following

ORDER.—The petitionercompany, which was formed in 1946, engaged itself in the newspaper industry and published newspapers including in the Indian Express. It had a Provident Fund Scheme of its own for its employees. The provident fund itself and its assets were entrusted to three trustees, including the Chairman of the Company, and a representative of the employees. The Employees' Provident Fund Act (XIX of 1952) came into force in 1952, but that Act did not then cover the employers and employees in the newspaper industry. When the Working Journalists Conditions of Service Miscellaneous Provisions Act (XLV of 1955) came into force

* W.P. No. 563 of 1959. 29th July, 1960. (7th Sravana, 1882—Saka).

towards the end of 1955, section 15 of that Act extended the provisions of Act XIX of 1952 to newspaper establishments, of which the petitioner's was one. On 4th December, 1956, a notification was issued under the provisions of Act XIX of 1952, applying the provisions of that Act to newspapers with effect from 31st December, 1956, which in effect meant that the statutory scheme under Act XIX of 1952 applied thereafter to the petitioner among others engaged in the newspaper industry.

The authorities informed the petitioner on 5th January, 1957, that it was open to him to apply for exemption from the provisions of Act XIX of 1952 under section 17 (1) of that Act. On 4th February, 1957, the petitioner applied for exemption. During the pendency of that application, on 22nd February, 1957, the respondent suggested certain amendments of the rules that governed the petitioner's provident fund scheme. Eventually on 29th September, 1958, the exemption sought by the petitioner was refused.

Even before the provisions of Act XIX of 1952 (hereinafter referred to as the Act) were extended to the employer and employees in the petitioner's concern and while the assets of the provident fund were vested in the trustees, the petitioner borrowed a sum of Rs. 9.5 lakhs from the Fund on a promissory note, and the petitioner effected an equitable mortgage as security for that loan by depositing title deeds of some of his immovable properties at Madras and Bombay with the trustees. During the pendency of the application preferred by the petitioner under section 17 of the Act for exempting his concern from the operation of the provisions of the Act, the petitioner was informed on 6th December, 1957, by the Central Commissioner that the petitioner should redeem the mortgage within one year. The petitioner was also subjected to the further condition, that steps should be taken to assign the mortgage immediately in favour of the Central Board of Trustees of the Employees' Provident Fund. Apparently there was no immediate assignment of the mortgage; nor did the petitioner redeem the mortgage within the period of one year allowed to him.

On 29th September, 1958, it will be remembered, the exemption sought by the petitioner was refused. The respondent informed the petitioner of this and called upon the petitioner to transfer to the respondent all the accumulations of the petitioner's provident fund within 30 days. On 20th November, 1958, the trustees, one of whom was the Chairman of the petitioner company, Sri R. M. Goenka, transferred to the respondent the Regional Commissioner, Government promissory notes of the face value of Rs. 3,19,200. The trustees also transferred to the Regional Commissioner the promissoy note for Rs. 9,50,000 executed by the petitioner, and along with it the deeds to evidence the equitable mortgage were also handed over. These were accepted on behalf of the Regional Commissioner on 21st November, 1958.

On 29th April, 1959, the respondent informed the petitioner that a sum of Rs. 9,29,913-68 was still due from him, and the respondent required the petitioner to pay up that amount before 15th May, 1959. It should be noted that after 29th September, 1958, the petitioner was required from time to time to make certain payments, which were all taken into account in arriving at the figure mentioned in the letter dated 29th April, 1959. The amount demanded on 29th April, 1959, Rs. 9,29,913-68 was really part of the debt due from the petitioner for which there was security of the equitable mortgage effected by deposit of title deeds. In the letter dated 12th May, 1959, which the petitioner sent in response to this demand the petitioner pointed out that all the assets had already been transferred, including the mortgage debt, and that the transfer had been accepted by the authorities. The petitioner stated that in accordance with the arrangement between the petitioner and the authorities the petitioner had been making payments from time to time which were really in part payment of the mortgage loan of Rs. 9,50,000, and the petitioner said :

"We shall however continue to make payments in accordance with our arrangements as and when amounts become payable to the employees who are no longer in our service, as we have been doing hitherto."

The petitioner regretted his inability to comply with the demand for the immediate payment of the entire amount due under the loan of Rs. 9,29,913-68.

On 15th May, 1959, the second respondent, the Collector of Madras, issued a notice to the petitioner under section 4 of the Madras City Land Revenue Amendment Act (VI of 1867), demanding the payment of the sum of Rs. 9,29,913-68. Section 8 of Act XIX of 1952, to which I shall refer in greater detail later, authorised recoveries of the dues specified in that section as if they were arrears of land revenue.

The first respondent, the Regional Commissioner, sent the letter, dated 16th May, 1959, in reply to the petitioner's letter, dated 12th May, 1959. In that letter the Regional Commissioner referred to the assignment of the mortgage debt—obviously the assignment effected by the trustees of the Fund—and stated :

"These properties have been accepted as security only as an interim measure during the period of one year of extension of time granted to you."

After pointing out that that period of one year had expired, the Regional Commissioner demanded the immediate payment of outstanding arrears.

The petitioner applied under Article 226 of the Constitution for the issue of a writ of *mandamus* to restrain the respondents, the Regional Commissioner and the Collector, from taking any further proceedings against the petitioner under section 8 of Act XIX of 1952 and also, of course, proceedings under the Revenue Recovery Act (VI of 1867).

The relevant statutory provisions of the Act (Act XIX of 1952) are section 8 (*a*) and section 15 (2) . The relevant portion of section 8 (*a*) provides :

"Any amount due—

(*a*) from the employer in relation to an establishment to which any Scheme applies in respect of...........accumulations required to be transferred under sub-section (2) of section 15...... may, if the amount is in arrear, be recovered by the appropriate Government in the same manner as an arrear of land revenue."

Section 8 by itself, it should be obvious, does not impose the liability to pay. It only subjects the employer who is liable to pay, that is, liable to transfer the accumulations to the provisions of the Revenue Recovery Act for example; whatever is lawfully due from the employer under this head, if it remains unpaid and is in arrear can be recovered in the same manner as an arrear of land revenue. That the provissions of Act VI of 1867 applied to recovery of land revenue payable by a person resident in the city of Madras did not admit of any doubt. The liability itself, to enforce which recourse could be had to the provisions of the Revenue Recovery Act, was this one declared by section 15 (2) of the Act. Section 15 (2) provided :

"On the application of any Scheme to an establishment, the accumulations in any provident fund of the establishment standing to the credit of the employees who become members of the Fund established under the Scheme shall notwithstanding anything to the contrary contained in any law for the time being in force or in any deed or other instrument establishing the provident fund but subject to the provisions, if any, contained in the Scheme, be transferred to the Fund established under the Scheme, and shall be credited to the accounts of the employees entitled thereto in the Fund."

Section 15 (2) creates the liability to transfer the Fund. But section 15 (2) itself does not specify whose is the liability to effect that transfer. Section 15 (2), however, in express terms subjects the liability it creates to the provisions contained in the Scheme. The Scheme referred to therein is the Scheme for which section 5 of the Act provides. Paragraph 28 of the Scheme directed :

"Every authority in charge of, or entrusted with the management of, any Provident Fund in existence on the 15th day of November, 1951, the accumulations wherein are to be transferred to the Fund under sub-section (2) of section 15 of the Act, shall, before the 1st day of January, 1953, or such later date as the Board may fix in this behalf—

* * * * * * *

(ii) transfer to the Fund in the manner specified in sub-paragraph (2) the total accumulations standing to the credit of the subscribers in relation to each factory..............

(2) All accumulations standing to the credit of the subscribers, however invested, shall be transferred to the Fund by the authority aforesaid in cash."

The rest of paragraph 28 I shall omit as it is not material for our present purposes.

When the Scheme under the Act became applicable to the petitioner's concern, the liability imposed by section 15 (2) of the Act arose. The liability to transfer the assests of the provident fund of the petitioner's concern to the Fund was under the Act and the Scheme. Paragraph 28 laid that liability to transfer on every authority in charge of or entrusted with the management of the petitioner's provident fund. I have already pointed out that the petitioner company itself was not in possession of the assets, because the assets of the provident fund were vested in the trustees. It is the trustees that constituted the authority in charge of the provident fund, or the authority entrusted with the management of the Fund within the meaning of paragraph 28. The petitioner, no doubt, was the employer. But on the relevant date, 15th November, 1951, the petitioner himself was not in charge of the Fund, nor was he entrusted with the management of the Fund. The charge and management had already been vested in the trustees, in whom also, as I have pointed out, the assets vested.

The main contention of the learned counsel for the petitioner was that the petitioner, who was admittedly the employer, was not the person on whom there vested any statutory liability to transfer the assets of the petitioner's provident fund to the Fund established under the Scheme. The combined effect of section 15 (2) and paragraph 28 of the Scheme was to cast that liability, in the circumstances of the case, not on the petitioner-employer but on the trustees. Therefore the requirements of section 8 (*a*), which applied no doubt to an employer, were not satisfied, because the petitioner as employer could not have been lawfully required in this case to transfer the assests to the authorities in charge of the Fund established under the Scheme.

This plea was developed for the first time when the petition came on for hearing before me, and it was subsequently formulated in the supplemental affidavit filed by the petitioner on 11th July, 1960. As the learned Government Pleader pointed out, at no earlier stage did the petitioner put forward the plea, that whether or not the trustees were liable to transfer the assets in cash, the petitioner himself was under no such liability, because no liability was cast upon him by paragraph 28 of the Scheme. That was not the defence the petitioner put forward in the correspondence that preceded the issue of the demand notice dated 15th May, 1959. It was not even disclosed in the original affidavit filed in support of the petition on the basis of which a rule *nisi* was obtained. The plea, as I said, was specifically disclosed only in the supplemental affidavit dated 11th July, 1960.

The relevant facts thus were not in dispute. The petitioner constituted a provident fund for his employees long before the Act. Act XIX of 1952 was applied to the employer and employees in the petitioner's newspaper concern. The assets of that provident fund however were vested not in the petitioner but in the trustees. That too was long antecedent to the relevant date prescribed by paragraph 28 of the Scheme. After the Act and the Scheme framed thereunder were extended to the petitioner's concern, there was a transfer of assets by the trustees, who were in charge of these assets, to the authority constituted under the Scheme. On 20th November, 1958, as I have pointed out, there was a transfer of the assets, which consisted of Government promissory notes, the promissory note for Rs. 9,50,000 and the security for the promissory note debt effected by the equitable mortgage by deposit of title deeds of the petitioner's properties. That transfer was accepted on 25th November, 1958, by or on behalf of the first respondent. No doubt under paragraph 28 (2), the liability was to transfer all accumulations howsoever invested in cash. There was no controversy about the transfer of the Government promissory notes. One of the assets transferred by the trustees, that is, one of the "investments" was the promissory note debt, for which there was the security of equitable mortgage,

The Commissioner appointed under the Scheme could very well have insisted at that stage on the trustees discharging the statutory liability imposed by paragraph 28 (2) of the Scheme, which in effect was that the trustees should realise the investment, that is, the loan and pay it in cash to the Commissioner in charge of the Fund established under the Scheme. That, however, was not done at that stage. Whether the trustees could still be required to realise the transferred asset and pay it in cash does not arise for consideration at this stage. The trustees as such are not parties to these proceedings. The question for determination is, was the petitioner as an employer under any liability to pay in cash, that is, whether the petitioner was under any liability to transfer any asset in cash. That question has to be answered only with reference to the terms of paragraph 28 of the Scheme, and the answer has to be in the negative and in favour of the petitioner. He was not, as I have pointed out, the authority in charge, or the authority entrusted with the management of the provident fund, the provident fund established by the employer. If section 15 (2) read with paragraph 28 of the Scheme did not impose any liability on the petitioner as an employer to transfer the assets of the provident fund established by him, then obviously the requirements of section 8 (*a*) cannot be held satisfied, and if those requirements are not satisfied, nothing can be recovered from the employer as arrear of land revenue. If that be the position, the notice of demand issued by the Collector on 15th May, 1959, will have to be set aside as one issued without jurisdiction.

The learned Additional Government Pleader contended that the effect of clause 28 was not to dispense with what he called the ultimate liability of the employer to transfer the assets of his provident fund to the authority in charge of the Fund established under the Scheme. I am unable to see any scope for differentiating between an immediate liability and an untimate liability, or primary liability and ultimate liability with reference to the circumstances of this case. Paragraph 28 categorically lays the liability not on the employer as such but only on the person or persons in charge of the provident fund or entrusted with the management of the provident fund. Once again I have to point out that the petitioner, though he was the employer, was not in charge of the provident fund ; nor was he entrusted with the management of that provident fund. That applied only to the trustees. I am unable to see anyting in paragraph 28 or in section 15 (2) read with paragraph 28 to impose a liability on an employer, if he was not the authority in charge of the provident fund or if he was not the authority entrusted with the management of the provident fund. In other words, where an employer had divested himself lawfully of the charge of the provident fund and of the management of the provident fund and had lawfully vested the assets of the provident fund, the charge of the provident fund and the management of the provident fund in trustees lawfully constituted, the employer is no longer under the liability created by section 15 (2) of the Act read with sub-paragraphs (1) and (2) of paragraph 28 of the Scheme.

The learned Additional Government Pleader pointed out that the primary object of the Act and the Scheme thereunder was that the assets of an employer's provident fund should be transferred in cash to the Fund established under the Scheme and if there was default, that liability could be enforced under section 8 of the Act. The further plea was that, since section 8 was limited only to employers, the object of the Act would be frustrated if section 15 (2) read with paragraph 28 of the Scheme were construed to absolve the employer in this case of any liability to effect the required transfer, that is, the transfer in cash. Section 8 of the Act, it should be remembered, is not the only remedy open in law to the first respondent. Even if the employer were liable to transfer the assets of his provident fund to the Fund established under the Scheme, section 8 is not the exclusive remedy. In other words, the liability could be enforced by other means also besides recourse to the relevant provisions of the Revenue Recovery Act. One thing however seems to me to be clear. Section 8 cannot be invoked to enforce a liability of any one other than an employer. If, as I have held, the liability to transfer the assets of the petitioner's provident fund was that of the trustees, the liability of the trustees will not fall within the scope of section 8 of the Act. How that liability

is to be enforced in law I am not called upon to decide in this case. Before section 8 can be applied to the petitioner, there must be proof that he was under a legal liability to transfer the assets, and I have held that in the present case the petitioner was under no such legal liability.

The learned Additional Government Pleader contended that, since it was a belated plea that the petitioner put forward, the validity of that plea should not be examined at all, and that the rule *nisi* should be discharged in the exercise of my discretion. I am unable to accept this argument. The statutory authorities in this case, the first respondent and the second respondent, the first claiming statutory powers under Act XIX of 1952, and the second claiming statutory powers under Act VI of 1867 invoked with reference to section 8 of Act XIX of 1952, could act only within the limits of their statutory powers. The limits in this case were defined by section 8. If the petitioner himself was under no statutory liability, the liability created by Act XIX of 1952, to pay anything there can be no question of that liability being enforced under section 8. Obviously the liability of the petitioner as a debtor under a mortgage debt is not a liability which could be enforced by recourse to the provisions of section 8, that is, the balance of the mortgage debt due from the petitioner cannot be recovered as if it were an arrear of land revenue under section 8 of the Act. When neither of the statutory authorities, respondents 1 and 2, had any jurisdiction to demand of the petitioner that he should transfer the assets of which he is not in charge as assets, the second respondent had no jurisdiction to issue the demand notice dated 15th May, 1959, under the provisions of section 4 of Act VI of 1867.

The rule *nisi* is confirmed and a writ of *mandamus* will issue as prayed for directing the respondents to forbear from applying the provisions of section 8 of Act XIX of 1952 and the provisions of Act VI of 1867 to recover the amount demanded of the petitioner. There will be no order as to costs.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATADRI.

Kolandaivelu Chettiar .. *Petitioner**

v

Koolayana Chettiar .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949) 7 (3) (*a*) *and Act (XVIII of* 1960 *section* 10 (3) (*a*)—*Landlord—Meaning of—Own occupation—Scope of—Requirement of a member of joint Hindu family—If owner can apply for eviction—Effect of section* 35 *of new Act on pending proceedings.*

By virtue of section 35 of the Madras Buildings (Lease and Rent Control) Act, 1960, all pending proceedings taken under the earlier Act have got to be decided under the relevant provisions of the new Act.

The expression 'for his own occupation' in section 7 (3) of the Act (now section 10 of the new Act) cannot be restricted only to the occupation of the landlord himself but should be interpreted to include the individual's family and dependents. It is proper and desirable for the Court to take into consideration the context of social order, customs, habits and ideas of living of the community to which the individual belongs and then come to a conclusion about the *bona fide* requirement of the landlord.

A landlord is entitled to apply under the Act for eviction of the tenant on the ground that he requires the building for establishing a separate residence for his son. The fact that the son has got a right in other joint family property or that he is living in the joint family house cannot be a bar to the maintainability of the application. Mere constructive or notional possession of other properties cannot constitute occupation of a building of his own under the Act.

(The provisions under the new Act, section 10, making express provision for the right of the sons pointed out. A father can file an application on the ground of his son's requirement).

Petition under section 115 of Act V of 1908 praying the High Court to revise to order of the District Court, Coimbatore, dated 28th July, 1959 and made in

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* C.R.P. No. 1305 of 1959. — 4th November, 1960. (13th Kartika, 1882-Saka)

C.R.P. No. 256 of 1959 (C.M.A. No. 32 of 1958, Sub-Court, Coimbatore, R.C. O.P. No. 20 of 1958, Rent Controller, Erode).

M. Natesan, for Petitioner.

N. R. Raghavachari, for Respondent.

The Court delivered the following

JUDGMENT :—This Civil Revision Petition arises out of proceedings taken out by the respondent under the Madras Buildings (Lease and Rent Control) Act, 1949. The respondent is the landlord. He filed an application under section 7 (1) of the Madras Rent Control Act for eviction of the tenant, the petitioner herein, from the suit premises bearing Door No.118. The respondent, that is the landlord, has also got three other houses bearing Door No. 125, which is in the occupation of himself and his second son, Door No.119 in the occupation of his eldest son and Door No.111 in which he has got a joint right with a third party. The reasons for the eviction as alleged in his petition are that the petitioner herein was in arrears of rent and the second son of the respondent is married and he wants to set up for his son an independent family of his own and for the said purpose he requires the property mentioned in the petition for the occupation of his son and for his personal use.

The petitioner herein contended that there was no necessity for the respondent herein to set up an independent family of his own for his son as he was married ten years ago and was living with his father, who is a widower, during all these years, and that the application for eviction was not *bona fide* for his own use, but, on the other hand has been filed to get an enhanced rent.

The learned District Munsif, who is the Rent Controller, gave a finding that the respondent herein, the landlord, required the suit premises *bona fide* for his personal use, that is, for setting up a separate family for his second son. In the result eviction was ordered by the learned District Munsif.

Against this order, the tenant, that is the petitioner herein, filed an appeal C.M.A.No.32 of 1958 on the file of the Subordinate Judge's Court, Coimbatore. The learned Subordinate Judge decided the case on the interpretation of section 7 (3) (*a*) of the Madras Buildings (Lease and Rent Control) Act, 1949, which was then in force.

Section 7 (3) (*a*) is as follows:

" A landlord may, subject to the provisions of clause (*d*), apply to the Controller for an order directing the tenant to put the landlord in possession of the building—

(i) in case it is a residential building, if the landlord requires it for his own occupation and he is not occupying a residential building of his own in the City, town or village concerned; "

The learned Judge was of opinion that as the landlord, that is the respondent herein, has been occupying a residential building of his own and even if he *bona fide* required the disputed premises for the occupation of his son, he would not be entitled to evict under section 7 (3) (*a*). He also found that the Act does not make any special provision for the members of a Hindu joint family and as such the joint family cannot be held to be a landlord for the prupose of section 7, clause (3) (*a*) of the Act. In the result, he set aside the order of eviction and dismissed the petition filed by the respondent (Landlord).

Again this judgment the respondent herein filed a Civil Revision Petition in the District Court of Coimbatore. The learned District Judge gave a finding that the application is *bona fide* and the landlord requires the suit premises for setting a separate family for his second son. The learned District Judge took a contrary view to that of the learned Subordinate Judge and came to the conclusion that the word ' landlord ' includes a member of the family. Therefore he held that the petition filed by the landlord for eviction is maintainable even though he requires it for setting up a separate family for his second son in spite of the fact that the landlord himself is in occupation of a building of his own excluding the suit premises.

Against this order the tenant, that is the petitioner herein filed the present Civil Revision Petition. By that time the Madras Buildings (Lease and Rent Control) Act, 1949 had been amended and the Madras Buildings (Lease and Rent Control) Act, 1960, had come into force.

Under section 35 of the present Act, the Madras Buildings (Lease and Rent Control) Act, 1949, was repealed and all the Rules made or deemed to have been made, notification issued or deemed to have been issued, orders passed or deemed to have been passed, decisions made or deemed to have been made, proceedings or action taken or deemed to have been taken and things done or deemed to have been done under any provision of the said Act, shall be deemed to have been made, issued, passed, taken or done by the appropriate authority under the corresponding provision of this Act and shall have effect accordingly.

Therefore, I have to decide the case under the relevant provision of the present Act of 1960. The relevant provision of the present Act is section 10, clause (3) (*a*), which is as follows :

" A landlord may, subject to the provisions of clause (*d*) apply to the Controller for an order directing the tenant to put the landlord in possession of the building—

(i) in case it is a residential building, if the landlord requires it for his own occupation or for the occupation of his son and if he or his son is not occupying a residential building of his own in the city, town or village concerned."

There was much discussion in several Courts in India as to who should be included in the word 'landlord' occurring in the Buildings (Lease and Rent Control) Acts of the respective Provinces. When interpreting the word ' landlord " Chagla, C.J., in an unreported case of the Bombay High Court (cited in "Principles of Rent Control" by Andhyarjuna, 1952 Edition, at page 257) held that one should look into the customs of society and the nature of socialities which subsist between the different members of the family in India. A member of the family of the landlord need not necessarily be the dependent on the landlord. Thus, where the premises belong to the joint family the requirement of any one member of the joint family would be the requirement of the landlord. All the cases that were decided in several Courts with regard to the interpretation to be given to the words "landlord requires it for his own occupation" were elaborately reviewed in a Bench decision of the Patna High Court in *Bidhubhusan* v. *Commissioner, Patna*[1]. Their Lordships held that the expression " his own occupation " cannot be restricted only to the occupation of the landlord himself but should be given a wider and liberal meaning so as to include the occupation of persons who are living with the landlord and are economically dependent on him. In the Patna case the landlord required the premises for establishing his nephew who was living with him and dependent on him in business.

Thus the various Courts, in determining the expression " his own ", have held that it does not necessarily mean the particular individual alone but must be interpreted to include the individual's family and also dependents. It is proper and desirable for the Court to bear in mind the context of social order, the habits and ideas of living, the religious and socio-religious customs of the community to which the individual belongs and then come to a conclusion on the facts of each case.

The learned District Judge on a consideration of all these circumstances came to the right conclusion that the respondent herein, that is the landlord, will be entitled to require the disputed premises for the occupation of his son under section 7, clause (3) (*a*).

But the learned counsel for the petitioner Mr. M. Natesan laid great emphasis on the words used in the present Act

" if he or his son is not occupying a residential building of his own in the city, town or village concerned."

1. A.I.R. 1955 Pat. 496.

His contention is that the petitioner and his second son are the members of a joint family. Admittedly, the second son is living with his father. Therefore, he must be deemed to be in occupation of a residential building of his own. It is not necessary that there should be an exclusive house or a residence of his own. On the other hand, Mr. N. R. Raghavachariar, learned counsel for the respondent, contended that the expression "of his own" means that there should be a building independently of his own. He should have full ownership. The building should belong to a single individual. It is only in those circumstances it can be called "a residential building of his own."

I entirely agree with Mr. N. R. Raghavachariar, the learned counsel for the respondent, because it is well-settled under the Hindu Law that no coparcener is entitled to separate possession of the coparcenary estate. The actual possession and management thereof must vest in a manager. He is the protector of the household and can prevent by obtaining an injunction a riotous member thereof from entering the family house without his permission to disturb its peace and tranquillity. It is also well-settled that all the coparceners have a community of interest and unity of possession in the coparcenary or joint family property. A coparcener cannot, while the family is undivided, predicate at any given moment that he, the particular coparcener, has a definite share in the coparcenary property. Applying these principles the learned counsel for the petitioner is not correct in saying that the petitioner's second son is in occupation of a residential building of his own.

The learned counsel for the petitioner also laid emphasis on the words "of his own". I am not much impressed with his arguments that the expression "of his own" must be deemed to mean either constructive ownership or notional possession. The meaning to be given to the word "own" depends upon the subject-matter and circumstances surrounding it. It is a general term which varies in its significance according to its use. The Madras Buildings (Lease and Rent Control) Act, 1960, is concerned with the actual and physical possession and not with the notional and constructive possession, and it will be foreign to the scheme of the Act to hold that occupation of one member should be construed as occupation by another when that another is not in fact in occupation.

It has also further to be understood that occupation includes possession. Legal possession does not of itself constitute occupation. There is a distinction between occupation and possession. Possession may be legal or constructive, but in occupation there is no legal or constructive occupation.

Therefore, I am of opinion that the view held by the District Judge, who decided the case under the old Act, that a landlord can maintain an application for the eviction of a tenant on the ground that he requires the premises for the setting up of a separate family for his second son is correct. His interpretation that the words "his own occupation" have to be construed to include occupation of the landlord's son is correct.

Under the present Act, the provision is made clear by inserting the words

> "for the occupation of his son and if he or his son is not occupying a residential building of his own in the city, town or village concerned."

The father can certainly file an application when he requires the premises to set up a separate family for his second son when his son is not occupying a residential building of his own in the place concerned.

The Civil Revision Petition is therefore dismissed. But there will be no order as to costs.

Time for eviction 3 months.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

G. Venkatachala Odayar .. *Petitioner**

v.

Ramachandra Odayar and another .. *Respondents.*

Madras Cultivating Tenants Protection Act (XXV of 1955)—Proceedings in eviction of tenant on the ground of non-payment of arrears of rent—Finding by the Revenue Court that the tenant is not in arrears—Subsequent suit in civil Court for recovery of such arrears—Finding of the Revenue Court, if a bar—Res judicata *and analogous principles.*

The decision of the Revenue Court on the question whether a cultivating tenant is in arrears of rent or not, being only incidental to the exercise of its jurisdiction to grant eviction cannot operate as *res judicata* in a subsequent civil suit between the parties.

In the context of the general jurisdiction of a civil Court and the exclusive jurisdiction of a special Court or Tribunal the legal conception of the plea of *res judicata* in respect of a matter decided by the Court of exclusive jurisdiction cannot appropriately be termed as the doctrine of *res judicata* but can only be called as a bar of the civil Court's jurisdiction to decide that which is within the exclusive jurisdiction of the special or exclusive Tribunal.

The Special Court or the Court of exclusive jurisdiction must be a competent Court having jurisdiction to decide and adjudicate upon the particular matter the decision in which is invoked as a bar in a subsequent suit. The bar of *res judicata* can come in only in respect of the actual decision by the Court of exclusive jurisdiction and not in respect of any other matter which might have been dealt with by that Court incidentally of course necessarily to enable it to render its decision.

It is obvious that the question of arrears of rent of a cultivating tenant and the right of the landlord to recover such arrears from the tenant are not matters which the Revenue Divisional Officer is empowered under the Act to determine, but which matters may arise incidentally in determining the question whether the cultivating tenant is liable to be evicted or not.

Case-law discussed.

Narasimha Chettiar v. *Muthuswami Goundar*, (1958) 2 M.L.J. 216, observations at page 219 *dissented from.*

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Tiruvarur, dated 19th June, 1957 and passed in S.C.S. No. 726 of 1956.

K. Raman, for Petitioner.

S. Bhaskaran, for Respondent.

The Judgment of the Court was delivered by

Jagadisan, J.—This Civil Revision Petition raises a question of law of general importance. The question is whether a finding of the Revenue Divisional Officer functioning under the Madras Cultivating Tenants' Protection Act, Madras Act (XXV of 1955) that the cultivating tenant is not in arrears of rent in an application filed by the landlord for evicting him can bar a civil suit filed by the landlord for recovery of such arrears, of rent.

The petitioner in the revision petition leased out his properties to the deceased father of the first respondent and the second respondent under a lease deed, dated 5th September, 1954, for the fasli year 1364. The rent fixed under the lease deed was 158 kalams of paddy. The petitioner claimed that the lessees were in arrears of rent to the extent of 18 Kalams for that fasli year. For the subsequent fasli, 1365 a fresh lease deed was executed by respondents 1 and 2 in favour of the petitioner on 25th January, 1956, agreeing to measure 176 kalams of paddy as rent. According to the petitioner the respondents were in arrears in respect of the fasli year to the extent of 20 Kalams of paddy. The petitioner filed S.C.S. No. 726 of 1956 on the file of the District Munsif's Court of Tiruvarur against the respondents claiming to recover the sum of Rs. 296-12-0 being the value of the arrears of rent of 38 Kalams of paddy and interest thereon at 5½ per cent. per annum. The respondents pleaded in that suit that they were not in arrears at all.

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* C.R.P. No. 1292 of 1957. 8th November, 1960. (17th Kartika, 1882, Saka).

During the pendency of the suit the petitioner filed P. No. 2 of 1957 before the Revenue Court, Tiruvarur, seeking to evict the respondents from their holdings under the provisions of Madras Act XXV of 1955 on the ground that they were in arrears of rent to the extent of 38 kalams of paddy for the fasli years 1364 and 1365. The Revenue Divisional Officer enquired into that petition and held that the respondents were not in arrears of rent and accordingly dismissed the eviction petition by his order dated 14th March, 1957. Thereupon the respondents filed an additional written statement in the pending suit, S.C.S. No. 726 of 1956 on the file of the District Munsif's Court, Tiruvarur, urging the plea that the finding of the Revenue Court holding that there was no arrear operated as *res judicata* and that the Civil Court had no jurisdiction to adjudicate this dispute of arrears of rent between the parties. The learned District Munsif tried this issue as a preliminary issue and upheld the respondent's contention. The suit was therefore dismissed with costs. This Civil Revision Petition has been preferred by the petitioner landlord against the said judgment and decree. In this judgment we are referring to the Civil Suit as a subsequent suit though it was instituted prior to petition in the Revenue Court as the Civil Suit was tried only after the termination of the Revenue enquiry.

Somasundaram, J., heard the Civil Revision Petition in the first instance. On behalf of the respondents the decision of this Court in *Narasimha Chettiar* v. *Muthuswami Gounder*[1], was cited before the learned Judge. In that decision Ramaswami, J., held that a finding of the Revenue Court in the decisions rendered by it in the course of proceedings under Madras Act XXV of 1955 would operate as *res judicata*. Somasundaram, J., was unable to agree with this view and he was of opinion that the Civil Revision Petition may be heard by a Division Bench. The Civil Revision Petition has therefore been posted before us.

Section 11 of the Civil Procedure Code embodies the doctrine of *res judicata*. The section however is not exhaustive and the doctrine of *res judicata* has often been invoked and applied to cases not strictly within the compass of that section. The maxim 'No man should be vexed twice over for the same cause' (*Nemo debet bis vexari pro una et eadem causa*) is recognised to be a principle of law which has to be given effect to and followed without being unduly restricted by the terms of the statute as enacted in section 11, Civil Procedure Code.

Sir Lawrence Jenkins delivering the judgment of the Judicial Committee in *Sheoparsan Singh* v. *Ramnandan Singh*[2] referred to the principle of *res judicata* in the following terms :

"........the rule of *res judicata*, while founded on ancient precedent, is dictated by a wisdom which is for all time. 'It hath been well said,' declared Lord Coke, '*Interest reipublicae ut sit finis litium*, otherwise great oppression might be done under colour and pretence of law' : *Ferrers' case*[3]. Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnaneswara and Nilakanta include the plea of a former judgment among those allowed by law, each citing for this purpose the ext of Katyayana, who describes the plea thus : ' If a person though defeated at law sue again he should be answered, ' You were defeated formerly '. This is called the plea of former judgment. (*See* the Mitak. Vyavahara, Bk. II ch. i., edited by J. R. Gharpure, page 14 and the Mayuka ch. i. s. 1. page 11 of Mandlik's edition). And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."

The question for consideration is whether the plea of *res judicata* either in its statutory form as found in section 11, Civil Procedure Code or as a rule of law of general jurisprudence can avail the respondents in this Civil Prevision Petition to defeat the suit of the petitioner in the Court below. Section 11, Civil Procedure Code is as follows :—

" No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties under whom they

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1. (1958) 2 M.L.J. 216.
2. (1916) 31 M.L.J. 77 : I.L.R. 43 Cal. 694 : L.R. 43 I.A. 91 (P.C.).
3. (1884) 6 Cokes Reports 9-a.

or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed; or in any Court beyond the limits of India, established or continued by the Central Government and having like jurisdiction, or before the Supreme Court"

One of the essential requirements of the section is that the adjudication relied upon as a bar in the subsequent suit must have been by a Court and that Court must have been a Court competent to try the subsequent suit in which the bar of *res judicata* is pleaded. It is obvious that even assuming that the Revenue Divisional Officer having jurisdiction under Madras Act XXV of 1955 can be called a Court he was not competent to try the suit filed by the petitioner in the District Munsif's Court, Tiruvarur, for recovery of arrears of rent. A strict and literal application of the terms of section 11, Civil Procedure Code, will certainly disarm the respondents of this plea of *res judicata*.

We have therefore to consider the other aspect of the question whether the general principles of *res judicata* can help the respondents to sustain the plea. The fact that the Revenue Divisional Officer is not a competent Court to entertain the subsequent suit on the file of the District Munsif's Court, Tiruvarur is not a ground which will disentitle the respondents in calling in aid the plea of *res judicata*. In *Raj Lakshmi Dasi and others* v. *Banmali Sen and others*[1], the Supreme Court observed thus:

"It was urged that to substiatiate the plea of *res judicata* even on general principles of law it was necessary that the Court that heard and decided the former case should be a Court competent to hear the subsequent case. This contention was based on the language of section 11. The condition regarding the competency of the former Court to try the subsequent suit is one of the limitations engrafted on the general rule of *res judicata* by section 11 of the Code and has application to suits alone. When a plea of *res judicata* is founded on general principles of law, all that is necessary to establish is that a Court that heard and decided the former case was a Court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the later suit. A plea of *res judicata* on general principles can be successfully taken in respect of jurdgments of Courts of exclusive jurisdiction, like revenue Courts, land acquisition Courts, administration Courts, etc. It is obvious that these Courts are not entitled to try a regular suit and they only exercise special jurisdiction conferred on them by the statute".

We shall now refer to the provisions of the Madras Cultivating Tenants Protection Act to ascertain the jurisdiction of the special machinery of the Revenue Court functioning under that Act. The Act confers upon the Revenue Divisional Officer specific powers and allots particular disputes between the landlord and the cultivating tenant to be decided by him. The landlord can evict a cultivating tenant only on application made to the Revenue Divisional Officer. This is provided for in section 3 (4) of the Act. The grounds of eviction are set out in section 3 (2) of the Act. Default in the matter of payment by the cultivating tenant is one of the grounds that entails eviction of the cultivating tenant. Section 3 (3) of the Act enables the cultivating tenant to seek an adjudication before the Revenue Divisional Officer of the quantum of rent payable by him. Section 4 of the Act provides for a cultivating tenant who was in possession of the land on 1st December, 1953 and who was not in possession at the commencement of this Act to be restored to possession on application to the Revenue Divisional Officer. Section 4-A enacts that a landlord can resume the land for personal cultivation by appopriate proceedings before the Revenue Divisional Officer subject to certain terms, and conditions mentioned therein. These are the matters on which the Revenue Divisional Officer can adjudicate. Section 6 of the Act enacts a rule of ouster of the jurisdiction of the Civil Courts. It is as follows:

"No Civil Court shall, except to the extent spesified in section 3 (3) have jurisdiction in respect of any matter which the Revenue Divisional Officer is empowered by or under this Act to determine and no injunction shall be granted by any Court in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act".

This section has not introduced anything new or strange in the realm of law relating to the general jurisdiction of civil Courts as it is now well settled that where

1. (1952) S.C.J. 618 : (1953) S.C.R. 154.

a statute creates new rights and establishes a special machinery for working out those rights by constituting a Tribunal or a special Court that tribunal or Court becomes vested with exclusive jurisdiction to decide the matters entrusted to it by the statute, and thereby excludes the jurisdiction of the civil Courts as well. But the civil Courts being Courts of unlimited jurisdiction, subject to limits of pecuniary jurisdiction imposed by statute and limits of territorial jurisdiction, must be presumed to have jurisdiction in respect of every civil right unless exclusion of such jurisdiction is expressed or can be necessarily implied. In *Secretary of State* v. *Mask and Company*[1], Lord Thankerton delivering the judgment of the Judicial Committee observed thus at page 236 :

> " It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure ".

In the context of the general jurisdiction of a civil court and the exclusive jurisdiction of a special Court or Tribunal the legal conception of a plea of *res judicata* in respect of a matter decided by the Court of exclusive jurisdiction cannot appropriately be termed as the doctrine of *res judicata* but can only be called as a bar of the civil Court's jurisdiction to decide that which is within the exclusive jurisdiction of the special Tribunal.

There may however be cases in which the Court of exclusive jurisdiction having decided and granted relief which it was competent to grant, the identical question may again arise in another form before the civil Court. Proceedings before the Land Acquisition Officer under the Land Acquisition Act culminating in a reference to a Civil court under section 18, 30 or 31 of that Act are instances in point. In such proceedings the title to the claimant's property is directly involved and the Land Acquisition Act clothes the special Court with jurisdiction to decide it. Any adjudication of title in those proceedings will certainly constitute *res judicata* between the parties or their privies in a subsequent suit in a civil Court. But two things must be particularly noted in this connection. Firstly the special Court or the Court of exclusive jurisdiction must be a competent Court having jurisdiction to decide and adjudicate upon the particular matter, the decision in which is invoked as a bar in a subsequent suit. Secondly the bar of *res judicata* can come in only in respect of the actual decision by the Court of exclusive jurisdiction and not in respect of any other matter which might have been dealt with by that Court incidentally of course necessarily to enable it to render its decision.

We shall now refer to a few decisions of this Court which dealt with the question of *res judicata* of a decision of the Revenue Court functioning under the Madras Estates Land Act. Under that Act the Revenue Court is entrusted with exclusive jurisdiction in respect of applications and suits, to grant relief and to work out the statutory rights of the parties governed by it. The question for consideration was whether any adjudication by the Revenue Court in the course of its exercise of exclusive jurisdiction on matters incidental to that determination can operate as *res judicata*. It was held that such incidental determination cannot bring in the bar of *res judicata* in a subsequent civil suit between the parties.

In *Ramadina Das Gosayiji* v. *Bishamo Mundalo*[2], Wallis, C.J., and Oldfield, J., observed thus :

> " It has been well pointed out by Seshagiri Ayyar and Napier, JJ., in Second Appeals Nos. 1002 and 1213 of 1916 that the Revenue Court is not the competent authority to decide finally whether any particular lands constitute an estate or not. If they constitute an estate, then the Revenue Court has jurisdiction and exclusive jurisdiction in the matter of commuting rents. For the purpose of deciding whether it should exercise that jurisdiction, the Revenue Court like any other Court of limited jurisdiction, has to determine whether the facts are such as to give it jurisdiction just as a Small Cause

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1. (1940) 2 M.L.J. 140 : L.R. 67 I.A. 222 : I.L.R. (1940) Mad. 599 (P.C.).
2. A.I.R. 1921 Mad. 473.

Court has to determine the question of title to land in a summary action for rent, or for damages for trespass. 'That decision however will not be binding as held in the case just referred to, on a civil Court".

In *Appa Rao* v. *Gurraju*[1], it was held that section 189 (3) of the Madras Estates Land Act does not constitute the decisions of the Revenue Courts on an issue as to title to land or occupancy rights therein arising incidentally in suits to enforce the acceptance of pattas which are cognisable exclusively by such Courts *res judicata* in a subsequent suit in a civil Court instituted by the landord for ejectment of the tenant from such land. Spencer, J., observed thus at page 866 :

"In the present case, I am of opinion that the prior decision having been a decision upon an incidental question as to occupancy rights, and not a matter falling within the exclusive jurisdiction of a Revenue Court, is not binding on the Civil Court under section 189 (3) although it did arise in a suit to enforce acceptance of pattas which was exclusively cognisable by a Revenue Court".

In *Venkatarama Rao* v. *Venkayya*[2], this identical question was considered by a Full Bench of this Court. At page 790 the learned Chief Justice observed thus:

"If a particular matter is one which does not fall within the exclusive jurisdiction of the revenue Court, then a decision of a revenue Court on such a matter, which might be incidentally given by the revenue Court, cannot be binding on the parties in a civil Court. One particular test would be to determine if that particular matter would not be a matter in respect of which the civil Court would have jurisdiction. To give an obvious instance, suppose in a suit under section 55 for the grant of a patta instituted by a person claiming to be the adopted son of the ryot who was a pattadar, the landlord raises a plea that he is not entitled to the patta because his adoption is not valid. It may be that the revenue Court would have to summarily go into the question whether the person suing is or is not the validly adopted son of the previous ryot. Can it possibly be said that the finding of the revenue Court on the issue of adoption is binding on the parties in a subsequent suit in a civil Court in which the validity of the adoption might fall to be decided ? There can be no doubt about the answer".

The Revenue Divisional Officer is empowered under the Madras Act XXV of 1955 to decide the question whether a cultivating tenant is liable to be evicted from his holding or not. That is a matter in which he is vested with exclusive jurisdiction, the jurisdiction of the Civil Court having been expressly taken away by section 6 of that Act. A cultivating tenant in arrears of rent having committed default in the matter of payment of rent is a person liable to be evicted. In order to determine whether the cultivating tenant can be evicted on the ground of his being in arrears of rent the Revenue Divisional Officer has necessarily to go into the question whether in fact the tenant is in arrears or not. But such determination of arrears of rent is only a matter incidental to the exercise of his jurisdiction to grant eviction. The Act has nowhere clothed the Revenue Divisional Officer with jurisdiction to grant relief to the landlord for recovery of arrears of rent. The landlord can recover arrears of rent from a cultivating tenant only through the medium of a civil Court. It is obvious that the question of the arrears of rent of a cultivating tenant and the right of the landlord to recover such arrears of rent from the tenant are not matters which the Reveue Divisional Officer is empowered under the Act to determine. The Revenue Divisional Officer is not a competent Court in respect of this matter which may however, arise incidentally in determining the question whether a cultivating tenant is liable to be evicted or not. On the principle of the decisions referred to above arising under section 189 (3) of the Madras Estates Land Act, we are of opinon that the decision of the Revenue Court on the question whether a cultivating tenant is in arrears of rent or not being only incidental to the exercise of its jurisdiction to grant eviction cannot operate as *res judicata* in a subsequent civil suit between the parties.

In *Narasimha Chettiar* v. *Muthusami Gounder*[3], Ramaswami, J., dealing with a case arising under the Madras Cultivating Tenants Protection Act, and dealing with the contention of the bar of *res judicata* observed thus at page 219 :

"The argument of the learned advocate for the Revision Petitioner is that the decision, whether the arrears are due or not, is only incidental and collateral and not a final determination by the

1. (1920) 39 M.L.J. 476 : I.L.R. 43 Mad. 859.
2. A.I.R. 1954 Mad. 788.
3. (1958) 2 M.L.J. 216.

Revenue Divisional Officer against whose order, it has to be remembered, no appeal is provided for but only a revision to the High Court. But having reagard to the principle of *res judicata* and the provision of hierarchy of Tribunals for deciding this matter and a revision being provided to the High Court and the continuance of the relationship of landlord and tenant itself being made dependent upon the question whether there are arrears or not, it seems to me that it is a mere quibble to say that all the requirements of *res judicata* are not fulfilled ".

With respect, we disagree with this observation. The learned Judge has not considered the question as to how far the Revenue Divisional Officer was competent to grant relief to the landlord in the matter of recovery of arrears of rent.

Somasundaram, J., in his referring judgment in this case observed thus :

" It is clear from the section that the issue must have been decided in a Court competent to try such a subsequent suit. Can the Revenue Court give decree for arrears of rent ? In a civil Court, the plaintiff applies for a decree for the arrears of rent. But, before the revenue Court he can only apply to evict the cultivating tenant on the ground that he has not paid the rent due to him. He cannot get a decree before the revenue Court for arrears of rent even if the Revenue Court finds that the rent is in arrear. If the Revenue Court is not competent to give a decree to recover the arrears of rent, then certainly that is not a Court competent to try the subsequent suit, and the principle of *res judicata* embodied in section 11, *Civil Procedure Code,* cannot therefore apply ".

With respect we are in complete agreement with this observation of the learned Judge.

We may refer to a recent decision of the Mysore High Court in *U. Venkataraya* v. *Louis Souza*[1], in which the Headnote is as follows :

" Section 6 (Madras Cultivating Tenants Protection Act), when read along with the other provisions of the Act makes it clear that only the decision of the Assistant Commissioner ordering eviction or refusing to order eviction of cultivating tenant cannot be challenged before a civil Court. Incidental determinations such as quantum of arrears or the rate of rent are also final in so far as they relate to the question of eviction. The Assistant Commissioner is empowered by the Act to determine the quantum of arrears of rent only for the purpose of deciding whether the tenant should be evicted or not and not for any other purpose. To that extent only, the jurisdiction of the civil Court is excluded."

The learned Judge of the Mysore High Court disagreed with the decision of this Court in *Narasimha Chettiar* v. *Muthuswami Gounder*[2], cited already.

We are therefore of opinion that there is no bar of *res judicata* preventing the petitioner from having his suit in the Court below tried on the merits, and that the jurisdiction of that Court is not taken away by section 6 of the Madras Cultivating Tenants Protection Act. The judgment and decree of the learned District Munsif are therefore set aside and the suit S.C.S. No. 726 is restored to his file to be tried and disposed of on the other issues arising in the case. The costs of the Civil Revision Petition will abide and follow the result.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VEERASWAMI.

Rajagopala Ayyar and another .. *Appellants**

v.

Avadai Velalar and others .. *Respondents.*

Registration Act (XVI of 1908), sections 21 and 22—Applicability and scope of—Sale deed of specified ne-third share of vendor in specified shares out of larger portion in named village situate within four specified boundaries—Sufficiency of description—Survey numbers of shares conveyed not given though village surveyed—Deed registered already and possession delivered—Validity and enforceability—Deed—Material alteration—Alteration altogether inconsequential and not altering or affecting rights and liabilites of parties—Effect of.

Section 22 of the Registration Act is more or less complementary to section 21 which requires that the description in a non-testamentary document relating to immovable property such as a sale deed, should be such as may be sufficient to identify the property conveyed or dealt with by the docu-

1. A.I.R. 1960 Mys. 209. 2. (1958) 2 M.L.J. 216.

* L.P.A. No. 101 of 1957. 30th June, 1960. (9th Asadha, 1882, Saka).

ment, and that whenever it is practicable, the description of the property should also be by reference to a Government map or survey. The provisions of sub-sections (2) and (3) of section 21 are only directory and if a description sufficient to identify the property conveyed is contained in the deed, section 21 does not warrant a refusal of registration on the ground that the description of the property in the document, though practicable, was not by reference to a Government map or survey.

Where the property conveyed by the vendor under a sale deed is described as his one-third share in 2-12-9 pangus (shares) out of 16 pangus (shares) in village consisting of 240 velies, situate within four specified boundaries, and it is clearly identifiable, it must be held that the description complies with the requirements of section 21 (1) of the Registration Act, as there could be no vagueness or indefiniteness about what precisely was conveyed under the sale deed. The fact that the sale deed did not give the survey numbers pertaining to the share of the lands conveyed thereunder, though the village was surveyed, would not invalidate the deed or disentitle it to registration on the ground of non-compliance with section 22 (1) and the Notification of the Government, dated 24th April, 1933, (G.O. Ms. No. 53, Law (Registration)) or render it void and unenforceable. And when the sale deed has in fact been actually registered, the Notification can have no relevance or application.

Nahar Lal Shah v. *Baiji Nath Shah*, A.I.R. 1928 Cal. 385 ; *Somasundaram Mudaliar* v. *Rajappa Mudaliar*, (1927) 52 M.L.J. 140, distinguished.

A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed. The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed. This rule of English law applies to India.

Halsbury's Laws of England (Simond's edition) Volume 11, paragraph 599, page 363 ; *Nathu Lal* v. *Mt. Gomti Kuar*, (1941) 1 M.L.J. 204 : L.R. 67 I.A. 318, followed.

Where the alteration complained of is quite inconsequential and makes no difference to the rights and liabilities of the vendor and the vendee under the sale deed, either in regard to the terms of sale or the extent of the property conveyed thereunder, it cannot be held to be a material alteration so as to avoid the deed.

Appeal under Clause 15 of the Letters Patent against the Judgement and Decree of the Hon'ble Mr. Justice Ramaswami Gounder, dated 20th February, 1957 and passed in S.A. No. 857 of 1954 preferred againt the decree of the Court of the Subordinate Judge, Thanjavur, in A.S. No. 92 of 1953 (O.S. No. 149 of 1951, District Munisiff's Court, Pattukottai).

M. Natesan, for Appellants.

T. V. Balakrishnan, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J.—This appeal from the judgment of Ramaswami Gounder, J., arises out of a suit for partition and separate possession of one-third share in the properties conveyed to the plaintiff and his two brothers, defendants 3 and 4, by defendant 43 under a sale deed dated, 28th March, 1946. The sale was for a consideration of Rs. 3,000 of which Rs. 1,000 was paid by the plaintiff to defendant 43 at the time of the execution of the sale deed. The vendor, evidently, having at the instance of his brothers, defendants 1 and 2, refused to register the sale deed, the plaintiff and defendants 3 and 4 got it compulsorily registered. The property conveyed under the sale deed is in Mannankadu village in Pattukottai taluk, which is a shrotriam inam consisting of 16 shares. Panchapakesa Ayyar and his sons, defendants 1, 2 and 43, owned 2-12-9 shares out of them under a Court auction purchase. Even after the death of Panchapakesa Ayyar, his three sons continued, as before, as members of a joint Hindu family. Under the said sale deed, defendant 43 sold his undivided one-third share in the 2-12-9 shares in the village.

A number of alienees from the father as well as defendants 1 and 2 were impleaded as party defendants but they were all given up. Defendant 43 remained *ex parte* and defendants 1 and 2 were the only contesting defendants. They raised various defences but it is only necessary for the purpose of this appeal to refer to two of them, namely, (1) that the sale deed did not satisfy the requirements of section 22 of the Registration Act and (2) that the sale deed was rendered void by a material alteration therein between the dates of its execution and registration. These two defences found favour with the trial and the first appellate Courts with the result that the suit stood dismissed. On Second Appeal by the plaintiff, Ramaswami Gounder, J., differing from the Courts below, found no substance in those contentions and allowed the Second Appeal by granting a preliminary decree

for partition as prayed for by the plaintiff and directing him to deposit into Court Rs. 2,000 being the balance of the sale price within the specified time to the credit of defendant 43 who was entitled to recover the same.

In this appeal before us were reiterated the same two contentions on behalf of defendants 1 and 2 which the first two Courts had accepted but rejected by Ramaswami Gounder, J. The first of them relying on the provisions of section 22 of the Registration Act proceeded on the plea that the sale deed, purporting to convey an one-third share in the 2-12-9 shares, contained no description of the properties or survey numbers though the village in which they were situate was surveyed as early as 1930. It was stated that in the absence of a description of the properties inculding survey numbers conveyed by the suit sale deed, it could not be said what properties were intended to be conveyed by and included in the sale deed and that as it was thus vague and indefinite, it was void. The sale deed recited that lands representing 2-12-9 out of 16 shares in the inam Mannankadu village were purchased by the vendor's father the late Panchapakesa Ayyar in auction and taken delivery of possession by him and that the vendor conveyed exclusive of the properties sold by him, and out of the balance remaining as detailed thereunder in 2-12-9 shares of nanja, punja, trees, samudayam vagaira in the village, his one-third share. The sale deed went on to say that the vendor left the properties conveyed thereunder in the enjoyment of the vendees from the date of the sale and declared that there were no previous encumbrances in respect of them. Then followed the details of the property which set out the four major boundaries for the inam No. 170 Mannankadu village, Pattukottai taluk and the extent of the village as consisting of 240 velies inclusive of shrotriam. The further details given there are : 'out of the Gana Sankaya Bagham (aggregate of shares into which the lands of a village are at the time of the original grant equally divided) of 16 shares the share to my vagaira is 2-12-9, out of this my 1/3rd share, the nanja, punja, samudayam, trees, two warams, one waram, etc., pertaining to the same and the aforesaid my share (0-14-11) the particulars of the property, are as follows : Survey number and extent situated in the aforesid village out of 7¼ shares, the lake, tank, pond, lane, samudayam, road, etc., pertaining to my 1/3rd share, you shall yourself enjoy the same.' Though the village had been surveyed, the sale deed did not give the survey numbers pertainings to the share of the lands conveyed thereunder. Notwithstanding the recital that what was conveyed by the vendor was exclusive of the properties sold by him, the evidence was that actually he had made no sale whatever of any of the properties. On these facts there appears to be no vagueness or indefiniteness about what precisely was conveyed under the sale deed. What was conveyed by defendant 43 was his one-third share in 2-12-9 pangus out of 16 pangus in Mannankadu village consisting of 240 velies and situate within the specified four major boundaries and it was clearly identifiable. That being the case, the description of the property in the sale deed conveyed thereunder complied with the requirements of section 21 (1) of the Registration Act, 1908. In fact the undivided one-third share of defendant 43 which was the subject-matter of a release deed executed by him in favour of defendants 1 and 2 subsequent to the suit sale deed, was described in the release deed in terms identical with those in the suit sale deed ; and that shows that defendants 1 and 2 themselves could think of no better or fuller description to identify the undivided one-third share of defendant 43.

But the learned counsel for the appellants, taking his stand on the fact that the sale deed specified no survey numbers, contended that the failure to set out the survey numbers, of the lands conveyed was in violation of the requirements of section 22 (1) of the Registration Act and the Notification of the Government made under that provision in G.O. Ms. No. 53, Law (Registration), dated 24th April, 1933, and that consequently the sale deed was void and unenforceable. Section 22 is in these terms :

"22. *Description of houses and land by reference to Government maps or surveys* : (1) Where it is, in the opinion of the State Government, practicable to describe houses, not being houses in towns, and lands by reference to a Government map or survey the State Governmrnt may, by rule made under

this Act, require that such houses and lands as aforesaid shall for the purposes of section 21, be so described.

(2) Save as otherwise provided by any rule made under sub-section (1) failure to comply with the provisions of section 21, sub-section (2) or sub-section (3) shall not disentitle a document to be registered if the description of the property to which it relates is sufficient to identify that property."

This section appears to be more or less complementary to the provisions of section 21 which require that the description in a non-testamentary document relating to immovable property should be such as may be sufficient to identify the property conveyed or dealt with by the document and that whenever it is practicable the description of the property should also be by reference to a Government map or survey. But if a description sufficient to identify the immovable property conveyed is contained in a sale deed, section 21 does not appear to warrant a refusal of its registration on the ground that the description of the property in the document though practicable, was not by reference to a Government map or survey. In other words, the provisions of sub-sections (2) and (3) of section 21 are only directory. That was the view taken by this Court in one of the earliest cases which is now supported by the provisions of sub-section (2) of section 22. But the contention of the learned counsel for the appellants was that by reason of the said notification under section 22 (1) the sale deed in question, was not entitled to be registered. The material clauses in the Notification read:

" (*a*) Every non-testamentary document presented for registration and relating to land shall if the land comprises one or more entire survey fields or sub-divisions, specify the number of each field or sub-division as given in the Government village map.

(*b*) If the land has no separate number assigned to it in the Government village map, the document shall specify the number assigned in such village map to the survey field or sub-division in which the land is situated, together with such description of the land as is sufficient for its identification.

(*c*) Failure to comply with the provisions of this rule shall disentitle a document to be registered."

Where clauses (*a*) and (*b*) of the Notification apply to a document, failure to comply with those provisions may of course be a good ground for a refusal to register the document. We do not however, see how the Notification applied to the sale deed under consideration. The conveyance thereunder was of an undivided one-third share out of certain pangus in a village and it is nobody's case that it was practicable to describe and delimit the lands comprised in the undivided one-third share with the reference to any particular survey field or sub-division on ground. Further, as a matter of fact, the sale deed has already been registered and once that has been done it seems clear that clause (*c*) of the notification, has, or can have, no more relevance. But it was contended that if a document not entitled to be registered under clause (*c*) of the notification had nevertheless been registered, it would all the same be void. The counsel could find no support for this proposition either from the provisions of the Registration Act, or the rules framed and Notifications made thereunder or any decided cases. On the premises that from the description given in the sale deed the property conveyed thereunder could not be identified which, as we have already stated, is a wrong assumption, the learned counsel for the appellants contended that the sale deed was void and referred us to the decision in *Nahar Lal Shah* v. *Baiji Nath Shah*[1]. In that case the finding was that the subject-matter of the mortgage had not been identified at all for the purpose of registration within the meaning of section 21 of the Registration Act and on that finding it was held that even though the mortgage deed was registered it would not be valid. This decision is obviously of no assistance to us, as, in this case, the description given in the sale deed was quite sufficient to identify the property conveyed thereunder. Reference was also made to *Somasundaram Mudaliar* v. *Rajappa Mudaliar*[2], in which it was held that the meaning of section 22 (2) was that, unless the rule framed in clause (1) to the effect that the property should be described in a particular way (as by giving survey numbers) also states that the document should not be registered unless it was so described, the document might be registered provided the descrition of the property was sufficient to identify the property. We do not see how

1. A.I.R. 1928 Cal. 385.
2. (1927) 52 M.L.J. 140.

this case helps the appellants either. This is not a suit for compulsory registration of a document. As we said, the sale deed has already been registered and considerations which bear upon the question whether the document was entitled to be registered, have no longer any bearing in the present case. We find, therefore, that there is no substance in the contention of the appellants that the sale deed was void because it failed to comply with the requirements of section 22 and the Notification made thereunder.

The second ground urged on behalf of the appellants was that the sale deed was void in consequence of a material alteration in the deed between the dates of its execution and registration, namely, the word "எங்களால்" was scored out and the word "என்னால்" was interlineated in the body of the sale deed. The sale deed originally stated that the vendor conveyed his undivided one-third share in the pangus belonging to him and his two brothers, defendants 1 and 2, exclusive of the properties sold by them. (எங்களால்). The argument was that the substitution of the word "என்னால்" for the word "எங்களால்" in the context, materially altered and enlarged the extent of the property conveyed by defendant 43 under the sale deed and also made it possible for the plaintiff and his two brothers as vendees to challenge the alienations of some of the properties effected for purposes binding on the family consisting of defendants 1, 2 and 43. In this connection reference was made to the fact that originally the plaintiff had impleaded all the alienees as party defendants in the suit but later on gave them up and that the suit eventually proceeded only as against defendants 1, 2 and 43. The learned counsel for the appellants also cited authorities to elucidate what is meant by a material alteration. In 11 Halsbury's Law of England (Simond's edition), paragraph 599 and page 363, it is stated:

> "A material alteration is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed."

The effect of making such an alteration without the consent of the party bound, according to the rule of English law, is exactly the same as that of cancelling the deed. The meaning and effect of a material alteration thus stated, has been held to apply to this country by the Privy Council in *Nathu Lal* v. *Mt. Gomti Kuar*[1], We do not think it necessary to refer to the other cases cited by the learned counsel on the subject. That there was an alteration of the word "எங்களால்" into "என்னால்" in the deed has been found to be a fact by the first two Courts below and it can no longer be in controversy. The question therefore, is whether it was a material alteration in the sense mentioned above. We have no hesitation in holding that the alteration was quite inconsequential and made no difference to the rights and liabilities of the vendor and the vendees under the sale deed, both in regard to the terms of the sale and the extent of the property conveyed thereunder. The word "எங்களால்" undoubtedly included the vendor. The vendor himself had made no earlier conveyance of any of the properties in Mannankadu village. The evidence of course showed that defendants 1 and 2 had sold some of the properties but defendant 43, the vendor did not not join them or either of them in any of the sales. It is not possible to read the word "எங்களால்" as only referring to the family as such of defendants 1, 2 and 43 so as to regard the alienations by defendants 1 and 2 as being on behalf of the family. What was sold by defendant 43 to the plaintiff and his two brothers, defendants 3 and 4 was his undivided one-third pangus belonging to him and his two brothers. Under the sale deed defendant 43 did not reserve to himself any interest out of his one-third share. Whatever undivided interest he was entitled to was what was sold under the sale deed. In those circumstances, with respect, we agree with Ramaswami Gounder, J., that the alteration did not, in any way, affect the rights and liabilities of the vendor and the vendees under the suit sale deed and cannot, therefore, be held to be a material alteration to avoid the deed.

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1. (1941) 1 M.L.J. 204: L.R. 67 I.A. 318.

The learned counsel for the appellants represented to us that as defendants 1 and 2 had paid defendant 43 a sum of Rs. 2,000 as consideration for the release deed, dated 29th March, 1946 and executed by the latter in favour of the former, it would be just and equitable to direct the deposit of Rs. 2,000 in the trial Courts made by the plaintiff being the balance of the price under the suit sale deed, to be paid not to defendant 43 but to defendants 1 and 2. We do not know whether, as a matter of fact, the plaintiff has made the deposit. Even if he has, defendant 43 is not represented before us. In the circusmtances it is a matter to be dealt with appropriately by the trial Court in proper time if defendants 1 and 2 move that Court for the purpose.

The appeal, therefore, fails and is dismissed with costs against defendants 1 and 2.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

Narayana Ayyangar son of Kasturi Ayyangar and others.. *Appellants**

v.

The Commissioner of the Madras Hindu Religious and Charitable Endowments, Madras .. *Respondent.*

Madras Hindu Religious and Chairtable Endowments Act (XIX of 1951), section 6 (13)—'Religious charity'—Feeding of Brahmins during festival season—When a religious charity.

To constitute a 'religious charity' within section 6 (13) of the Madras Hindu Religious and Charitable Endowments Act, 1951, there should be a public charity which should be associated with a Hindu festival or observance of a religious character. The charity however need not be connected with a math or temple. In order to hold that a feeding of Brahmins on festive occasion is associated with the festival itself, there should be a unity of purpose or a common object or common endeavour between the festival itself and the charity. The mere fact that a feeding charity is held on an important festival occasion is not by itself enough to establish any link between the occasion and the charity itself. Where in a place of sacred shrine feeding of people on an important festival of the temple is done, idependently of the temple festival, the feeding charity cannot be held to be a religious charity within the meaning of section 6 (13) of the Act.

Appeal against the Decree of the Court of the Subordinate Judge of Tiruchirapalli, in Original Suit No. 81 of 1954.

S. Rangaswami Ayyangar and *T. Krishnaswami Ayyangar,* for Appellants.

The Government Pleader (*A. Alagiriswami*) and *R. G. Rajan,* for Respondent.

The Judgment of the Court was delivered by

Jagadisan, J.—Venkatarama Iyengar, Kasturi Iyengar and Ranga Iyengar, three residents of the village of Kariamanikam, Lalgudi taluk, Tiruchirappalli district, of pious nature with enterprising spirit, conceived the idea of establishing a feeding charity years ago. The famous shrine of Sri Prasanna Venkatachalapathiswami at Gunaseelam village was only one and half miles away from their village. The sanctity of the shrine is so high and the devotion of its worshippers from far and near is so great that large concourse of pilgrims resort to it in all seasons of the year, particularly during the Brahmotsavam festival in the month of Purattasi. These pious individuals collected subscriptions and donations from the people in the locality, added their own contributions to the collected fund and began to feed Brahmins who came to Gunaseelam during the annual festival. Besides this feeding at Gunaseelam they also fed Brahmins at a Vanabhojanam in Kariamanikam village itself in the month of Kartikai. In course of time these feeding charities bacame popular and a large number of Brahmins were fed and considerable amounts were recived as contributions from benevolent people interested in such feeding. 7 acres of wet lands were purchased between the years 1936 and 1940 for a total

* Appeal No. 199 of 1957. 1st November, 1960. (10th Kartika, 1882, Saka).

sum of Rs. 10,500, to constitute a permanent source of income for the performance of these charities. These three founders agreed amongst themselves that they should function as hereditary trustees for the feeding charity, and that on the death of any one of them his place should be taken up by his eldest son. Ranga Iyengar died sometime in 1942 leaving behind Lakshminarayana Iyengar, his eldest son. Kasturi Iyengar died somtime in 1940 leaving behind his only son Narayana Iyengar.

The President of the Hindu Religious Endowments Board, Madras, in exercise of his powers under section 69 of Madras Act (II of 1927) called upon the trustees of the aforesaid charity, styled as Sri Gunaseelam Prasanna Venkatachalapathi Perumal Purattasi Rathothsavam Samarathanai, to pay contributions in respect of the said charity for the fasli years 1351 to 1354. The trustees objected to such levy and filed O.P.No. 297 of 1947 on the file of the District Court of Tiruchirappalli under section 84 (1) of the Act for the cancellation of the order levying contribution. By order, dated 11th March, 1949, the learned District Judge allowed the petition holding that the charity was not a 'specific endowment' within the meaning of Madras Act II of 1927. The President, Hindu Religious and Charitable Endowments Board, Madras, preferred an appeal to this Court, A.A.O.No. 540 of 1949, but the appeal was dismissed. The decision of the Division Bench of this Court dismissing the appeal is reported in *The President, Hindu Religious and Charitable Endowments, Madras* v. *Venkatarama*[1].

Madras Act XIX of 1951 repealed Madras Act II of 1927, and for the first time a definition of 'religious charity' was introduced under section 6 (13) of the Act. The Deputy Commissioner, Hindu Religious and Charitable Endowmets, started proceedings under section 57, clause (*d*) of the new Act in O.S.No. 295 of 1953 on his file. After a summary enquiry he held that this "Samarathanai Kattalai" is a religious charity as defind under section 6 (13) of the Act. To this proceeding Venkatarama Iyengar, one of the original founders and Narayana Iyengar, the son of Kasturi Iyengar were impleaded as parties. These trustees preferred an appeal before the Commissioner of the Hindu Religious and Charitable Endowments, Madras, in Appeal No. 22 of 1954 on his file. The appeal was, however, dismissed by order No. 619, dated 22nd March, 1954. Thereupon the present suit, O.S.No. 81 of 1954 on the file of the Court of the Subordinate Judge of Tiruchirappalli was filed by Venkatarama Iyengar and Narayana Iyengar, impleading the Commissioner of the Madras Hindu Religious and Charitable Endowments as the first defendant and Lakshminarayana Iyengar, the son of Ranga Iyengar as the second defendant, he being away at Calcutta in service unable to join them as plaintiffs. During the pendency of the suit Venkatarama Iyengar died and Narayana Iyengar and Ramaswami Iyengar were impleaded as his legal representatives.

The learned Subordinate Judge who tried the suit held that section 6 (13) of Madras Act XIX of 1951 would cover the feeding charity and accordingly he dismissed the suit with costs of the first defendant. This appeal has, therefore, been preferred by the trustees challenging the correctness of the said judgment and order.

There is no dispute about the mode in which the feeding charity is being conducted. During the Rathothsavam festival of Sri Prasanna Venkatachalapathiswami temple at Gunaseelam Brahmins are fed at a place called Justice Seshagiri Iyer's choultry situated within 100 yards of the Gunaseelam temple. Originally the feeding was being done on the car festival day, and on the day previous to it. But for the past 20 years the feeding is being done on all the ten days of the festival. This is the evidence of P. W. 1, the Village Munsif of Amoor. He also deposed that feeding is not done in any other period in the year except the ten days of the car festival. Occasioanlly it was done on two days earlier and two days later than the festival itself. P. W. 2 a resident of Gunaseelam definitely stated that there

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1. (1953) 2 M.L.J. 357.

is no connection between the feeding charity and the temple. Food cooked for the purpose of feeding the Brahmins is not taken to the deity at the shrine for *neivethyam* He also deposed to the conducting of Vanabhojanam in Kartikai month in Kariamanikam village.

P. W. 3 is a resident of Tiruchirapalli town. He deposed that the feeding charity was conducted by the trustees in the month of Purattasi every year in Seshagiri Iyer's choultry. P. W. 4 is the second plaintiff himself. He gave evidence stating that for the last 25 years the feeding was being done at Seshagiri Iyer's choultry and all Brahmins coming to choultry were fed there irrespective of the fact that they came to the temple or not. On a consideration of this evidence the learned Subordinate Judge came to the following conclusion:

> " The charity in question is a feeding charity conducted during the ten days of the Rathothsavam in the Prasanna Venkatachalapathiswami temple in Gunaseelam in the month of Purattasi. Only Brahmins are fed and not other community people. There are similar feeding charities for the different communities conducted by the respective community people. The charity in question has no connection with the Gunaseelam temple in the sense that the food prepared is not offered to the deity, and feeding is done not in the temple premises but at a separate place originally in a specially erected pandal and now in Seshagiri Iyer's chouldry. The other communities are not fed at this charity ....The temple authorities have no voice in the conduct of the feeding."

We agree that this is the proper inference from the proved facts in this case.

The question that has now to be considered is whether on the facts so found the charity is one within section 6 (13) of Madras Act XIX of 1951. That section is as follows:

> " Religious charity means a public charity associated with a Hindu festival or observance of a religious character, whether it be connected with math or temple or not."

It is not necessary to refer to the definition of "religious endowment" as embodied in section 6 (14) and a "specific endowment" as embodied in section 6 (16) of the Act, as it is common ground that unless this samarathanai charity is " religious charity " under section 6 (13), it cannot be a " religious endowment " or " specific endowment ". To constitute a religious charity within the meaning of section 6 (13) of the Act there must be a public charity, and that charity must be associated with a Hindu festival or observance of a religious character. The charity may or may not be connected with a math or temple.

There was some discussion in the Court below whether this samarathanai charity is a public charity or not. It was contended on behalf of the trustees in the Court below that the charity was not a public charity as the beneficiaries are only Brahmins who form a part of the general public. But this argument is obviously untenable. In *Deoki Nandan* v *Murlidhar*[1], Venkatarama Ayyar, J., delivering the judgment of the Bench observed thus at page 759:

> " The distinction between a private and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public *or a class* thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment. The position is thus stated in Lewin on Trusts, Fifteenth Edition, pages 15-16:
>
> By Public must be understood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. To this class belong all trusts for charitable purposes, and indeed public trusts and charitable trusts may be considered in general as synonymous expressions. In private trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be, definitely ascertained."

In a subsequent decision of the Supreme Court in *Sri Venkataramana Devaru and others* v. *State of Mysore and others*[2], it was held that the expression 'religious institution of a public character' occurring in Article 25 (2) (*b*) of the Constitution constitutes not merely temples dedicated to the public as a whole but also those founded for the

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1. (1957) 1 M.L.J. (S.C.) 28 : (1957) An. W.R. (S.C.) 28 : (1957) S.C.J. 75 : (1956) S.C.R. 756 (759).

2. (1958) 1 M.L.J. (S.C.) 109 : (1958) 1 An. W.R. (S.C.) 109: (1958) S.C.J. 382: 1958 S.C.R. 895.

benefit of sections thereof and includes denominational temples as well. At page 912, Venkatarama Ayyar, J., observed as follows:

> "The word 'public' includes, in its ordinary acceptation, any section of the public, and . . ."

We are clearly of opinion that this Samarathanai charity is a public charity within the meaning of section 6 (13) of the Act.

We have now to construe the words "associated with a Hindu festival or observance of a religious character" occurring in section 6 (13) of the Act. The learned counsel for the respondent contended that a Samarathanai charity is itself of a religious character and for this position he relied upon the decision in *Ramaswami* v. *Aiyasami*[1], Ramaswami, J., after referring to several Lexicons and Dictionaries for the proper interpretation of the word Samarathanai, observed thus at page 472:

> "The information culled out from these lexicons shows nothing more than that the Dharmam of feeding was one of the means of serving, worship, adoration and propitiation of the deity and that generally speaking the people who were fed were poor Brahmins."

We are unable to see how from the observation referred to above it can be said that a feeding charity as such acquires a religious character or is caught within the definition of religious charity under section 6 (13) of the Act. Under the Hindu Law the distinction between a religious and a charitable endowment is no doubt an innovation and a modern development caused by legislation and the exercise of governmental control over public trusts. The endowment of a Hindu to do charity or to make a charitable gift is only to acquire religious merit. As observed by Dr. Bijan Kumar Mukherjee in his Tagore Law Lectures, on "The Hindu Law of Religious and Charitable Trust" at page 14:

> "In the Hindu system there is no line of demarcation between religion and charity. On the other hand charity is regarded as part of religion. The Hindu religion recognises the existence of a life after death, and it believes in the law of Karma according to which the good or bad deeds of a man produce corresponding results in the life to come. All the Hindu sages concur in holding that charitable gifts are pious acts *par excellence*, which bring appropriate rewards to the donor, and the seer in the Rigveda says in clear accents that 'He who gives alms goes to the highest place in heaven.'"

Whatever affinity there may be between religious and charitable endowments under the Hindu Law in view of the fact that the ultimate object of making endowments is one prompted by religious motive, it cannot be a factor that can be taken into account in interpreting a statute.

Learned counsel for the respondents then relied upon a decision of a Division Bench of this Court in *Radhakrishna Chettiar* v. *Commissioner, Hindu Religious and Charitable Endowments*[2]. That was a case in which the question of the applicability of section 6 (13) of the Act came to be considered with regard to a feeding charity conducted by the Arya Vysya community at Gunaseelam in the month of Purattasi. By a deed of trust dated 26th November, 1942, a chathram was founded for the benefit of the members of the Arya Vysya community who visit Gunaseelam for the purpose of participating in the religious festivals in the month of Purattasi. There was a deed subsequent to it which provided for the performance of puja and neivethyam in the temple. The question for consideration before the Division Bench was whether this endowment constituted religious charity within the meaning of section 6 (13) of the Act. Anantanarayanan, J., delivering the judgment of the Bench observed thus at page 494:—

> "It is not now necessary to consider whether the learned Subordinate Judge was justified in his finding that the puja and neivedyam had to be performed at the temple during the Radothsavam, when there is no specific mention of the place of puja in the second document, Exhibit B-2. But presumably the puja and neivedyam had to be performed at the temple; as this is in consonance with the usual religious practice. This apart, we are unable to subscribe to the inference that the performance of this religious ritual was not one of the objects of the trust. For, it is perfectly probable and possible that all the objects of the trust might not have been enumerated in the very first document and a legitimate object of the trust might be enumerated in a later document. Consequently, it cannot be said

1. A.I.R. 1960 Mad. 467. 2. (1960) 1 M.L.J. 494.

that the performance of puja and neivedyam are not objects of the trust; and, since admittedly they are performances of a religious character, the property would be a 'religious charity' within the meaning of section 6, sub-section (13) of the Act."

This finding recorded by the Division Bench was certainly sufficient to dispose of the appeal. Their Lordships, however, observed further thus at page 495 :

"Even apart from this, and upon a wider ground the contentions of the learned counsel are unsustainable. Since, the admitted facts of the present case are that this charitable institution was intended to feed Arya Vysya pilgrims to these religious festivals, upon the stated occasions this endowment would be a 'religious charity', even apart from the performance of puja and neivedyam. Those latter objects indisputably determine its character as religious charity and specific endowment, to which the provisions of the Act are applicable."

We are of opinion that this latter observation of Anantanarayanan, J., is clearly in the nature of *obiter dictum* not necessary for the disposal of the appeal. The trust forming the subject-matter of construction in that appeal was a composite one involving not merely a feeding charity but also an endowment for the puja and neivedyam of the deity in Sri Venkatachalapathiswami temple at Gunaseelam. The trust with which we are concerned in this appeal is not of such a character as it is solely a charitable endowment for the purpose of feeding brahmins in the month of Purattasi at Gunaseelam and in the month of Kartikai at Kariamanikam. We, therefore, do not feel bound by the *obiter dictum* referred to above in deciding the present case the subject-matter of which relates to a trust of a character entirely different from that which was before their Lordships in the Division Bench case referred to above.

The important word which has to be construed in section 6 (13) of the Act before it can be held that the feeding charity in the case is a religious charity or not is the word "associated". We have already held that the charity is a public charity, and it cannot be disputed that the Rathothsavam festival in the month of Purattasi of Sri Venkatachalapathiswami of Gunaseelam temple is a Hindu festival or observance of a religious character. The Oxford Concise Dictionary gives the meaning of the word "associate" as follows :

"Join (persons, things or one with another), combine for common purpose."

In Webster's New International Dictionary the word 'associate' is assigned the following meaning :

"To unite in company, to unite in action, to join for a common purpose."

In "Words and Phrases" Permanent Edition, Vol. IV, page 559 under the caption 'Associate' the following observations occur :

"In ordinary nomenclature, the word 'associate' signifies to connect closely or join with others in a common purpose, activity, or responsibility, to partake or share in a common design and implies participation by each of the individuals so united in the achievement of a common purpose. In its general and ordinary sense, 'associate' signifies confederacy or union for a particular purpose, good or ill. To 'organise' is to arrange individual elements interdependently, each individual having a special relationship with respect to the whole."

The Samarathanai charity which happens to be conducted during the Rathothsavam festival of Sri Venkatachalapathiswami of Gunaseelam shrine cannot be said to be associated with the Ratho hsavam festival itself. The trustees of the shrine conducting the festival have no manner of check, control or supervision over this feeding charity. They cannot insist upon the feeding being done during the festival. Cessation or discontinuance of the feeding by the trustees of the feeding charity may constitute a breach of trust on their part but cannot in the least affect the due performance of the Rathothsavam festival itself. Plainly and simply the Rathothsavam festival and the feeding charity have nothing to do with each other. The mere fact that the founders of the feeding charity thought that it will be meritorious to feed brahmins on an important festival occasion which is a sacred occasion cannot establish any link or connection between the occasion and the charity itself. As there is no unity of purpose or a common object or a common endeavour between the festival and the charity there is no association between the two within the language of the enactment.

We are, therefore, clearly of opinion that this Samarathanai charity is not a religious charity under the Act, and that the decision to the contrary of the Deputy

Commissioner, Hindu Religious and Charitable Endowments and that of the Commissioner are erroneous in law and unsustainable.

The appeal is, therefore, allowed, and there will be a decree in favour of the plaintiffs setting aside the order dated 22nd March, 1954, passed by the first defendant in Appeal No. 22 of 1954 on his file with costs throughout.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Narasimhalu Naidu and others .. *Appellants**

v.

Chinna Chengama Naidu and others .. *Respondents.*

Madras Indebted Agriculturists (Temporary Relief) Act (V of 1954), section 4—Interpretation—"Further proceedings in suit"—If includes application for passing final decree.

An application for the passing of a final decree will certainly be a " further proceeding in suit " within the meaning of section 4 of Madras Indebted Agriculturists (Temporary Relief) Act V of 1954, and the applicant is entitled to include within the period of limitation the period of stay due to the moratorium.

Appeal against the Order of the District Court, Chingleput, dated 16th April, 1958 and made in Appeal Suit No. 206 of 1957 preferred against the Order in I.A. No. 1761 of 1956 in O.S. No. 144 of 1951 dated 2nd August, 1957, on the file of the District Munsif, Trivellore.

T. C. A. Bashyam and *T. C. A. Tirumalachari*, for Appellants.

M. Natesan, for Respondents.

The Court delivered the following

JUDGMENT.—The appellants were the defendants in O.S. No. 144 of 1951, District Munsif's Court, Tiruvallur, and the order now canvassed in appeal is that of the learned District Judge in I.A. No. 1761 of 1956 in that suit. The facts are very simple, and the point involved is also a simple question of the interpretation of section 4 of Act V of 1954. The appellants are admittedly agriculturists entitled to the benefits of this Act, and the question is whether the respondents (Plaintiffs) could institute a proceeding for the passing of a final decree in the suit, taking advantage of the extended period, of limitation which necessarily follows from the bar or moratorium declared under Act V of 1954. In brief, the appellants claim that the bar or moratorium declared under Act V of 1954 does not extend to such an application for the passing of a final decree in the suit, and that, though they are agriculturists entitled to the benefits of the Act, they could not have resisted this application for a final decree, had it been filed within the normal period of limitation, on the ground that the Legislature had declared a moratorium in respect of such proceedings in their favour. If this argument is to be sustained, it follows that the application for the passing of a final decree in the Court below was time-barred, and that it would have to be dismissed.

The learned District Judge took the view that the application was not time-barred, and he set aside the order of the lower Court and remanded the application for disposal upon the merits. The present Civil Miscellaneous Appeal is from that order.

The learned District Judge cites the decision in *B. Narain Dutt* v. *B. P. Roy Chowdhry*[1], for the view that the word "suit" does not merely have the narrow significance attached to the word "action" in English law, but that it is a more comprehensive legal expression, embracing all contentious proceedings of an ordinary civil kind. I do not think that it is necessary to proceed into a discussion of this matter, for the simple reason that it seems very clear to me that the language of section 4 of Act V of

* A. A. O. No. 306 of 1958. 22nd April, 1960.
(2nd day of Vaisakha, 1882, Saka).

1. (1891) I.L.R. 18 Cal. 500.

1954 is plain and unambiguous, and worded in such a manner as certainly to include such an application for a final decree.

The section runs as follows :—

> " All further proceedings in suits and applications of the nature mentioned in section 3 in which relief is claimed against an agriculturist, not being proceedings for the amendment of pleadings or for the addition, substitution, or the striking off of parties, but otherwise inclusive of proceedings consequent on orders or decrees made in appeals, revision petitions, or applications for review, shall, subject to the next succeeding sub-section, stand stayed........ "

It appears to be very clear, on this wording, that an application for the passing of a final decree, even if it is not to be construed as a 'suit' in the manner that the learned District Judge has done, will certainly be a 'further proceeding in suit' within the meaning of section 4 of Act V of 1954. As pointed out in *Atulyadhan* v. *Sudhangsu*[1], the rule is well settled that where the words of a statute are precise and unambiguous, the meaning of the words must receive their full effect. On this principle, I am unable to see how an application for the passing of a final decree could be construed as otherwise than a 'further proceeding in suit' within the meaning of section 4. Even if it is to be construed as an execution application, which was the view taken by the Allahabad High Court with reference to an analogous kind of legislation in *Umrao* v. *Behari Lal*[2], the Act would still apply, because section 3 of the Act is specifically in bar of execution applications. Hence, in any view of the matter, the Act would have applied to this proceeding, and the respondents (plaintiffs) were entitled to include within the period of limitation the period of stay due to the moratorium.

The decision of the Court below is correct, and the Civil Miscellaneous Appeal, which fails, is dismissed with costs.

K.L.B. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VEERASAMI.

B. Mutha Gowder .. *Appellant**

v.

M.S. Kada Gowder .. *Respondent.*

Companies Act (VII of 1913), sections 185 and 195 (k)—Applicability and scope—Discretion of Court—Application by one director against another—Applicant equally liable with respondent and also party to resolutions culminating in transaction impeached—Competency of application.

It is highly undesirable that the powers of the Court under sections 185 and 195 of the Companies Act, 1913, should be allowed to be invoked by one director against another director particularly when the director invoking the section is actuated by personal spite and hostility towards the director who is sought to be proceeded against. The Court, under either section, has a discretion in the matter and will not exercise its discretion in favour of the applicant when he himself was a director at all material times relating to the transaction and was equally responsible with the respondent for the transaction impeached as improper and when the applicant himself was a party to the resolutions passed at the meeting of the Board of directors , which culminated in the transactions on the basis of which the application is made.

Appeal against the Order of the District Court of Coimbatore dated 4th October, 1956 and made in I.A. No. 413 of 1954 (in O.P. No. 225 of 1952 on the file of the High Court, Madras.)

K. S. Sankara Ayyar, for Appellant.

Messrs. Pais, Lobo and Alvares, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the order of the learned District Judge of Coimbatore in I.A. No. 423 of 1954 on his file in O.P. No. 225 of 1952 on the file of the High Court, Madras.

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1. (1951) 55 C. W. N. 343 at 346. 2. A.I.R. 1947 All. 187.

* A.A.O. No. 13 of 1957. 26th April, 1960. (6th Vaisakha, 1882, Saka).

Kundah Trading Company, Ltd., was directed to be wound up by an order of this Court dated 22nd September, 1953, in the said O.P. No. 225 of 1952. On the 28th January, 1954, the above interlocutory application was filed by the appellant purporting to be under sections 185 and 195 of the Indian Companies Act, 1913, against the respondent herein for the following reliefs: namely, for a direction to the respondent to render an account of his management of the company during his period as managing director, to pay all sums that may be found due by him to the company and to restore to the company the unlawful gain to the tune of Rs. 49,000 illegally made by him in the matter of purchase of the tea factory belonging to the company and to pay other sums, namely, Rs. 7,500 being the price of the tea taken by the respondent and Rs. 21,000 alleged to be due as consideration for the assignment to the respondent of a promissory note executed by the appellant in favour of the company. The affidavit filed in support of the application contained the following allegations. On 19th May, 1946 the tea factory, at Hibbada together with its fixtures was agreed to be sold by the company to the appellant on the understanding that the appellant would take over the outstandings (Rs. 73,007-11-4) found due to the company and discharge the company's debts which amounted to Rs. 1,84,951-1-3. In other words the sale was for a consideration of Rs. 1,12,000. The transaction, however, fell through. On 5th July, 1946, the same factory was agreed to be sold to the respondent herein for a sum of Rs. 70,000. The respondent had been the managing director of the company from 30th July, 1945 up to 5th July, 1946, on which date he resigned from the said office, though he continued to be a director till 29th July, 1947, on which date he resigned from that office also. The said price of Rs. 70,700 was further reduced to Rs. 63,200. The tea stock worth about Rs. 20,000 was taken for Rs. 7,500 and even this amount had not been paid. The sale deed executed by the company in favour of the respondent directed the respondent to discharge certain debts, which he did not discharge. On the other hand the directors had to borrow monies to make part payments towards the said debts. The company assigned in favour of the respondent a promissory note which the appellant had executed in favour of the company on 5th September, 1946, as security for any deficit which may be due to him in the course of his management of the company. There was no consideration for the assignment in favour of the respondent, but he filed a suit on the foot of the said promissory note against the appellant, O.S. No. 16 of 1947 and obtained a decree therein. On these allegations the appellant charged the respondent with misfeasance as the company had lost by the reduction of the sale price to an extent of Rs. 49,000 and as quantities of tea worth nearly Rs. 29,000 had been taken by the respondent for a sum of Rs. 7,500. The respondent was also said to be guilty even of other acts of misfeasance committed by him as managing director and as director of the company. The respondent pleaded *inter alia* that the appellant had no *locus standi* to file the application and that the proper person to file the application was the Official Liquidator, that the appellant was a bitter enemy of his and that the application had been filed out of spite and to wreak his vengeance on the respondent for having obtained a decree against him in O.S. No. 16 of 1947. The respondent further stated that the resolution which sanctioned the sale in his favour was passed at a meeting of the shareholders. The respondent further denied the several allegations made by the appellant that he had caused loss to the company. He stated that he had actually discharged debts and had paid Rs. 7,500 for the tea stock. Regarding the promissory note executed by the appellant in favour of the company which had been assigned to him, the respondent stated that the allegations were all irrelevant for the purpose of the present application. The respondent also relied on the fact that the appellant was a party to the several resolutions in pursuance of which the sale in his favour was concluded and he also relied on an order of consent passed in C.M.A. No. 71 of 1951 on the file of this Court.

The learned District Judge of Coimbatore held that the appellant was entitled to maintain the application but that he had failed to establish that the company had lost by any act of misfeasance on the part of the respondent. If any money was due to the company from the respondent it was for the Official Liquidator to take proper proceedings. He also held that the assignment of the promissory note execut-

ed by the appellant in favour of the company was not relevant to this application." The learned Judge's conclusion was that the appellant had not proved any of the charges levelled against the respondent to make him liable to make good any money to the company which he had retained or which he had secured utilising his position as a director of the company.

He therefore dismissed the application and hence the present appeal. The appellant's application, as already mentioned, purports to be under the two sections of the Companies Act of 1913, namely, sections 185 and 195. In so far as they are material they run thus :—

Section 185 :—" The Court may, at any time after making a winding up order, require any contributory for the time being settled on the list of contributories and any trustee, receiver, banker, agent or officer of the company to pay, deliver, surrender or transfer forthwith, or within such time as the Court directs, to the official liquidator any money, property or documents in his hands to which the company is *prima facie* entitled. "

Section 195 (1) : " The Court, may after it has made a winding up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company."

It is not necessary to embark on a discussion of the question whether a person in the position of the appellant who is a fully paid shareholder can maintain an application under either section. It is clear that under either section the Court has discretion to make the order sought and we have no hesitation in holding that in this case the application should not be granted at the intance of a party like the appellant. The appellant was himself a director at all material times relating to the transaction. If there was any loss to the company the appellant was as much liable to the company as the respondent himself as both were directors. It it highly undesirable that the powers of the Court under sections 185 and 195 of the Indian Companies Act should be allowed to be invoked by one director against another director. There can be no doubt that the application is actuated by personal spite and hostility towards the respondent. As a fully paid shareholder the appellant need not be afraid of any liability being cast on him. Having regard to the facts alleged by him it is most unlikely that there will be any surplus assets of the company in which the appellant may be expected to share.

There is another circumstance also which we have to take into consideration and that is the part which the appellant played as one of the directors along with the respondent. The appellant now says that the respondent as director occupied a fiduciary position *vis-a-vis* the company and he used his position as such to obtain undue advantage to himself by purchasing the factory. Evidently he overlooks the fact that he himself had entered into a similar transaction of purchase but only it was not concluded. The resolution of the Board of directors dated 5th July, 1946, was passed unanimously that the tea factory belonging to the company should be offered for sale for Rs. 70,700, and sold to the respondent. The appellant was a party to this resolution. The appellant was also a party to the subsequent resolution regarding the reduction of the price. Having regard to the conduct of the appellant, it is most undesirable that he should be allowed to proceed with this application and obtain any relief against the respondent.

At the same time we feel, having regard to the grave allegations made by the appellant that there should be further investigation with the help of a qualified auditor. The main difficulty is lack of funds to enable the official liquidator to take further steps. If, however, any person is prepared to place funds at the disposal of the official liquidator he may employ a qualified auditor to help him in further investigation about the allegations made by the appellant and submit a report to the learned District Judge. If as a result of the investigation the learned District Judge is of the opinion that a misfeasance application should be filed by the official liquidator he may direct him to do so. We propose to say nothing on the merits at this stage. One thing we must say, namely, that in any misfeasance application which

may be taken out by the official liquidator the appellant should be a party along with the other directors.

In the result the appeal is dismissed with costs.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

C.D. Sarojini Ammal .. *Appellant**

v.

The Egmore Benefit Society, 3rd Branch Ltd., by its Secretary at Flowers Road, Vepery, Madras .. *Respondent.*

Civil Procedure Code (V of 1908)—Order 21, rule 90—Application under—Direction to furnish security —Failure to furnish security by judgment-debtor by the date fixed—Respondent voluntarily taking notice and filing objection—Effect of—Jurisdiction of Court to demand security.

It is true that a Court when once it has admitted an application under Order 21, rule 90, Civil Procedure Code, without ordering any security, has no further jurisdiction to direct the furnishing of security. *Vaidyanatha Ayyar* v. *The Indian Bank Ltd.*, (1955) 2 M.L.J. 99 referred :

But when a Court has ordered on such an application that security should be furnished by a specified date and the judgment-debtor has failed to furnish the same, from the mere fact that the Court inadvertently permitted the respondent, who took notice voluntarily, to file his objection, it cannot be implied that the Court has done something which it never intended to, namely admit the petition. *Venkatalingama Nayanim* v. *Venkata Narasimha Nayanim*, (1942) 1 M.L.J. 403, applied. In such cases the petitioner is not absolved from the duty of furnishing security in accordance with the order if he desires his application to be heard.

Appeal against the Order of the City Civil Court (II Assistant Judge) Madras, in E.A. No. 2172 of 1957 in E.P. No. 58 of 1956 in O.S.No. 1274 of 1954.

S. V. Venkatasubramanian and *V. Narayanamurthi*, for Appellant.

K. G. Manikavasagam, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the petitioner in the Court below in an application under Order 21, rule 90 of the Code of Civil Procedure to set aside the sale on account of certain material irregularities, and alleged fraud. The learned IInd Assistant Judge of the City Civil Court, Madras, dismissed the application because the petitioner (appellant) defaulted to furnish security as demanded by the Court under the *First proviso* to Order 21, rule 90, Civil Procedure Code. The facts are practically admitted, and the appeal merely involves a simple question of the application of certain relevant legal principles to facts of this character.

What happened in the Court below was this. The petitioner (appellant) had not furnished security, and the matter was before the Court on 31st October, 1957. On the adjourned date, there was a definite order made calling upon the appellant to furnish security in a sum of Rs. 5,000 and the proceedings were again adjourned to 16th November, 1957. On that date, security was not furnished but the learned Counsel for the decree-holder appeared, and took notice voluntarily, and desired to file a counter-statement. He was permitted to file this counter-statement upon his voluntarily taking notice, and the statement was filed on 20th November, 1957. It was then that the learned Counsel for the judgment-debtor (appellant) put forward the contention, which is also now advanced before me, that the Court, in permitting the learned counsel for the deree-holder to file a counter when he had no *locus standi* to appear, was in effect admitting the application under Order 21, rule 90, Civil Procedure Code. Once the Court admitted the application, it had no further jurisdiction to call for security. This last proposition is not in dispute,

* C.C.C. Appeal No. 106 of 1957. 16th February, 1960.
(27th Magha, 1882, Saka)

and it is supported by the authority of a Division Bench of this Court in *Vaidyanatha Ayyar* v. *The Indian Bank Ltd.*[1]. The argument is that whatever might have been the original intention of the Court, and even if the Court was not conscious that it was virtually defeating its own intention, by implication, when it permitted the learned Counsel for the decree-holder to appear and to file a counter nevertheless the implication cannot be denied that this deprives the Court of the further jurisdiction to call for security. The question is whether the Court can, by the effect of a legal implication of this character, be presumed to have done what it consciously never intended to do.

The precise matter came up before King and Happell, JJ., in *Venkatalingama Nayanim* v. *Venkata Narasimha Nayanim*[2]. The facts of that case were that in an application to set aside a sale in execution of a decree, the petitioner was ordered to furnish security on a certain date, when a draft security bond was tendered. Without testing the security, the Court, presumably by inadvertence, issued notice to the opposite side which appeared and raised objections to the sufficiency of the security. The security was tested and found to be wholly inadequate, and the Court dismissed the application for default in furnishing security. On an appeal against that order, this very same proposition was put forward that by issuing notice, the Court must be deemed to have admitted the application, and thereby to have deprived itself of the jurisdiction to furnish security.

The learned Judges then observed,

> " Whereas in this case, we are able upon the facts to ascribe to the Court a quite different intention when it issued the notice, then it would be absurd to hold that there is any principle of law by which the Court should be deemed to have done what it consciously did not intend to do. It is clear therefore to us that in issuing notice, the Court did not intend to deprive itself of the power of deciding whether the security to be eventually furnished by the petitioner was adequate or not ".

This authority precisely applies to the present facts, which are even stronger than the facts of the citation. In the present case, the record makes it clear beyond doubt that throughout the learned Judge intended to call for security and passed an order to that effect, which he desired to enforce, and was opposed to admitting the petition before the security had been furnished. The learned Judge permitted the learned Counsel for the decree-holder to appear and make some submissions when the latter had no *locus standi*, and without realising that such a step might by legal implication, be construed as an implied admission of the very petition. But the learned Judge cannot be presumed to have intended to have done something which he was consciously quite opposed to do. Consequently, I hold that the petitioner (appellant) was not absolved from the duty of furnishing security to the satisfaction of the Court in accordance with the order, if he desired his application to be heard. Since he defaulted to do so, his application was properly dismissed. The appeal, therefore, fails and is dismissed with costs.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

Columbia Films of India Ltd., by Wesley Barrett and others .. *Petitioners**

v.

The Commissioner, Corporation of Madras .. *Respondent.*

Madras City Municipal Act (IV of 1919), section 110 and Schedule IV, Part II, rule 7—Proviso—Effect of.

The Proviso to rule 7 of Part II, Schedule IV of the Madras City Municipal Act relating to the levy of tax on companies whose head office is outside the city, is designed as a concession to the assessee and to afford relief against the hardship which an assessment on the basis of paid up capital might involve in cases where the business carried on within the city by a company, whose principal office

1. (1955) 2 M.L.J. 99.
2. (1942) 1 M.L.J. 403.

* W.P. Nos. 772, 773 and 774 of 1959.

9th December, 1959.
(18th Agrahayana, 1881, Saka).

outside the city, is only nominal. The Proviso is not intended to be an alternative method of assessment which the Corporation could resort to at its option.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavits filed therewith, the High Court will be pleased to issue writs of *mandamus* directing the Commissioner of Corporation of Madras to forbear from demanding or proceeding to recover from the petitioners, the Companies tax for 1958-59, and 1957-58, respectively payable under the provisions of the Madras City Municipal Act at any rate not exceeding the rate prescribed on the basis of paid up capital as provided in the first part of rule 7, Part II of Schedule IV to the Madras City Municipal Act of 1919.

V. C. Gopalaratnam and *L. V. Krishnaswami Iyer*, for Petitioners.

T. Chengalvarayan, for Respondent.

The Court made the following

ORDER.—The point involved in these petitions is a very short one and turns on the construction of the First proviso to rule 7 of Part II of Schedule IV of the City Municipal Act, Madras Act IV of 1919.

The petitioners in these three petitions are three foreign but Indian Registered film distributing companies carrying on business in India who have their Head Offices in Bombay with Branch Offices in Madras. All their contracts for the distribution of their films, by the theatres in the City of Madras are entered into in Bombay and the Branch Offices merely acting as post offices collecting the moneys due and remitting the proceeds to their respective Head Offices. The point in controversy is as regards the assessment to Companies' tax of these "Branch Offices" under the Madras City Municipal Act. Section 110 of the Act enacts, (I will set out only the relevant portion) :

"If the Council by a resolution determines that a tax on companies shall be levied, every company which, after the date specified in the notice published under sub-section (2) of section 98-A transacts business within the city in any half year for not less than sixty days in the aggregate shall pay, in addition to any licence fee that may be leviable under this Act, a half-yearly tax assessed in accordance sith the rules in Schedule IV, but in no case exceeding rupees one thousand."

The necessary resolution has been passed and the Companies which are the petitioners here have transacted business within the City for this period specified in the section. They have, therefore, become liable to the payment of a half-yearly tax assessed in accordance with the rules in Schedule IV. The portion of Schedule IV, which is relevant is to be found in rule 7, which is the first of the rules in Part II of this Schedule which is headed, "Assessment of Companies". That rule reads :

"Companies shall be assessed by the Commissioner on the following scales :—

	Paid up Capital.	*Half yearly tax.*
	Lakhs of rupees.	Rs.
A	Less than one	30
B	One and more than one, but less than two	50
C	Two and more than two, but less than three	100
D	Three and more than three, but less than five	150
E	Five and more than five but less than ten	250
F	Ten and more than ten but less than twenty	500
G	Twenty and more than twenty.	1,000

Provided that any company, the Head or a Principal Office of which is not in the city and which shows that its gross income received in or from the city in the year immediately preceding the year of taxation—

(*a*) has not exceeded Rs. 5,000 shall pay only Rs. 25 per half year.

(*b*) has exceeded Rs. 5,000 but has not exceeded Rs. 10,000	shall pay only Rs. 50 per half year.
(*c*) has exceeded Rs. 10,000 but has not exceeded Rs. 20,000	shall pay only Rs. 100 per half year.
(*d*) has exceeded Rs. 20,000	shall pay per half year Rs. 100 together with a sum calculated at the rate of 25 rupees per half year for every 5,000 rupees or part thereof, of gross income in excess of Rs. 20,000 subject to a maximum half yearly tax of 1,000 rupees.

Provided further that when a company the Head or a Principle Office of which is not in he city becomes liable to tax for the first time, it shall pay in the first year, a tax of 25 rupees ; but if the gross income of the company during such year is subsequently found to have exceeded 5,000 rupees, it shall pay the tax calculated in accordance with the abovementioned scale less the initial payment of 25 rupees. "

If the Head Offices of the petitioners-companies—had been in Madras, they would have been liable to tax under the main part of rule 7 and in that event having regard to their paid up capital, the tax payable by them would have been Rs. 30 per half year. Their Head Offices are, however, situated in Bombay and if the amounts collected by them from the theatre owners in the City and the States and transmitted by them to Bombay were the criteria for determining the tax payable by them, that is, by the application of the Proviso, they would fall under Head (*d*) of the Proviso. They have been assessed by the Corporation of Madras on the latter basis, and it is the legality of this method of invoking of the Proviso by the Corporation that is challenged in these petitions.

Mr. Chengalvaroyan, learned counsel for the Corporation raised two points. The first was that on a proper construction of section 110 read with rule 7 of Schedule IV, it was for the Corporation to decide whether a company should be assessed under the main part of the rule, or under the Proviso. He also put his argument in a slightly different form by saying that the main part of the rule—the assessment based on paid up capital—was on its terms inapplicable to cases where the Head Office of the Company was situated outside the City with the result that it was only the Proviso that would be attracted.. I feel unable to accept either argument. The first part of the rule besides the scale of tax on the paid up capital of a company applies without reference to the location of the Head Office. If the terms of section 110 are satisfied, namely, that a company has been transacting business within the City for the minimum period of 60 days within any half year, the liability to tax arises and the rate at which such tax shall be assessed is normally dependent upon the paid up capital. The next question is whether the Proviso has been framed with a view to alleviating any hardship which a taxation on the basis of the paid up capital might inflict upon companies whose business within the City might be only nominal or whether the Proviso is an alternative method of assessment of which Corporation might avail itself at its choice. The language of the Proviso is, in my opinion, consistent only with the construction that it is designed as a concession to the assessee and to afford relief against the hardship which an assessment on the basis of paid up capital might involve in individal cases. If the Head Office were within the City the sole basis for computing the tax would be the paid up capital, whatever might be the turnover or quantum of the business of the company. In cases, however, where the Head Office is situated outside, the Company might have branches in several places one of which might be within the City, and the framers of the rule, therefore, contemplated that it would be unjust to tax each one of these branches on the basis of the paid up capital. That it is intended as an option which could be availed of by the assessee in cases where the operation of the tax on a paid up capital basis, was unduly harsh appears to be favoured by the use of the expression ' which *shows* that its gross income received in or from the city. . . ' If the company did not *show* it, and there does not seem to be any obligation upon it imposed by the Proviso to do so, the result would be that paid up capital would form the basis for the levy of the tax. In my opinion, the Second proviso which I have extracted earlier would also appear to support this construction. I, therefore, hold

that the assessment of the companies by the Corporation by applying the Proviso is illegal and not justified by section 110 read with rule 7 of Schedule IV, Part II, and the demand made by the Corporation on that basis must, therefore, be quashed.

The second point that was urged by Mr. Chengalvaroyan, learned Counsel for the Corporation, was that there was an alternative remedy which was both sufficient and effective, which precluded resort to the jurisdiction of this Court under Article 226. Learned Counsel for the Corporation pointed out that under rules 12, 14 and 15 (*a*) of Schedule IV, provision was made for the entertainment of regular appeals and ultimately for the matter being decided by the Court of Small Causes. Though the learned Counsel originally put this forward as an objection, he expressly withdrew it and stated that he desired to have the proper construction of rule 7 of Schedule IV determined by this Court and for that reason he did not want to raise any objection which would preclude the Court from deciding this question of construction. The objection having been specifically withdrawn, I need say no more about it.

The writ petitions succeed accordingly, and the rules *nisi* are made absolute. No order as to costs.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

A.R. Srinivasan .. *Petitioner**

v.

State of Madras, by its Secretary, Public Works Department, Fort St. George, Madras .. *Respondent.*

Madras Civil Service (Classification, Control and Appeal) Rules, 1953—*Civil servant—Misconduct Lgtal Jurisdiction to punish—" Good and sufficient reason "—Proof—Necessity—Finding rested on suspicion—Sufficiency for imposing punishment—Order based on suspicion—Quashing of—Jurisdiction of High Court—Constitution of India* (1950), *Article* 226.

It cannot be disputed that where there is no proof but a mere suspicion of misconduct on the part of a Government servant, the Government would have no good cause to punish him. The High Court would have jurisdiction, under Article 226 of the Constitution of India, to quash an order of the Government imposing a penalty on its servant if its finding of misconduct was rested on mere suspicion and not legal proof. Mere suspicion cannot take the place of proof to satisfy the requirements of " good and sufficient reason " and in the absence of good and sufficient reason the Government would have no jurisdiction to inflict any punishment under the Madras Civil Service (Classification, Control and Appeal) Rules. The conclusion arrived at by the authority conducting the inquiry should be based on evidence and the charges in such cases, being in the nature of a criminal prosecution, should be proved beyond reasonable doubt.

Kuppuswami v. *State of Madras,* (1956) 2 M.L.J. 352 and *G. Sundaram* v. *The State of Madras (Hom Department),* W.A. No. 54 of 1956, followed.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the orders of the Government of Madras, dated 14th November, 1957 in G.O. Ms. No. 3606, Public Works, as confirmed by G.O. Ms. No. 2057, P.W.D., dated 25th July, 1958 and quash the said orders.

M. K. Nambiar and *K.K. Venugopal,* for Petitioner.

The Additional Government Pleader (*M. M. Ismail*), for Respondent.

The Court made the following

ORDER.—This is a petition under Article 226 of the Constitution to issue a writ of *certiorari* or other appropriate writ, calling for the records relating to the

*W.P. No. 977 of 1958. 22nd December, 1960.

order of the Government contained in its G.O.Ms. No. 3606, Public Works, dated 14th November, 1957, as confirmed by G.O. Ms. No. 2057, P.W.D., dated 25th July, 1958, compulsorily retiring the petitioner from service as Officiating Executive Engineer and to quash the same. The petitioner, who is a graduate in Engineering, entered service under the Government of Madras on 3rd February, 1930, as a Supervisor in the Public Works Department. In course of time, he rose up to the position of an Executive Engineer. On 1st August, 1951, he was appointed as Project Engineer, and placed in exclusive charge of the Manimuthar Project in the Tirunelveli District. Later, towards the end of the year 1952, the project was placed under a Superintending Engineer with two Executive Engineers, subordinate to him each in charge of a separate Division. The petitioner was put in charge of one of those Divisions. On 30th September, 1954, he was transferred to Vaigai Project in Madurai District.

In the meantime, in March, 1953, the Government received some complaints which contained charges of corruption against the petitioner. Certain enquiries and investigations were then made and finding that there was a case for fuller enquiry the Government forwarded the case to the Tribunal, constituted under the Madras Civil Services Discipliany Tribunal Rules, 1948. The Tribunal by its order date 3rd September, 1954, framed two charges against the petitioner, and they wered duly communicated to him. The first of the charges related to alleged receipt of illegal gratification in cash and kind from six persons whose names were set out therein. The second charge which is more relevant for the present case was in these terms :

"That actuated by corrupt and dishonest and improper motives with intent to mislead your superiors and the Government, you failed to disclose the acquisition and possession of valuable property, *viz.*, Bangalow No. 12-A, Babu Rajendra Prasad Road, West Mambalam, Madras-17, worth about Rs. 50,000 standing in the name of your wife, Srimathi Vedavalli Ammal, and thereby contravened the provisions of Rule 10 of the Government Servants Conduct Rules, and in your landed property statement for 1954, dated 14th January, 1954, you merely made mention of a house without garden as belonging to your wife without disclosing the location of the same ".

The two charges were enquired into by the Tribunal on 1st and 2nd November, 1954. Six witnesses were examined in support of the 1st charge against the petitioner, but the apparent tenor of the evidence showed that it was not sufficient to sustain the charges made. The Director of Prosecutions, who was in charge of the case against the petitioner, applied for, and obtained an adjournment of the case for about three weeks, with a view evidently to communicate the lack of progress in the case and to obtain fresh instructions from the Government. By that time, the Government were placed in possession of a few more facts by the Investigating Officers. This led to the framing of three aditional charges against the petitioner which was done by the Tribunal on 21st December, 1954, of which the first two alone are important. They run thus :—

"*Additional Charge No.* 1.—That actuated by corrupt motive and in abuse of his position and authority as Executive Engineer of the Manimuthar Project and with intent to appropriate for his own use, he, on or about 22nd November, 1952, caused delivery of 27 A.C. corrugated sheets worth Rs. 540, out of a consignment of 102 A.C. corrugated sheets despatched from the Public Works Workshops and Stores, Madras, to Manimuthar Project, at his Bangalow in Babu Rajendra Prasad Road, West Mambalam, Madras, and that with a view to cover the consequent shortage, he suggested to Sri Paul Dorairaj, Junior Engineer, Stores No. II Section, Stores and Transport Sub-Division, Manimuthar Project, and Sri D. K. Nagarajan, Assistant Engineer, Stores, to account for the 102 A.C. sheet as having been received and to write off the shortgage of 27 A.C. sheets as having cracked and broken in transit, and on their refusal to comply with his suggestion, he returned those 27 A.C. corrugated sheets on 6th April, 1953, through Departmental lorry M.S.Z. 6618 by fraudulently debiting the cost of transport to the Government".

"*Additional Charge No.* 2.—That actuated by corrupt motive and in abuse of his position and authority, in 1953, he made use of Government Pick Up Van M.D.T. 2128 for his private visit with his family to Varkala, Trivandram, and other places on a pleasure trip and drew 14 gallons of petrol from out of the Government stock of the Manimuthar Project".

The 3rd charge which was later held not proved related to the petitioner utilising the services of a fitter employed in the project for making certain household articles

utilising the Government material for the same. The additional charges were duly communicated to the petitioner, and an enquiry followed thereon.

The Tribunal held that the first of the charges concerning receipt of illegal gratification from certain contractors had not been proved: so also the third additional charge, *i.e.*, that relating to the utilisation of the fitter employed in the project and the utilisation of Government property for making household utensils. But it held that the other 3 charges had been made out. At the end of the finding, the Tribunal expressed its view that the petitioner's conduct was such that he was neither fit to occupy any responsible post, nor was it safe for the Government to retain him in service. On a consideration of the report, the Government came to the tentative conclusion that the finding of the Tribunal was correct, and that the petitioner should be compulsorily retired from service by way of punishment. The Government thereupon issued a notice to the petitioner on 13th June, 1956, intimating its provisional conclusion and calling upon him to show cause why the proposed punishment should not be inflicted. Annexed to the notice was a copy of the proceedings of the Tribunal including its report. The petitioner submitted his representations. On the receipt of the representations, the Government forwarded the entire record to the Madras Public Service Commission for its opinion. By his letter, dated 2nd April, 1957, the Secretary of the Madras Public Service Commission sent the following communication to the Government :

"I am to say that the commission *is generally in agreement with the findings of the Tribunal.* The accused officer's reply to the show cause notice is unconvincing and the commission agrees with the remarks of the Chief Engineer (P.W.D.) on that reply—*Vide* Chief Engineer's Letter No. C-1/2591/53/53, dated 7th November, 1956.

The prosecution evidence as a whole leaves in one's mind a strong suspicion of corrupt practices on the part the accused officer, although some of the individual instances may not stand the test of strict legal proof as in a criminal case. According to the principles laid down in G.O. No. 902, Public (Services), dated 28th May, 1938, dismissal or removal would be justified in this case. The proposed penalty of compulsory reitrement errs on the side of leniency, but it serves the purpose (*viz.*, that the accused officer should no longer be retained in service) well enough. The commission agrees that, in all the circumstances of the case, it is enough to impose that penalty. The commission advises accordingly ".

The Government then considered the entire matter in the light of the petitioner's representations and the Commission's report : it came to the conclusion that the petitioner should be compulsorily retired from service and passed G.O. Ms. 3606, dated 14th November, 1957, imposing the punishment. The findings on the basis of which the Government imposed the punishment is a matter on which different views are possible. On the one hand, it is contended that it was a mere suspicion and not proof of any misconduct, while, on the other, it is said that it amounted to an implicit acceptance of the findings of the Tribunal. It is, therefore, necessary to set out the relevant portions of the order, which runs thus :—

"4. The Government have carefully considered the explanation submitted by the accused officer in consultation with the Madras Public Service Commission. After perusing the records of the case, the Madras Public Service Commission has expressed the opinion that the accused officer's explanation is unconvincing and that the prosecution evidence as a whole leaves in one's mind a strong suspicion of corrupt practices on the part of the accused officer although some of the individual instances may not stand the test of strict legal proof as in a criminal case. The Madras Public Service Commission considers that removal or dismissal from service of the accused officer will be justified in the present case, and that the proposed penalty of compulsory retirement from service errs on the side of leniency and that it, however, serves the purposes, *viz.*, that the accused officer should no longer be retained in the service of the Government. The Commission has therefore agreed that, in the present case, it is enough to impose the penalty of compoulsory retirement from service on the delinquent Officer. *The Government agree with the Madras Public Service Commission.*

5. While the charges referred to above were under the consideration of the Government, the Chief Engineer, P.W.D. (General) brought to the notice of the Government certain additional items of irregularities alleged to have been committed by the same Officer, Sri A. R. Srinivasan, during his term of office as Executive Engineer, Manimuthar Project. The main allegation was that he made certain unauthorised payments for extra loads and lifts to contractors and job workers in the Manimuthar Project, where they were not due, and that a part of these payments were undoubtedly unauthorised aid to contractors in contravention of paragraph 315 of the Madras Public Works Department Code. As the allegation was a serious one, the Government ordered that the matter should be enquired into in detail and deputed Sri J. G. Abraham, Superintending Engineer, Madras Circle, for conducting the enquiry. The Government also ordered in G.O. Ms. 1211, Public Works, dated

18th March, 1957, that Sri A. R. Srinivasan should be placed under suspension forthwith pending enquiry into a disposal of the further charges against him. Sri A. R. Srinivasan was accordingly relieved from the charge of the Salem Division on 23rd March, 1957 afternoon. *The Government have decided that the officer should be retired compulsorily on the basis of the charges already proved before the Tribunal for Disciplinary proceedings* and that if it is later found necessary to impose further punishment on the basis of the present enquiry into the further charges against the officer, then the question of reducing the pension due to the officer for unsatisfactory work may be considered by Government. The Governor of Madras accordingly directs that Sri A. R. Srinivasan, Officiating Executive Engineer, P.W.D., be compulsorily retired from service from 23rd March, 1957 afternoon, the date on which he was relieved from the charge of the Salem Division and placed under suspension ".

The petitioner then appealed to the Governor. The appeal was rejected. G.O. Ms. No. 2057 dated 25th July, 1958 contains the order, the material portion of which states :

"The Governor of Madras has gone through the relevant papers on the subject and has observed that the three charges *held to be proved against him by the Tribunal for Disciplinary Proceedings are sufficiently grave calling* for the imposition of the penalty of compulsory retirement from service under the Government ".

The validity of the aforesaid orders is challenged in this petition.

It cannot be disputed that the procedure adopted in relation to the enquiry into the charges of misconduct against the petitioner conformed strictly to principles of natural justice and to the constitutional and other provisions. The only ground on which the order imposing the punishment is attacked is that it had been passed without good cause on the basis of a mere suspicion. This contention is based on the somewhat contradictory basis for the Government's order, disclosed in paragraphs 4 and 5 of G. O. Ms. No. 3606, dated 14th November, 1957. In the former paragraph the Government accept the conclusion of the Public Service Commission. Does it mean that they too rest their conclusion on suspicion? In the latter paragraph it is stated that the punishment was decided on the basis of charges proved before the Tribunal. Does this mean that the Government had accepted the findings of the Tribunal notwithstanding the advice of the Public Service Commission that such evidence as there is in the case, which could be said to be legal, raised only a suspicion? The resolution of those doubts presents no little difficulty.

It cannot be disputed that where there is no proof but a mere suspicion of misconduct on the part of a Government servant, the Government would have no good cause to punish him. The learned Additional Government Pleader frankly conceded that this Court would have jurisdiction to quash an order of the Government imposing a penalty on its servant if its finding of misconduct was rested on mere suspicion and not legal proof. In *Kuppuswami* v. *State of Madras*[1], a Bench of this Court held that a mere suspicion could not take the place of proof to satisfy the requirements of " good and sufficient reason " and that in the absence of good and sufficient reason the Government would have no jurisdiction to inflict any punishment under the Madras Civil Service, Classification Control, etc., Rules. In W. A. No. 54 of 1956, *G. Sundaram* v. *The State of Madras (Home Department)* it was taken as a well established principle of law that all enquiries whether judicial, departmental or otherwise into the conduct of individual officers of the Government should conform to certain standards, one such standard being that the conclusion arrived by the authority conducting the enquiry should be based on the evidence, and that the charges in such a case being in the nature of a criminal prosecution, should be proved beyond reasonable doubt.

It becomes, therefore, necessary to consider what precisely are the reasons which induced the Government to take disciplinary action against the petitioner. It needs no saying that, although the actual enquiry was delegated to the Tribunal, the Government is the ultimate authority and its conclusion alone is material. What is relevant to consider is whether the Government acted on legal proof or on the basis of a suspicion. The Government is not bound to accept the finding of

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1. (1956) 2 M.L.J. 352.

the Tribunal constituted under the Madras Civil Service Disciplinary Rules, 1948 : *a fortiori* the reasoning adopted by the latter for its conclusion unless accepted by the Government can have no force. Equally so is any advice or opinion given by the Public Service Commission. Neither its reasoning nor its conclusion is binding on the Government who can either adopt or accept or reject the same. As stated already, the Government intimated the petitioner on 13th May, 1956, that they had provisionally accepted the findings of the Tribunal. That was merely a tentative acceptance, it being open to them to take a different view of the case altogether and come to a fresh conclusion after considering the further representation of the officer concerned and of the expert advice of the Public Service Commission. The material point to be considered is what were the grounds on which the authority ultimately acted ?

Before considering that question, it is necessary to refer to three circumstances : (1) that the petitioner pleaded innocence, (2) that the Tribunal found on evidence that three out of the five charges laid against the petitioner had been made out, and (3) that the Public Service Commission went into the matter fully and, after analysing the evidence with respect to the 3 charges held proved by the Tribunal, gave its own view of the evidence. Frnm the terms of the letter of the Secretary of the Madras Public Service Commission, which I have set out earlier, it is not possible to find whether it found there was any acceptable legal evidence in support of any of the charges. It no doubt states that the Commission was generally in agreement with the findings of the Tribunal, but it later whittles down that general statement by specifically stating on what basis those findings could be supported, namely, (1) some of the individual instances may not stand the test of strict legal proof and (2) that in regard to other charges the evidence leads only to a strong suspicion. The opinion so expressed cannot be said to be clear or unambiguous but there can be no doubt that what in the opinion of the Commission justified the 3 charges found against the petitioner was strong suspicion and not legal proof. There is thus a contradiction between the Tribunal and the Commission. From the report of the former it is clear that it held that there was evidence to support 3 of the 5 charges. The communication of the latter to the Government would show that the result of the evidence led only to a strong suspicion against the petitioner. It becomes necessary then to ascertain which of the two views found acceptance with the Government. In paragraph 4 of the G. O. Ms. No. 3606, dated 14th November, 1957, the Government unreservedly accept the view of the Public Service Commission. I had doubts whether the concurrence expressed by the Government with the view of the Public Service Commission should be held to relate only to the question whether compulsory retirement or dismissal was the proper punishment in the case and not to the view of the Commission as to what the evidence in the case amounted to. Paragraph 5 of the order refers to the Government having taken action on the basis of the charges already proved before the Tribunal. That does not, however, clearly indicate whether the Government accepted the findings of the Tribunal in preference to the assessment of the evidence by the Public Service Commission. The paragraph is primarily concerned with other charges that came to light subsequently, the suspension of the officer pending investigation of those charges and reserving further action thereon in case it became necessary. In the context the reference to the punishment of compulsory retirement appears to be more a record of an antecedent decision than one which is made as a result of the reasons contained in paragraph 5. The reference to the "charges proved before the Tribunal" was possibly intended as descriptive of the charges which induced them to take action rather than an acceptance of the findings of the Tribunal in respect of those charges. In G. O. Ms. No. 2057, dated 23rd July, 1958, there is reference to the 3 charges proved before the Tribunal as justifying the punishment. This is merely a subsequent interpretation of G. O. Ms. No. 3606 and it is by no means clear that the statement was not merely made as descriptive of the charges which ultimately led to the punishment.

What remains to be considered is the terms of paragraph 4 of the Government Order. Its narrative portion consists of two parts: (1) the opinion of the Public Service Commission and (2) the proper punishment to be meted out to the officer. can it be said that when at the end of the paragraph the Government expressed its agreement with the Commission it was only in regard to the 2nd portion and not to the first? *Prima facie* it would be an inappropriate use of the word "agreement" if it were to relate only to the question of punishment contained in the latter part of paragraph 4. It will be remembered that even at the time of its provisional conclusion the Government had decided that compulsory retirement was the proper punishment in the circumstances and it had later intimated its view to the Public Service Commission. That body, however, was of the opinion that a more drastic punishment was required: but later on it agreed with the Government's proposal. The agreement was, therefore, by the Commission to what the Government proposed. There was no need for any further agreement on the part of the Government in the matter of punishment. To say, therefore, that the Government agreed with the Public Service Commission's agreement to the Government's proposal would be otiose, if not meaningless. The agreement of the Government with the Commission should, therefore, be in regard to the view of the Commission as to the effect of the evidence in the case. The Commission's appraisal of the evidence will have no utility unless the Government agreed with it.

It must, therefore, follow that the Government too shared the view of the Commission that there was no legal proof in regard to individual instances and the evidence as a whole left in its mind only a strong suspicion of the petitioner having been guilty of the 3 charges. It is not open to this Court under Article 226 of the Constitution to consider whether the view of the evidence is justified or not. It may be that a substantial portion of evidence which the Tribunal accepted as credible did not find favour with the Government, and what remained fell short of legal proof raising a suspicion. The learned Additional Government Pleader did not justify the order of the Government on any such basis. When once it is found that the Government acted only on suspicion, the disciplinary action taken against the petitioner, being based on such suspicion, cannot be sustained as one within its jurisdiction.

Rule *nisi* made absolute. There will be no order as to costs.

P.R.N. *Petition allowed:*
Rule nisi *made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction)

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VEERASWAMI.

The Commissioner, Corporation of Madras .. *Appellant**

v.

Colombia Films of India, Ltd., Madras .. *Respondents.*

Madras City Municipal Act (IV of 1919), *schedule IV, part II, rule* 7—*Proviso—Applicability and scope —Right of assessee—Corporation's right to assess on basis of Proviso against assessee's wish.*

The Proviso to rule 7 of Schedule IV, Part II of the Madras City Municipal Act is only intended for the benefit of the assessee and if the application of the Proviso is not likely to be of assistance to the assessee, the latter cannot be compelled to resort to the Proviso. The Corporation cannot claim to make an assessment on the basis of the Proviso, when the assessee does not resort to it.

Appeals under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Rajagopala Ayyangar dated 9th December, 1959 and

* W.A. Nos. 26 to 28 of 1960.

31st March, 1960.
(11th Chaitra, 1882, Saka).

made in the exercise of the Special Original jurisdiction of the High Court in W.P. Nos. 772 to 774 of 1959 presented under Article 226 of the Constitution of India to issue writs of *mandamus* directing the Commissioner of Corporation of Madras to forbear from demanding or proceeding to recover from the petitioners herein the companies tax for 1958-59 and 1957-58 respectively payable under the provisions of the Madras City Municipal Act at any rate not exeeding the rate prescribed on the basis of paid up capital as provided in the First part of rule 7, Part II of Schedule IV to the Madras City Municipal Act of 1919.[1]

T. Chengalvarayan, for Appellant in all the appeals.

Respondents not represented.

The Judgment of the Court was delivered by

Rajamannar, C.J.—We are in entire agreement with the learned Judge that the Proviso to rule 7 of Schedule IV of the Madras City Municipal Act was obviously intended for the benefit of the assessee and if the application of the Proviso was not likely to be of assistance to the assessee, he is not compelled to resort to the Proviso. The Corporation can then assess the company only under the main rule itself on the basis of paid up capital. If on account of this the Corporation is likely to lose revenue because companies with a low capital have been able to transact business, the gross income from which is considerable, the only remedy is to have the rule or Act amended. As it stands, the Proviso aforesaid is only intended for the benefit of the assessee. The Corporation cannot claim to make an assessment on the basis of it. The appeals are dismissed.

P.R.N. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

Ganapathi Iyer .. *Petitioner**

v.

Ayyakannu .. *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1955), section 2 (a)—Under-lessee or person deriving title through a 'cultivating tenant'—Not a 'cultivating tenant' within the scope of the Act.

An under-lessee or a person deriving title through a 'cultivating tenant' is not a 'cultivating tenant' within the meaning of section 2 (*a*) of the Madras Cultivating Tenants' Protection Act.

A cultivating tenant enjoying the privileges of the enactment is only a statutory tenant in respect of whom and in whose favour it is impossible to conceive of an estate between himself and the landlord. The statutory tenant has only the statutory rights conferred upon him by the special enactment.

An under-lessee from such a statutory tenant cannot claim to have any interest in the land derived from the cultivating tenant as such interest as is conferred upon the cultivating tenant is purely personal to him and his heirs. If the cultivating tenant himself cannot be supposed in law to have any estate as between himself and the head lessor much less can the sub-lessee claim any interest in himself.

Section 2 (*a*) of the Act ought not be to be so construed as to result in the under-lessee becoming a permanent tenant on the land without any danger or apprehension of his being evicted from his holding. The rule of statutory interpretation even when the words of the statute are plain, will enable a Court to avoid a construction which will result in inconvenience injustice or absurdity.

The position of an under-lessee under the General Law discussed.

Solomon v. *Orwell*, (1954) 1 A.E.L. Rep. 874, referred.

Serang Abdul Khadir v. *Rajagopala Pandarayar*, (1956) 1 M.L.J. 34, distinguished.

Petition under section 6-B of Act XXV of 1955 as amended by Act XIV of 1956 read with section 115 of Act V of 1908, praying the High Court to revise the order of the Revenue Court, Tiruchirapalli, dated 28th February, 1957 and made in D.A. No. 288 of 1956.

K. Raman and *V. Ratnam*, for Petitioner.

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1. Since reported *Columbia Films of India Ltd.* v. *Commissioner Corporation of Madras*, (1961) 1 M.L.J. 208.

* C.R.P. No. 943 of 1957.

9th November, 1960.
(18th Kartika, 1882, Saka).

M. S. Sethu, for Respondent.

The Judgment of the Court was delivered by

Jagadisan, J.—This Civil Revision Petition has been directed to be heard by a Division Bench by my Lord the Chief Justice as there is a conflict of judicial opinion on the question involved for decision in the case, namely, whether a sub-lessee or an under-lessee is a cultivating tenant within the meaning of section 2 (*a*) of the Madras Cultivating Tenants Protection Act (Madras Act XXV of 1955).

The facts that have given rise to this Civil Revision Petition are not in dispute. The petitioner leased out a few items of his properties situated in the village of Pudukudi, Lalgudi taluk to one Rangaraju. There is a Vyavasaya Sangam (Agricultural Association) in the village of Pudukudi. Though the legal status of the said Sangam is not clearly disclosed, it is obvious that it is composed of several individuals who do not hesitate to put forward rights under the Madras Cultivating Tenants Protection Act as if they are cultivating tenants. Kolandaivelu who has given evidence in the case as P.W. 2 is stated to be the President of the Sangam. Rangaraju, the lessee from the petitioner, leased out 78 cents of wet land in S. No. 88 of the village to Kolandaivelu aforesaid. This Kolandaivelu in turn leased out the property to Ayyakannu, the respondent in this Civil Revision Petition. Having thus come into possession of the said 78 cents of wet land as an under-lessee from an under-lessee, Ayyakannu filed D.A. No. 288 of 1956 in the Revenue Court of Tiruchirapalli impleading the petitioner herein as the respondent to that application. He averred that he was a cultivating tenant entitled to the benefits of Madras Act (XXV of 1955) that at the time of the harvest of the first crop of kar in November, 1956, he gave notice to the petitioner herein of the proposed harvest by him requesting him to come to the thrashing floor to take his share of the paddy. The petitioner of course did not respond to that request and Ayyakannu made the harvest himself. He alleged that he got 20 kalams of paddy by the harvest. He claimed that out of this 20 kalams the share of the petitioner as per the Madras Cultivating Tenants (Payment of Fair Rent) Act (XXIV of 1956), was only 8 kalams. He therefore deposited Rs. 88 being the market vale of the 8 kalams of paddy into the sub-treasury at Lalgudi and started proceedings under section 3 (3) (*b*) of Madras Act (XXV of 1955). This section provides for an enquiry by the Revenue Divisional Officer into the quantum of lawful rent payable by a cultivating tenant to his landlord.

This application was resisted by the petitioner-landlord on the ground that Ayyakannu was not a cultivating tenant competent to institute any proceeding under section 3 (3) (*b*) of the Act. The Revenue Court held that the land was cultivated by Ayyakannu as sub-lessee during 1956-57, and he was therefore a cultivating tenant of the land for that period entitled to deposit the rent under section 3 (3) of the Act, and to start an enquiry in respect of the rent payable by him. The Revenue Court further held that the fair rent under the Madras Cultivating Tenants (Payment of Fair Rent) Act can only be fixed by the Rent Court and that after the fixation of such fair rent Ayyakannu will have to pay the balance, if any, that may be found due. The landlord was permitted to draw the deposit of Rs. 88 from the sub-treasury.

The Civil Revision Petition has been preferred by the landlord challenging the correctness of the said decision by the Revenue Court.

Ayyakannu who now claims to be the cultivating tenant under the Madras Act (XXV of 1955) and who instituted D.A. No. 288 of 1956 before the Revenue Court at Tiruchirapalli admittedly got a lease of the property only from Kolandaivelu, P.W. 2 in the case. P.W. 2 has deposed that he took the land on lease from Rangaraju. This is what he deposed before the Revenue Court:

"C.P. (Counter petitioner) owns land in my village. I took C.P's. land on lease from Rangaraju, for the current year. Madabhutham's son Thangavelu who cultivated C.P's land leased the land to Sangam. I sub-leased to landless people"

In cross-examination he admitted that the landlord leased only to Rangaraju. Rangaraju himself gave evidence as P.W. 3. He admitted having taken 2.57 acres of land on lease from the counter-petitioner the landlord. He admitted that he sub-leased 1.57 acres to Kolandaivelu, P.W. 2. He also admitted that the landlord issued notice to him claiming arrears of rent. Of course he did not pay the arrears but sent only a reply notice as per Exhibit B-1. He further admitted that he was in arrears of rent to his landlord for the last fasli. On this evidence, it is absolutely clear that the petitioner leased out a block of lands to P.W. 3, that P.W. 3 sub-leased a portion of it to P.W. 2 and P.W. 2 further under-let a portion to P.W. 1, Ayyakannu who is now on the scene claiming the character of a cultivating tenant under the Act.

The simple question which arises for decision is whether an under-lessee or any person deriving title through him is a cultivating tenant within the meaning of section 2 (*a*) of the Act. Section 2 (*a*) is as follows :—

> " Cultivating tenant in relation to any land means a person who carries on personal cultivation on such land under a tenancy agreement, express or implied, and includes :—
>
> (i) any such person who continues in possession of the land after the determination of the tenancy agreement, and (ii) the heirs of such person, but does not include a mere intermediary or his heirs."

Section 2 (*e*) defining ' landlord ' is as follows :

> " landlord in relation to a holding or part thereof means the person entitled to evict the cultivating tenant from such holding or part ".

Section 2 (*ee*) defines ' personal cultivation ' thus :

> " A person is said to carry on personal cultivation on a land when he contributes his own physical labour or that of the members of his family in the cultivation of that land ".

Section 3 providing an immunity to cultivating tenants from being evicted is as follows :—

> "(1) Subject to the next succeeding sub-sections, no cultivating tenant shall be evicted from his holding or any part thereof, during the continuance of this Act, by or at the instance of his landlord, whether in execution of a decree or order of a Court or otherwise "

It is the definition of the term ' cultivating tenant ' which we must observe is not quite clear or free from obscurity or ambiguity, that has given rise to this controversy namely whether an under-lessee or a sub-lessee is a cultivating tenant or not. The learned counsel for the respondent contended that in order to be a cultivating tenant within the meaning of the Act only three conditions need be fulfilled. The first condition is that the person must carry on personal cultivation; that is he must contribute his own physical labour or that of the members of his family in the cultivation of the land. The second condition is that there must be a tenancy agreement express or implied. According to the learned counsel for the respondent a sub-lessee fulfils both the conditions as he carries on personal cultivation by contributing his own physical labour or that of the members of his family, and that he is under a tenancy agreement with his lessor, though that lessor is only a lessee from the head-lessor.

The learned counsel for the petitioner contended that the tenancy agreement express or implied contemplated under section 2 (*a*) of the Act is an agreement between the owner of the land and the tenant and not an agreement between the tenant and his sub-tenant. It was pointed out on behalf of the petitioner that while the definition of the term ' culivating tenant ' is specifically made to include the heirs of such person no reference is made to the assignee from the lessee. Strong reliance was also placed on behalf of the petitioner on the language of section 3 of the Act which makes it clear that a sub-tenant cannot be evicted from the holding at the instance of the head-lessor.

We shall now refer to the decisions of this Court which dealt with the subject-matter now in controversy. The first decision to which our attention has been

drawn is that delivered by Ramachandra Iyer, J., in C.R.P. No. 604 of 1957. The learned Judge observed thus in the judgment:

"The agreement contemplated in section 2 (a) of Madras Act XXV of 1955 whether it was express or implied should be with the landlord directly."

This observation of the learned Judge was referred to with approval by Balakrishna Ayyar, J., in the decision in *Ramaswami Naidu* v. *Marudaveera Mooppan*[1]. The learned Judge observed as follows:

"I am unable to accept the contention of Mr. Krishnaswami Ayyar that a sub-lessee can claim the benefits of this Act. A tenancy agreement means an agreement creating a tenancy and when we speak of a tenancy we normally understand that there is on the one side a landlord and, on the other side, a tenant or lessee. In relation to sub-lessees we do not usually use the term tenancy agreement; instead we speak of the assignee of a lease. It will also be appreciated that if the contention of Mr. Krishnaswami Ayyar were right, it would be possible for a lessee to create rights larger than he himself has and normally a construction which produces such a result should not be accepted. The expression 'heirs, legal representatives and assigns' is a very familiar one. When therefore the legislature said that the 'heirs of such person' shall be deemed to be tenant but did not, at the same time, include 'his legal representatives or assigns' in that category the inference must be that it did not want to confer the benefit of the Act on the legal representatives or assignees of the original lessee. Otherwise, it will be hard to explain the omission of the words 'legal representatives and assigns."

In another unreported decision, C.R.P. Nos. 1888 and 1889 of 1958 Ramachandra Iyer, J., followed the decision of Balakrishna Ayyar, J., cited above. The learned Judge therein observed as follows:

"The definition of the term 'cultivating tenant' also makes it clear that the assignees of a cultivating tenant could not become cultivating tenants in respect of the holdings held by the assignor under the landlord. The principle for the non-recognition of the assignees as cultivating tenants is that there could be no privity of contract between the landord and the assignee of a lessee".

In C.R.P. No. 1017 of 1957 the learned Chief Justice took a contrary view. The petitioner in that case was no other than the petitioner herein. The learned Chief Justice holding that a sub-lessee was a cultivating tenant observed thus:

"It is clear from the evidence set out in the judgment of the Revenue Court that the respondent who deposited the rent in the Revenue Court was a cultivating tenant within the meaning of the definition in the Act. The petitioner who is the landlord alleged that one Rangarajan was his lessee. That Rangarajan came and gave evidence as P.W. 3 that he had given the benefit of the lease to P.W. 2 who in turn sub-leased to P.W. 1 and P.W. 1 cultivated the land in 1956-1957 as sub-lessee. In the circumstances he would be entitled to the benefit of the Act as a cultivating tenant and as such he deposited the rent under section 3 (3) (a) of the Act."

Somasundaram, J., who heard this Civil Revision Petition in the first instance in his judgment directing the reference has expressed the view that he is inclined to agree with the decision of my Lord the Chief Justice in C.R.P. No. 1017 of 1957.

We shall now examine the position of an under-lessee apart from the provisions of Madras Act (XXV of 1955), in the general law governing the relationship of landlord and tenant. The tenant of a demised property can in the absence of agreement restricting his rights under-let it for any period less than the residue of his own term. The under-lease comes to an end with the head-lease and the under-lessee does not in the absence of fresh agreement become the tenant to the head-lessor but if the under-lessor continues to hold as a tenant the yearly under-tenancy also continues. (Halsbury's Laws of England, Vol., 23, page 447, foot note). There is neither privity of contract nor privity of estate between the head-landlord and the under-lessee. The under-lessee has no equity to enforce the provisions of the under-lease against the head-landlord (*Tayler* v. *Gillet*)[2]. If the head-lease contains a proviso for re-entry on breach of convenant the under-lessee is liable to be evicted for such breach. But if the head-lease is terminated by the lessee voluntarily surrendering the lease to the head-lessor that will not prejudice the rights of the under-lessee on the principle that the lessee cannot derogate from his own grant. This principle was stated thus by Mellish, L.J., in *Great Western Railway Co* v. *Smith*[3].

"It is a rule of law that if there is a lessee and he has created an under-lease or any other legal interest if the lease is forfeited then the under-lessee or the person who claims under the lessee loses

1. (1959) 1 M.L.J. 25 at p. 27.
2. L.R. 20 Equity 682.
3. 2 Ch.D. 235 at page 253.

his estate as well as the lessee himself; but if the lessee surrenders he cannot by his own voluntary act in surrendering prejudice the estate of the under-lessee or the person who claims under him."

This is also the principle embodied in section 115 of the Transfer of Property Act.

The under-lessee being only a holder of derivative interest in respect of the demised property from the lessee cannot certainly have higher rights than his own assignor. Though the lease-hold estate cannot be drowned by a voluntary surrender by the lessee in favour of the head-lessor so as to prejudice the rights of strangers like the under-lessee who is not a party to the surrender seldom can the estate of the under-lessee survive the extinction or termination of the estate of the original lease. A lessee cannot efface himself and bring about a direct jural relationship between the head-lessor and the under-tenant. If the lessee were to be in such a position it can only mean that tenants can be foisted upon the landlord irrespective of his inclinations in the matter. We are happy to find that such is not however the position under the general law relating to landlord and tenant.

The question yet remains whether the special enactment, Madras Act (XXV of 1955), is so worded as to make a departure from the general law inevitable. It must be noted that even a cultivating tenant enjoying the privileges of the enactment is only a statutory tenant in respect of whom and in whose favour it is impossible to conceive of an estate between himself and the landlord. The statutory tenant has only the statutory rights conferred upon him by the special enactment.

The decision in *Soloman* v. *Orwell*[1], is somewhat instructive in this connection. In that case the statutory tenant of a dwelling house within the Rent Restrictions Act let to a sub-tenant three rooms in the dwelling house with the right to share with the tenant the kitchen scullery. The statutory tenant having vacated that part of the premises occupied by her by removing therefrom and giving the keys to the landlord the landlord claimed from the sub-tenant possession of the part sub-let. The sub-tenant submitted that after surrender of the statutory tenancy she, the sub-tenant had the same right given to her under section 7 of the Landlord and Tenant (Rent Control) Act, 1949, against the landlord as she had against the statutory tenant and that that right could only be terminated by notice to quit in the ordinary manner. It was held that a statutory tenant had no interest capable of existing in law as an estate but had merely a statutory right of occupation, which could not be the subject of a surrender at Common Law, and that therefore when the tenant vacated the premises the sub-tenant's right of occupation automatically came to an end and the landlord was entitled to possession. At page 876 Denning, L.J., observed as follows :—

"When a statutory tenant sub-lets a part of the premises, he does not thereby confer any estate or interest on the sub-tenant. A statutory tenant has no estate or interest himself, and he cannot carve something out of nothing. The sub-tenant, like the statutory tenant, has only a personal right or privilege. The question is : What is the position of the sub-tenant when the statutory tenancy comes to an end ? A statutory tenancy may, of course come to an end without a notice to quit, *i.e.*, by death (if there are no entitled relatives) or by the delivery up of the premises to the landlord. When the statutory tenancy comes to an end, the sub-tenant's right automatically comes to an end unless there is some statutory protection afforded to him."

At page 877 Romer, L.J., observed thus :

" . . . . it is plain that a statutory tenant has no legal or equitable estate which can be the subject of a surrender to the reversioner or out of which a subsidiary estate may be taken by a sub-tenant. All he has is a personal right of occupation which he can bring to an end by relinquishing possession. That is different from surrendering an estate which will merge in the superior estate of the reversioner."

We are of opinion that the principle of the decision referred to above is fully applicable to an under-lessee from a cultivating tenant under Madras Act (XXV of 1955). Such under-lessee cannot claim to have any interest in the land derived from the cultivating tenant as such interest as is conferred upon the cultivating tenant is purely

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1. (1954) 1 A.E.L. Rep. 874.

personal to him and his heris: If the cultivating tenant himself cannot be supposed in law to have any estate as between himself and the head-lessor much less can the sub-lessee claim any interest in himself. We have therefore no hesitation in holding that a sub-lessee or an under-lessee is wholly beyond the pale of the Act.

We are also convinced that section 2 (*a*) of the Act ought not to be so construed as to lead to results which will be manifestly startling. Once the sub-lessee gets a foot-hold in the scheme of the Act and becomes clothed with the rights of a cultivating tenant it looks as if he can never be evicted from the holding. The position may be thus illustrated. *A* is the landlord; *B* is his lessee and *C* is the under-lessee from *B*. *A* can claim arrears of rent only from *B* and can only evict *B* for default in payment of such arrears. *B* having sub-let the property to *C* will no longer be interested in the property and of course will never agree to become liable to pay rent to *A*. *A* cannot evict *C* for default in the matter of payment of rent by his lessee *B*. *C* can if at all be evicted only *B*. If *B* evinces no interest in the matter and if *A* cannot evict *C*, *C* will be a permanent tenant on the land without any danger or apprehension of his being evicted from his holding. We are unable to view with equanimity that the Legislature intended to bring about such a disastrous position. The rule of statutory interpretation even when the words of the statute are plain will enable a Court to avoid a construction which will result in inconvenience, injustice or absurdity. This rule has been variously described by eminent Judges, sometimes as the "rule of common sense", and on some occasions as the "golden rule".

In *Simms* v. *Registrar of Probates*[1], Lord Hobhouse observed thus :

> "Where there are two meanings, each adequately statisfying the meaning (of a statute) and great harshness is produced by one of them, that has a legitimate influence in inclining the mind to the other.
> ....
> It is more probable that the Legislature should have used the word in that interpretation which least offends our sense of justice."

In *R.* v. *Overseers of Tonbridge*[2], Brett, L.J., said :

> "If the inconvenience is not only great, but what I may call an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable, though not in its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning."

We think that this cardinal rule of interpretation can well be applied to construe the terms of section 2 (*a*) of the Act which are, of course, enigmatic.

Reference was made to the decision of the Andhra Pradesh High Court in *Rangayya* v. *Tatayya*[3]. In that case two archakas who held lands on archakatvam service leased them out to one Tatayya. Tatayya sub-leased a portion thereof in favour of one Rangayya. The result was that Tatayya was holding a portion of the lands as the lessee and Rangayya was holding the other portion as the sub-lessee. The archakas filed applications for fixation of fair rent under section 6 of the Andhra Tenancy Act (XVIII of 1956). One of the questions raised was whether Rangayya, the sub-lessee was a cultivating tenant against whom an application for fixation of fair rent can be filed. Umamaheswaram, J., held that the archakas were not competent to maintain any application against Rangayya, the sub-lessee, as he was not their cultivating tenant. To this extent we are in respectful agreement with the learned Judge. But the learned Judge further observed as follows at page 54 :

> "Having given my anxious consideration, I am inclined to hold that Tatayya is a cultivating tenant under the archakas in respect of 1 acre and 60 cents and that Rangayya is the cultivating tenant under Tatayya in respect of 9 acres, 70 cents. It might be open to Tatayya to take proceedings under section 6 of the Act as against Rangayya in respect of 9 acres and 60 cents in his actual possession."

If the learned Judge meant to lay down that Rangayya the sub-lessee can be called a cultivating tenant *qua* his landlord Tatayya we must express our respectful dissent.

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1. L.R. (1900) A.C. 323 at 335.
2. L.R. (1884) 13 Q.B.D. 339 at p. 342.
3. (1960) 2 An.W.R. 53.

Mr. M. S. Sethu, the learned counsel for the respondent relied upon a decision in *Serang Abdulkhadir* v. *Rajagopala Pandarayar*[1], in support of his contention that a sub-lessee is a cultivating tenant. That case arose out of the provisions of the Tanjore Tenants and Pannayals Protection Act. Sub-lessees of parcels of holdings claimed the benefit of restoration of possession of property under section 6 (2) of that Act. The question was whether they were cultivating tenants entitled to the benefits of the Act. The learned Chief Justice delivering the judgment of the Division Bench observed thus at page 35 :

"No doubt the tenancy agreement is not with the land-owner as such, but in definition the words are merely " a tenancy agreement express or implied" and it does not specify that such agreement must be with the landowner as defined in clause (*g*). This is the view which Govinda Menon, J., took in *K. P. A. D. Charities, Nachiarkoil* v. *Chinnaswami*[2], the facts of which case are on all fours with the facts of this case and Rajagopalan, J., has followed the decision of Govinda Menon, J."

The definition of the term " landowner " in the Tanjore Act is very significant. It is as follows :—

"Landowner" means the owner or other persons deriving rights under him, who lets land for cultivation by a tenant, and includes the assignees, heirs or other legal representatives of such owner or person deriving rights under him."

Section 2 (*e*) of Madras Act (XXV of 1955), defines landlord as the person entitled to evict a cultivating tenant. We are of opinion that the terms of the two enactments are not *in pari materia* and that the decision of the Division Bench referred to cannot be applied to ascertain the status of a sub-lessee under Madras Act (XXV of 1955).

With respect we agree with the view taken by Balakrishna Ayyar and Ramachandra Iyer, JJ., in the decisions already noted.

The Civil Revision Petition is allowed and the decision of the Revenue Court, Tiruchirapalli, in D.A. No. 288 of 1956 is set aside and the said application is directed to be dismissed with costs throughout.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

R. K. Veerappa Naidu and another .. *Petitioners**

v.

N. Gopalan .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *sections* 2 (1) *and* 7 (3) (c)—" *Building* " —*Meaning of.*

The definition of the word ' building ' in section 2 (1) of the Madras Buildings (Lease and Rent Control) Act, 1949, should be read subject to the qualifications expressed therein, *viz.*, 'unless there is anything in the subject or context '. For purpose of section 7 (3) (*c*) of the Act a part of a building in occupation of a landlord will not be a building as defined by the Act, though the part n the occupation of the tenant will be one. A part of a building will be deemed to be a 'building' for the purposes of the Act only if it is let or intended to be let. As a portion in the occupation of the landlord cannot be said either to be let or intended to be let such portion will not constitute a building under the Act and could only be termed as part of a building.

Hence where a portion of a building has been let out to a tenant and the other portion remains with the landlord the case would come within section 7 (3) (*c*) of the Act. There may also be cases where a landlord in occupation of a part of a building may *bona fide* require the rest of it even though he may be in occupation of a different building as a tenant. It is not necessary in such cases that the additional accommodation sought for should be in respect of the same business carried on by the landlord in the other part of the building.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Madurai, dated 15th March, 1960 and made in

1. (1956) 1 M.L.J. 34.
2. (1954) 1 M.L.J. 277.

* C.R.P. No. 905 of 1960. 27th October, 1960. (5th Kartika, 1882, Saka).

C.R.P. No. 291 of 1959 (C.M.A. No. 31 of 1956, Sub-Court, Dindigul—H.R.C. No. 2 of 1956 District Munsiff Court, Periyakulam).

G. Ramanujam and *V. Ramaswami*, for Petitioners.

T. M. Krishnaswami Ayyar and *A. Balasubrahmanyam*, for Respondent.

The Court delivered the following

JUDGMENT.—The respondent, who is the manager of a joint Hindu family owns a building at Theni which bears Union Nos. 320, 321 and 322. Nos. 320 and 322 are shops situate on either side of No. 321 which is a residential portion occupied by the family; all the three portions are integrally connected. The shop bearing Union No. 320 was leased out to the petitioner in 1941 and since then he has been in occupation of it carrying on business in electrical goods. The family of the respondent is running a business called Gopal Radio Service in shop bearing No. 322 that is a business dealing in electrical goods and in renting out loud-speaker arrangement. The brother of the respondent, a qualified radio mechanic, started a business, which is now found to be a joint family business in repairing radios, etc., under the name of "Wirless India". As the accommodation available in shop No. 322 was found insufficient, he took up on lease a building in another part of Theni. Stating that shop No. 322 was necessary for the business carried on by the younger member of the family, the respondent filed a petition for the eviction of the petitioner under section 7 of the Madras Buildings (Lease and Rent Control) Act. The petitioner resisted the application on various grounds, which it is now unnecessary to set out in detail. Nor is it necessary to refer to the chequered career of the petition. The Rent Controller directed eviction, while the appellate authority set aside that order. On revision, the learned Additional District Judge of Madurai held that the premises were required *bona fide* as additional accommodation for the purpose of the business of the family of the respondent and he directed the eviction of the tenant. This Revision Petition challenges the propriety of that order.

For the petitioner it was first contended that the learned District Judge had no jurisdiction to convert a case which fell under section 7 (3) (*a*) (iii) of the Act, that is a claim for *bona fide* occupation by a owner of another building, into one under section 7 (3) (*c*) of the Act, which related to a claim for additional accommodation in the same building. It was urged that the case should be decided only under the former provision and that as the younger brother of the respondent was already in occupation of a non-residential building as a tenant, no order for eviction should be passed against the petitioner. I cannot agree that the petition was filed only under section 7 (3) (*a*) (iii). The respondent was in occupation of a substantial portion of the building; when he required for personal occupation the other portion as well, the case should be dealt with as one for additional accommodation under section 7 (3) (*c*), which specifically provides for such a case.

It was however argued that as shop No. 320 occupied by the tenant would be a 'building' within the meaning of the term as defined in section 2 (1) of the Act section 7 (3) (*c*) will not apply, as it contemplated a case of obtaining of additional accommodation of a part of a building, the owner already occupying another portion of the same building. In support of the contention reliance was placed on the decision of Mack, J., in *Arunachala Naicker* v. *Gopal Stores*[1], where the learned Judge held that a landlord doing business in one building could not evict a tenant carrying on business in another portion of the building, as the portions in which they were respectively carrying on business should be held to constitute separate buildings under the Act, though they structurally formed part of the same building. That decision proceeded on the basis that if the landlord and tenant were in occupation of different buildings as defined in the Act, the operation of section 7 (3)(*c*) of the Act would be excluded and that the portion let out and that occupied by the landlord would form distinct buildings. A contrary view was however expressed by Panchapakesa Ayyar, J., in *Ganapathi Panidan* v. *Sheik Mohammad*[2]. It was held in that case that the word

1. (1955) 2 M.L.J. 206. 2. (1957) 71 L.W. 45.

"building" defined in section 2 (1) as meaning "any building or portion of a building let or to be let separately" could not have the same meaning as the word "building" in section 7 (3) (*c*) where the phrase "who is occupying only a part of a building" would have a wider connotation.

The view of Panchapakesa Ayyar, J., rests on the familiar rule of interpretation that all statutory definitions and abbreviations should be read subject to the qualifications, expressed in the definition clauses which create them, such as "unless there is anything repugnant in the subject or context". In my view it is unnecessary to travel beyond the terms of the definition of the word 'building' for the purpose of interpreting section 7 (3) (*c*).

But before considering that question it is necessary first to refer to the view taken in *Arunachala Naicker* v. *Gopal Stores*[1]. The ratio of that decision is two-fold : (1) A case of additional accommodation can arise only where the landlord is already occupying a portion of the same building and wants the rest which is in occupation of the tenant ; where the buildings are separate and the landlord is occupying one of them but requires another, it will not be a case of additional accommodation under section 7 (3) (*c*), but one where the landlord wants accommodation of a building for his own use under section 7 (3) (*a*) (iii). (2) In deciding whether the landlord is in occupation of a part or whole of a building, the definition given in section 2 will have to be adopted. Therefore, a building structurally one, will constitute two or more if a portion or portions of it had been let out, the tenant occupying some portion or portions and the landlord another. To such a case section 7 (3) (*c*) will not apply, as they will constitute different buildings under the definition given in the Act.

With great respect to the learned Judge, I am unable to agree with the latter proposition. A part of a building in occupation of the landlord will not be a building as defined by the Act, though the part in the occupation of the tenant will be one. Section 2 (1) which defines building creates a fiction in regard to certain cases, whereby a part of a building is deemed to be a building. A part of a building to which that fiction would not apply will not obviously constitute a building under the Act, but would still be called a part of the building. Section 2 (1) states that "building" means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes, etc. Therefore, a part of a building will be deemed to be building for the purpose of the Act only if it is let or intended to be let. A portion in the occupation of the landlord cannot be said either to be let or intended to be let. Therefore, that portion will not constitute a building under the Act, and could only be termed a part of the building. Section 7 (3) (*c*) contemplates a portion of the building in the occupation of the landlord and another portion in the occupation of the tenant, the former seeking eviction of the latter. Further to interpret the portion of the building in the occupation of the landlord as a building would only render nugatory the provisions of section 7 (3) (*c*) and defeats the purpose of the enactment. On the terms of the definition of the word 'building' a landlord occupying a portion of a building could not be said to occupy a distinct building so as to disentitle him to resort to the provisions of section 7 (3) (*c*). In my opinion, where a portion of a building has been let out to a tenant and the other portion remains with the landlord, the case, would come under section 7 (3) (*c*) as the portion of the building, in the possession of a landlord could not be held to be a separate building.

It was argued that even if section 7 (3) (*c*) were held to apply, the landlord should positively prove that balance of convenience is in his favour and, as in this case the landlord is occupying a building taken on lease, it should be held that the condition in clause (*c*) had not been satisfied and that therefore the application for eviction should be rejected. The question whether the balance of convenience

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1. (1955) 2 M.L.J. 206.

is in favour of the landlord or tenant is one of fact. The learned District Judge has held that in the circumstances the landlord would suffer more if relief was refused to him than the tenant by eviction. I do not agree with the contention that whenever a landlord is in occupation of another portion, he cannot apply under section 7 (3) (*c*) for additional accommodation of a building part of which is already in his occupation ; to hold otherwise would be to import the restrictions, contained in section 7 (3) (*a*) (iii) into section, section 7 (3) (*c*). There may be cases where a landlord in occupation of part of a building may *bona fide* need the rest of it though he may be in occupation of a different building as a tenant. To such case section 7 (3) (*c*) would apply.

Mr. Ramanujam, learned counsel for the petitioner then contended that the business that had been carried on in No. 322 by the respondent, was different from the one carried on by his younger brother and that therefore it could not be said that the additional accommodation was required for the purpose of the business that was being carried on in No. 322. According to the learned counsel the words "additional accommodation" in section 7 (3) (*c*) would imply that additional accommodation was necessary in respect of the very business that was being carried on in the other part of the building. In the present case, it has been found that the nature of the business that has been carried on in No. 322 is the same as that which is carried on by the respondent's younger brother outside. Both the businesses are the businesses of the family. Even apart from that, I cannot put such a narrow construction on the provisions of section 7 (3) (*c*). What the provision enacts is that the landlord should require for additional accommodation in respect of his business ; the need should be the landlord's and not that for the business that is being carried on in the other part of the building. A landlord may have more than one business, or it may be that the landlord might be doing no business in the part of the building which he is occupying, *e.g.*, it might be used only for residential purposes. In either case, if he needs the portion in the possession of a tenant for the purpose of his business, it will be "additional accommodation" coming within section 7 (3) (*c*).

It follows that the view of the learned District Judge that the respondent is in need of additional accommodation is correct. The Civil Revision Petition fails and is dismissed with costs.

On behalf of the petitioner Mr. Ramanujam requests six months' time being given for delivery of possession of the property. The petitioner has been in occupation of the premises since 1941 and it is stated that it will be extremely difficult for him to obtain accommodation for non-residential purposes in Theni in a short time. I consider that, in the circumstances of the case, the request is a reasonable one. The petitioner will have six months' time to give vacant possession of the property from the date of receipt of this order by the Rent Controller.

R.M. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VEERASWAMI.

The Corporation of Madras .. *Appellant**

v.

Vijayalakshmi Ammal ... *Respondent.*

Madras City Municipal Act (IV of 1919), *sections* 218 (2) *and* 390-*A—Suit for recovery of improvement charges—Limitation—Limitation Act (IX of* 1908), *section* 19—*Applicability—Section* 29 (2)—*scope.*

A suit for recovery of improvement charges for work done by the Corporation from the owner of the property liable therefor will be a claim under section 218 (2) of the Madras City Municipal

*S.A. No. 26 of 1959. 16th November, 1960. (25th Kartika, 1882—Saka).

Act and the period of limitation therefor will be governed by section 390-A of the said Act. The applicability of section 19 of the Limitation Act to such cases is expressly excluded and there could be no question of saving the limitation by acknowledgment. The claim will be barred if the suit is not instituted before the expiry of three years from the date when a suit might first have been instituted. *i.e.*, when the Corporation incurred the expenses.

Appeal against the decree of the City Civil Court, Madras (Additional Judge) in Appeal Suit No. 112 of 1957 preferred against the decree of the City Civil Court, Madras (V Assistant Judge) in Original Suit No. 1000 of 1953).

T. Chengalvaroyan, for Appellant.

T. R. Srinivasa Ayyangar, for Respondent.

The Court delivered the following

JUDGMENT.—This Second Appeal by the Corporation of Madras arises out of a suit which is instituted for recovery of a sum of Rs. 702-11-9 together with interest. The claim relates to the proportionate amount payable by the defendant to the Corporation in respect of a certain work done by the latter in metalling and lighting a private street in S.A. No. 94/2 in Mambalam, Madras. There is no dispute that the liability of the defendant arose under section 218 (1) of the Madras City Municipal Act, 1919. One of the defences was that the suit was barred by limitation, in view of section 390-A of that Act.

The trial Court held that the suit was barred by limitation in so far as it related to the recovery of charges for improvements under Exhibit A-11 but that the claim in respect of expenses incurred for lighting except items 7 and 8 was in time. The trial Court decreed the suit on that basis. On appeals preferred by both the Corporation as well as the defendant, in so far as the decree of the trial Court was against the one or the other, the learned Additional Judge of the City Civil Court agreed with the findings of the trial Court and dismissed both the appeals. The aggrieved Corporation has come up to this Court in Second Appeal.

The main question that was argued in Second Appeal was the question of limitation. There is no dispute that section 390-A will govern the suit. That section provides that no suit shall be instituted, in respect of any sum due to the Corporation under the Act, after the expiration of a period of three years from the date on which a suit might first have been instituted. A suit might first have been instituted when the Corporation incurred the relative expenses. That would be the point at which limitation would commence. It was so decided by a Division Bench of this Court in In re *Corporation of Madras*[1]. The expenses were incurred by the Corporation on October 19, 1948. The suit out of which the Second Appeal arises was instituted on June 26, 1953. The suit for recovery of the amount covered by Exhibit A-11, and items 7 and 8 under Exhibit A-14, would, therefore, be barred by limitation.

But the contention of Sri Chengalvaroyan, the learned counsel for the appellant, is that Exhibit A-48 dated October 25, 1950, contains an acknowledgment by the defendant of her liability and the claim was, therefore, saved from the bar of limitation. The question, therefore, is whether section 19 of the Limitation Act will apply to a case governed by section 390-A of the Madras City Municipal Act.

Section 29 (2) of the Limitation Act runs:

"29 (1) . . . .

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—

(*a*) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which they are expressly excluded by such special or local law; and

(*b*) the remaining provisions of this Act shall not apply."

1. (1954) 2 M.L.J. 219.

Sri Chengalvaroyan argued that section 29 (2) will not apply to the instant case because the period of limitation prescribed in section 390-A of the City Municipal Act is the same as prescribed for such a suit by the First Schedule of the Limitation Act. He contended that if only the period of limitation prescribed by the special law was different from the period prescribed for a particular suit by the First Schedule of the Limitation Act, the application of section 19 of the Limitation Act would stand excluded. The entire argument proceeded on the assumption that the period of limitation prescribed by the Limitation Act for a suit of this nature is the same as that prescribed by section 390-A of the City Municipal Act. But this assumption in my opinion, appears to be incorrect. The article that can, if at all, be said *prima facie* to apply is Article 56. That article governs a suit for the recovery of the price of work done by the plaintiff for the defendant at his request where no time has been fixed for payment. There is no evidence in this case that the work in question was done at the request of the defendant. In fact, the liability arose by virtue of the provisions of sub-section (2) of section 218 of the City Municipal Act and not on any other basis. If Article 56, therefore, is not applicable, as I think it does not, the only other article left is Article 120 which provides for six years from the date when the right to sue accrues. The period of limitation prescribed by section 390-A is, therefore, different from the period prescribed by Article 120. Section 29 (2) of the Limitation Act will, in the circumstances, be attracted. The result will be that by operation of clause (*b*) of sub-section (2) of section 29, the application of section 19 of the Limitation Act will stand expressly excluded. It will follow, therefore, that Exhibit A-48 cannot help the plaintiff-Corporation as an acknowledgment of the defendant's liability. The suit which was instituted on June 26, 1953, was therefore, barred by limitation ; and the conclusion arrived by the Courts below is correct.

The Second Appeal fails and is dismissed with costs. No leave.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

The Management of the Tiruchi-Srirangam Transport Company (Private) Ltd. .. *Petitioner**

v.

The Labour Court, Madurai and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 33 (c) (2)—Scope of—Discharged workman—If could invoke the aid of Labour Court.

Having regard to the object of the legislation and the context in which section 33 (*c*) (2) of the Industrial Disputes Act, 1947, came to be enacted it is clear that the section would enable a Labour Court to adjudicate on claims made not only by workmen who are still under the employment of the Management but also by discharged workmen as well. The expression 'any workman' would include a workman who would be entitled to any benefit conferred under the Act and should necessarily include a discharged worker as well. But where a workman was not in service even on the date of the dispute such a workman will not be one entitled to any benefit under a settlement or award which will be binding only on the persons specified in section 18 (3) of the Act. Such persons cannot invoke the aid of the Labour Court under section 33 (*c*) (2) of the Act.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Claim Petition No. 227 of 1958 on the file of the Labour Court, Madurai and quash the order dated 21st November, 1958 and made therein.

P. V. Marthandam, for Petitioner.

B. Lakshminarayana Reddi, for second Respondent.

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* W.P. No. 658 of 1959. 25th October, 1960. (3rd Kartika, 1882—Saka).

The Court made the following

ORDER.—This is a petition under Article 226 of the Constitution to call for the records in Claim Petition No. 227 of 1958 on the file of the Labour Court, Madurai, and to quash the order dated 19th November, 1958. The second respondent to this petition, Iswaran, was employed as a Traffic Supervisor in the Trichy-Srirangam Transport Co. (Private,) Limited, the petitioner. His services were terminated on 21st December, 1956, under a scheme of retrenchment. Subsequent thereto, there were disputes between the Management and the other workers in regard to the payment of bonus for the years 1955-56 and 1956-57. A settlement was reached before the Conciliation Officer on 29th April, 1958. In pursuance of such settlement, the Management declared an additional bonus of one month's wages for each of the two years.

Iswaran was however not paid anything by way of bonus though he had worked during those years persumably because he was not in service on the date of the dispute which ended in the settlement referred to above. Feeling aggrieved, he applied to the Labour Court, Madurai, for an order under section 33 (*c*) (2) of the Industrial Disputes Act for ascertainment of the bonus due to him under the settlement and for a direction to the Management to pay the same. The Labour Court held that Iswaran would be entitled to the additional bonus of one month's wages for the years 1955-56 and also a bonus proportionate to the period of his service in the following year. The Court passed an order directing the Management to pay a sum of Rs. 189-44 nP. It is this order that is challenged as one beyond the jurisdiction of the Labour Court.

Mr. Marthandam, who appeared for the Management, contended that the jurisdiction of the Labour Court to pass an order in favour of the respondent depended in turn on its jurisdiction to entertain the claim at the instance of the second respondent. According to the learned counsel, the Labour Court being one created by statute for a special purpose, its powers and jurisdiction being defined therein, the person who seeks its assistance for enforcing certain alleged rights should prove strictly that he was one to whom relief was contemplated under the provisions of the Act. It was argued that section 33 (*c*) (2) under which an application was made to the Labour Court read in the light of the definition of the term "worker" in section 2 (*s*) of the Act would not cover the case of discharged worker. Section 33 (*c*) (2) states :

"Where any workman is entitled to receive from the employer any benefit which is capable of being computed in terms of money, the amount at which such benefit should be computed may, subject to any rules that may be made under this Act, be determined by such Labour Court as may be specified in this behalf by the appropriate Government, and the amount so determined may be recovered as provided for in sub-section (1)".

The term "workman" has been defined in section 2 (*s*) as :

"any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute or whose dismissal, discharge or retrenchment has led to that dispute. . . . ." (*The rest of the section is omitted as unnecessary*).

Mr. Marthandam's argument is that on the terms of the definition of "workman", a discharged or dismissed employee could not be held to be a workman except in regard to proceedings relating to industrial disputes, *i.e.*, collective disputes, while in all other cases a workman would only mean an employee in actual service. A proceeding under section 33 (*c*) (2) being one not relating to an industrial dispute but merely an individual dispute, a discharged workman could not it is contended resort to the machinery provided by section 33 (*c*) (2) for obtaining relief from the Labour Court. Learned counsel referred to the provisions of section 2 (*s*) before its amendment in 1956 which did not contain the clauses relating to workers

concerned in an industrial dispute and a decision of the Calcutta High Court under that section, in *J. Chowdhury* v. *M. C. Banerjee*[1], where it was held (under the unamended section) that in order to be a "workman" within the meaning of the Act, one must either be in employment or be discharged during the pendency of an industrial dispute. The principle of that decision is sought to be applied to the definition of the term workman even under the amended Act, so far as the matter relates to individual and not industrial disputes.

The argument is no doubt attractive but I am unable to accept the same. Section 33 (*c*) (2) refers to a claim by any workman which *prima facie* will include dismissed or discharged workman as well. In order to ascertain the class of people to whom the remedy under section 33 (*c*) (2) is provided, it is necessary first to ascertain the intention of the Legislature when it enacted section 33 (*c*) (2). Was it merely intended to provide a remedy for the limited class of persons who were in actual employment on the date of the application under that section or to discharged or dismissed workers as well. It is a settled rule of construction that definitions in statutes must be read subject to the qualifications variously expressed in the definition clauses which created them such as unless the context otherwise requires, etc., (Craies on Statute Law, page 95). In the present case section 2 expressly makes the definition applicable unless there is repugnance to the subject or context. Section 33 (*c*) (2) provides a machinery for the ascertainment of monetary values of benefits to which a worker would be entitled to under the settlement or award passed under the Act or under the provisions of the Act. In all cases the primary duty of a Court in construing a provision like section 33 (*c*) (2) is to gather the intention of the Legislature as expressed in the enactment. In certain statutes it may be that on account of obscurity of language it would not be possible to ascertain the intention without having regard to the circumstances with reference to which the words were used. The rule that the circumstances attending the enactment could be looked into for a true interpretation of the statute was laid down as early as 1584 in what is known as *Heydon's case*[2]. That rule is stated thus :

"That for the sure and true interpretation of all statutes in general (be they penal or beneficial restrictive or enlarging of the common law) four things are to be discerned and considered—(1) What was the common law before the making of the Act; (2) What was the mischief and defect for which the common law did not provide; (3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; (4) The true reason of the remedy. And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*." (*Vide* Craies on Statute, page 91).

This rule of interpretation will apply not merely to the common law but to the law as it stood under the provisions of the statute as well. In order therefore to ascertain whether any workman used in section 33 (*c*) (2) would comprehend only those in actual employ and not discharged workman as well, it would be necessary to consider the history of the provision. That such a method is permissible would be apparent from the following passage extracted in Craies Statute Law (5th End.) page 119.

"In the construction of a statute it is of course at all times and under all statutes permissible to have regard to the state of things existing at the time the statute was passed and to the evil which as appears from its provisions, it was designed to remedy."

The Industrial Disputes Act of 1947 was enacted for the investigation and settlement of industrial disputes by providing a machinery for conciliation or adjudication. By Act XLIII of 1953, a new chapter V-A was introduced by way of amendment to the Industrial Disputes Act, 1947. That chapter provided for payment of lay-off compensation to the worker (sections 25-A and 25-E) and the conditions subject to which each worker may be retrenched and the compensation payable to him on such retrenchment (sections 25-F to 25-H). Section 25-I invested the Government with a power to recover any money due from the employer under

1. 55 Cal. W.N. 256.

2. (1584) 3 Coke's Rep. 8 : 96 E.R. 637.

that chapter. But that provision did not enable the Government to adjudicate disputed questions of liability or to ascertain even the quantum payable to the worker by the Management. It was merely a procedural section for an already ascertained liability: Vide *C. B. R. Ratnam & Co* v. *Ekambaram and another*[1]. There was thus no machinery after the amendment effected in 1953 to adjudicate disputed questions even in regard to rights declared by the statutes like the one under chapter V-A. Act XXXVI of 1956 introduced several amendments to the Industrial Disputes Act, 1947. By that Act section 25-I was repealed and the manner of recovery of the moneys due to the employers from the employee was provided for and the mode of ascertaining the same was enacted in section 33 (*c*). In *Kasturi & Sons* v. *Salivateeswaran*[2], the Supreme Court considering the effect of the provision stated :

> " Sub-section (1) of section 33 (*c*) has been added by Act XXXVI of 1956 and is modelled on the provisions of section 17 of the present Act. Section 33 (*c*), sub-section (2), however, is more relevant for our purpose. Under section 33 (*c*), sub-section (2), where any workman is entitled to receive from his employer any benefit which is capable of being computed in terms of money, the amount at which such benefit may be computed may, subject to any rules made under this Act, be determined by such Labour Court as may be specified in this behalf by the appropriate Government, and the amount so determined should be recovered as provided in sub-section (1). Then follows sub-section (3) which provides for an enquiry by the Labour Court into the question of computing the money value of the benefit in question.....These provisions indicate that, where an employee makes a claim for some money by virtue of the benefit to which he is entitled, an enquiry into the claim is contemplated by the Labour Court, and it is only after the labour Court has decided the matter that the decision becomes enforceable under section 33 (*c*) (1) by a summary procedure."

It is now settled that section 33 (*c*) would comprehened all kinds of benefits to which a worker would be entitled whether such benefits be monetary or non-monetary. Section 33 (*c*) (2) would entitle the Labour Court to ascertain the liability of the employer in respect of these benefits. What are the benefits to which a worker would be entitled to under the Act which would require ascertainment under section 33 (*c*) (2). We can conceive of a case of benefits under an award or settlement or one under chapter V-A of the Act. Chapter V-A itself provides for payment to the worker of the nature of lay-off compensation or retrenchment compensation. Once an award is passed the enforcement of the benefits declared by it to any particular worker could only be considered as an individual claim. It is not disputed that even in regard to such individual claims resort could be had to the provisions of section 33 (*c*) (2). Similarly in a case of retrenchment compensation a claim could be made only by a discharged worker. That would also be only a case of an individual dispute. Therefore it is clear that the object of the Legislature is to provide for the adjudication of individual claims not necessarily by persons who are still under the employment of the Management but by discharged persons as well. Therefore to construe section 33 (*c*) (2) in the light of the definition contained in section 2 (*l*) would be manifestly inconsistent with the mischief sought to be remedied and it must be held that the intention of the Legislature was that the former provision would apply to discharged workman as well. The words ' any workman ' would mean a workman who would be entitled to benefits conferred under the Act and should necessarily include a discharged worker as well. I am therefore of opinion that the Labour Court would have jurisdiction to entertain the claim.

But Mr. Marthandam has raised another objection to the propriety of the order passed by the Labour Court which appears to be sound. According to the learned counsel section 33 (*c*) (2) would only enable a person to resort to the Labour Court only where money is due to a workman who would be entitled to the benefit under a settlement or award. In the present case, the worker was discharged in the year 1956. The actual dispute which culminated in the settlement dated 30th April, 1958, was initiated by notice dated 7th April, 1958. Learned counsel refers me to section 18 (3) which enacts the persons on whom a settlement or award is binding. Section 18 (3) (*a*) read with clause (*d*) states that a workman who was employed

1. (1957) 2 L.L.J. 226.
2. (1958) S.C.J. 844 : (1958) 1 L.L.J. 527: (1958) M.L.J. (Crl.) 635: (1958) 2 M.L.J. (S.C.) 130 : (1958) 2 An. An.W.R. (S.C.) 130.

in the establishment on the date of the dispute and all those who subsequently became employed in that employment would be entitled to the benefits of the settlement. It is contended that as Eswaran was not in service on the date of the initiation of the dispute, he would not be one to whom the benefit of the settlement would apply. I am of opinion that the argument is well founded.

Mr. Lakshminarayana Reddi for the respondents however contends that this point was not taken before the Labour Court and therefore he had no opportunity of adducing evidence as to when exactly the dispute arose in regard to the bonus for the two years. I am not convinced that the point was not taken before the Labour Court as the counter statement filed by the Management clearly sets out that point. But learned counsel is certainly right when he stated that the Labour Court has not considered those objections. According to the learned counsel, although it is not possible to have a claim for 1956-57 before the worker was dismissed there is a possibility of there having been a claim or demand for bonus for the earlier year as the worker was in service till the following year. This is a matter which has got to be considered by the Labour Court. The Labour Court has held that as Iswaran was in service during the entire period of 1955-56 and a portion of the year 1956-57 he should be held entitled to the bonus. That is not the only consideration on which he would be entitled to the bonus. He has got further to satisfy that he got a benefit under the settlement, namely, that he was a worker on whom settlement would be binding under the provisions of section 18 (3). This matter has not been investigated by the Labour Court.

I therefore quash the order of the Labour Court and direct it to rehear the claim petition as to whether the second respondent was a person who would be entitled to any benefit under the settlement. The rule *nisi* is made absolute. There will be no order as to costs.

R.M. ——— *Rule absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASAN.

G. Sarangapani Iyengar .. *Appellant**

v.

Krishnan and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 32, rule 7—Suit by son for possession and mesne profits on basis of partition—Father, mother and their four minor children as defendants attacking partition as sham and colorable—Plaintiff challenged to take a special oath taking such oath—Decree passed for possession and mesne profits—If compromise requiring sanction of Court to bind the minors.

In a suit to recover possession and mesne profits on the basis of an alleged partition against the father, mother and four minors as defendants, the defence was that the partition was sham and colorable. On the plaintiff being challenged to take special oath, the plaintiff took the oath and a decree was passed for possession and mesne profits. In a subsequent suit by the minors it was contended that the decree in the earlier suit as regards mesne profits proceeded on a compromise and as sanction of Court was not obtained it was not binding on the minors. In the circumstances,

Held : When once it was decided in favour of the plaintiff in the earlier suit on the basis of the oath, which was but a species of evidence, the result had necessarily to follow that the decree for possession as well as mesne profits had to be given. The circumstance that "these defendants consent to a decree" formed part of the memo. filed on behalf of the minors did not make it a compromise entered into on behalf of the minors. Such agreement did not come within Order 32, rule 7 of the Civil Procedure Code. The prior decree for mesne profits was accordingly binding on the minors.

The matter cannot be examined without reference to the particular facts which went to the challenge to take the oath.

Appeal against the Decree of the Court of the Subordinate Judge, Madurai, in Appeal Suit No 29 of 1958 preferred against the Decree of the Court of the District Munsif of Madurai Town in Original Suit No 197 of 1957.

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*S.A. No. 22 of 1959. 10th November, 1960. (19th Kartika, 1882—Saka).

T. S. Kuppuswami Ayyar, for Appellant.

M. Natesan, for Respondents.

The Court delivered the following

JUDGMENT :—This Second Appeal arises under the following circumstances. The appellant, as plaintiff in O. S. No. 212 of 1953 on the file of the District Munsif, Madurai, sued to recover possession of certain property and for mesne profits from the defendants in that suit. Those defendants consisted of the father, the mother and the four minor defendants. The case set up by the present appellant (plaintiff in that suit) was that that item of property had vested in him by reason of certain earlier partition arrangements which had been effected. The defendants in that suit resisted that contention and attacked the alleged partition arrangements as sham and colourable transactions. Issues were joined, and at the time of trial, the plaintiff in that suit was challenged to take a special oath for the purpose of resolving the controversy whether there was a valid partition entitling the plaintiff to the property in question. Such an oath was taken, and, thereupon, the learned District Munsif passed a decree for possession of the property and for mesne profits, as prayed for in that suit.

The minor defendants in that suit, as plaintiffs in the suit leading to this appeal (O. S. No. 197 of 1957, District Munsif's Court, Madurai Town), alleged that, in so far as the decree in O. S. No. 212 of 1953 laid upon them the liability to pay mesne profits to the successful plaintiff therein, who is the appellant here, is vitiated for the reason that the decree was based on a compromise, which required the permission of the Court, and that such permission had not been obtained. In claiming that the decree was based on a compromise, what is really contended is that, in putting the plaintiff in that suit on a special oath in resolving the controversy in that suit, the challenge to take the special oath and to abide by the result, thereof, virtually amounted to a compromise, which should invite the application of Order 32, rule 7. The minors, as plaintiffs, however, did not attack that portion of the decree, which related to the possession of the premises in question, which also resulted from the taking of the special oath.

The contention of the appellant as defendant in this suit was that it was not a compromise and that no permission of the Court was required for inviting the opposing parties to take the oath under the Special Oaths Act.

On the issue whether the decree should be set aside as against the minor plaintiffs, the learned District Munsif came to the conclusion that the requirements of the Civil Procedure Code were not attracted to the present case and that the decree in that suit, O. S. No. 212 of 1953, was not liable to be set aside.

In an appeal, however, the learned Subordinate Judge of Madurai took a different view. He thought that the earlier decisions which dealt with this point and which were relied on by the learned District Munsif, did not have any application and that there had been a violation of the requirements of Order 32, rule 7, which necessarily led to the result that the decree in so far as the minors are concerned, which proceeded on the basis of the compromise, had to be set aside. Hence this Second Appeal.

It has been argued on behalf of the appellant that, the only point in controversy between the parties being whether the possession by the minor-plaintiffs along with their parents was in their own right and whether the partition that was pleaded by this appellant as plaintiff in that suit was vitiated for any of the reasons alleged by these minors, on a determination of that question, the inevitable result would follow that the suit had either to be dismissed or decreed. There could not, it is argued by learned counsel for the appellant, survive any matter for any further examination by the trial Court, and, certainly, the question of mesne profits would not also call for any further examination. If it was found on the taking of the special oath that the contention of these defendants, who were in possession of the premises, that the partition transactions were sham and nominal could not be sustained, their possession became unlawful, and since in the written statement there

had been no plea taken regarding the quantum or liability to mesne profits, the Court would naturally have passed the decree. It is urged, therefore, that, in so far as the question of mense profits was concerned, there was no compromise between the parties, which, in order to bind the minor defendants, should have had the sanction of the Court.

It is unnecessary to examine in detail the decisions bearing upon this point. *Chengal Reddi* v. *Venkata Reddi*[1], had clearly laid it down that the procedure of taking, a special oaths is only one method of letting in evidence on a disputed issue, and in so far as there is an agreement even on behalf of a minor party to a suit, inviting the other party to take an oath, such agreement does not come within the scope of Order 32, and the evidence so let in would be conclusive. The learned Judges have taken care to specify that such evidence would be operative only in so far as that particular issue is concerned and would not decide the suit in its entirety. The importance of that decision consists in the fact that it establishes that, where a special oath is taken, it amounts to the tendering of evidence of a particular kind on a specified matter. This principle has been followed in *Sheo Nath Saran* v. *Sukh Lal Singh*[2], and also *Baldeo Singh* v. *Niras Singh*[3].

What is, however, contended on behalf of the respondents in this appeal is that the agreement, Exhibit B-6, to take the special oath is couched in this manner. "If the plaintiff will take oath by putting out camphor in Court. . . . . . these defendants consent to a decree and vacate possession of the suit premises." The portion let out relates to the point in issue to be decided in a particular manner on the taking of the oath. Learned counsel for the respondents argues that, since this agreement goes to the extent of enabling the Court to pass a decree on the taking of the oath, it comes within the mischief of Order 32, rule 7. It seems to me that the matter cannot be examined without reference to particular facts which went to the challenge to take the oath. It is obvious from what has been stated earlier that the only real point in controversy between the parties was about the possession of the house, and, when once it was decided in favour of the plaintiff in that suit on the basis of the oath, which was but a species of evidence, the result had necessarily to follow that the decree for possession as well as mense profits had to be given. The circumstance that "these defendants consent to a decree" formed part of the memo. filed on behalf of the minors does not amount, in my opinion, to a compromise entered into on behalf of the minors. It is true that, in *Parbhu Dayal* v. *Jamil Ahmad*[4], the distinction was drawn between the establishment of a fact on the basis of a special oath and a compromise or agreement by guardian which required the sanction of the Court. On the facts of that particular case, it was held that, though the minor was bound by reason of section 11 of the Oaths Act, the statement of the minor's guardian that the suit could be decreed was held not to be binding on the minor, because that part of the statement, amounted to a compromise in respect of other matters in controversy. I am not satisfied that the facts of that decision have any application here.

It seems to me, therefore, that, when once the minor defendants in that suit became bound as a result of the oath taken by the plaintiff therein, the subsequent decree of the suit followed as a matter of course and was not based upon any consent or agreement of the guardian. The grounds upon which the learned Subordinate Judge distinguished the decisions on the point do not appear to be valid.

Learned counsel for the appellant does not seek to enforce the decree against the minors on the basis of any personal liability.

In the result, the judgment and decree of the Subordinate Judge are set aside and those of the District Munsif restored. There will be no order as to costs in this appeal.

No leave.

K.S. — *Appeal allowed.*

1. (1889) I.L.R. 12 Mad. 483.
2. (1899) I.L.R. 27 Cal. 229.
3. A.I.R. 1946 Pat. 272.
4. (1921) I.L.R. 44 All. 117.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VEERASWAMI.

Abdul Majid Lebbai .. *Appellant**

v.

Papathi Ammal and another .. *Respondents.*

Transfer of Property Act (IV of 1882), section 53—Fraudulent transfer—What is.

Madras Indebted Agriculturists (Re-payment of debts) Act (I of 1955), section 7—Presumption under.

The test to see whether a transfer is a fraudulent one within the meaning of section 53 of the Transfer of Property Act, is to find out whether the debtor has retained any benefit for himself under the impugned transfer. Hence even in cases where a property is sold to discharge an earlier mortgage, if out of the sale price the debtor receives some consideration to himself, however, small it may be, the transfer will be hit by section 53. The fact that the major part of the sale price went in discharge of an earlier mortgage on the very property covered by the sale-deed, does not in any way affect the position.

The statutory presumption against the validity of a sale enacted in section 7 of the Madras Indebted Agriculturists (Re-payment of Debts) Act, 1955, will be attracted in cases where a sale is effected under which the vendor derives some benefit for himself, even though the major portion of consideration for the sale goes in discharge of an earlier mortgage on the very property sold.

Appeal against the Decree of the Court of the Subordinate Judge, Thanjavur, in Appeal Suit No. 116 of 1957 preferred against the Decree of the Court of the District Munsif of Thanjavur in Original Suit No. 68 of 1956.

R. Gopalaswami Ayyangar, for Appellant.

N. R. Sesha Ayyar, for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal by the first defendant is directed against the Judgment and Decree of the learned Subordinate Judge of Tanjore in A.S. No. 116 of 1957 which confirmed the decree of the trial Court. The suit out of which the Second Appeal arises was instituted by the first respondent for a declaration that the suit property belonged to her and that it was not liable to be attached in execution of the decree in Small Cause Suit No. 934 of 1952 which the appellant had obtained against the second respondent. She claimed that she had purchased the suit property from the second respondent under a sale-deed, dated 23rd September, 1955. On 17th October, 1955, in E.P. No. 392 of 1955, the appellant attached the suit property and the first respondent's claim in E.A. No. 708 of 1955 on the strength of the sale-deed in her favour was rejected by the trial Court. It is that order which the first respondent sought to set aside in the suit.

The appellant's case was that the sale aforesaid executed in favour of the first respondent was fraudulent and was voidable under section 53 of the Transfer of Property Act, that it was executed during the enquiry for arrest in E.P. No. 244 of 1955, in execution of another decree which the appellant had obtained in S.C. No. 716 of 1952 against the second respondent, that the second respondent was actually living opposite to the house of the first respondent and was also related to her and that the sale should be presumed under section 7 of the Madras Act (I of 1955) to have been one made with intent to defeat and delay the creditors of the second respondent.

Although the trial Court was of the view that the circumstances showed that the sale was intended to frustrate the appellant in his attempt to realise the fruits of his decrees, it nevertheless considered that the presumption under section 7 of the Madras Act (I of 1955) was rebutted by the fact that the sale was to discharge a pre-existing mortgage on the property and not to delay or defeat the vendor's creditors. The trial Court, therefore, decreed the suit. The lower appellate Court proceeded upon the footing that the appellant could not avail himself of the pre-

*S.A. No. 880 of 1958. 20th October, 1960.
(20th Asvina, 1882-Saka).

sumption under section 7 of the said Act in the view that although the second respondent was an agriculturist till 12th April, 1955, he was not an agriculturist after 28th September, 1955 and agreed with the trial Court that inasmuch as the sale was executed for the purpose of discharging an earlier mortgage it could not be held to be a transaction entered into with a view to defeat or delay the second respondent's creditors. In the result, the lower appellate Court dismissed the appeal before it. The first defendant having lost in both the Courts below has preferred the Second Appeal.

Sri R. Gopalaswami Ayyangar, the learned counsel for the appellant, contended that the Courts below went wrong in affirming the sale in favour of the first respondent. His contention was that although the sale purported to be in discharge of an earlier mortgage, in as much as the vendor got some benefit under the sale and retained the same to himself, the sale was one which was affected by section 53 of the Transfer of Property Act; that the presumption under section 7 of Madras Act (I of 1955) applied to the sale and that the circumstances in which the sale was executed, far from rebutting the statutory presumption, went to support the same. It seems to me that this contention has force.

The sale in favour of the first respondent was for a consideration of Rs. 600 of which Rs. 522 went in discharge of an earlier mortgage of the property, dated 30th June, 1947. It is common ground that the second respondent received the balance of Rs. 78 before the Sub-Registrar at the time of the registration of the sale-deed and had retained the benefit of that money. It is also common ground that the appellant had obtained a decree against the second respondent in S.C. No. 716 of 1952 and had filed E.P. No. 244 of 1955 for the arrest of the second respondent in execution. The second respondent was actually arrested on 20th September, 1955. He then paid a sum of Rs. 10 and took time till 26th September, 1955, for settlement of the outstanding debt due to the appellant under the decree. As I said, the sale of the suit property was executed by the second respondent in favour of the first respondent on 23rd September, 1955. It is true that on that date there was no subsisting attachment on the property. But the fact that it was executed after his arrest and before the adjourned date of E.P. No. 244 of 1955 clearly suggested that the sale was executed with a deliberate intent to frustrate the appellant and defeat and delay the creditors of the second respondent. It is no doubt well-settled that if the effect of a transfer of immovable property is only to defeat a particular creditor or to prefer a particular creditor or creditors of the transferor to another, such a transfer cannot be held to be a fraudulent transfer within the meaning of section 53 of the Transfer of Property Act. It has been frequently held that a transfer which defeats and delays creditors is not an instrument which prefers one creditor to another but an instrument which removes the property from the creditor to the benefit of the debtor. The test to see whether a transfer is a fraudulent transfer within the meaning of section 53 of the Transfer of Property Act is to find out whether the debtor has retained a benefit for himself under the impugned transfer. If he has retained any benefit under a transfer, the transfer will clearly come within the mischief of section 53 of the Transfer of Property Act. Now in this case it is not denied that the second respondent under the sale in favour of the first respondent retained for himself the benefit of a part of the consideration therefor, namely, Rs. 78. It does not appear that the second respondent was possessed of any other property. In the circumstances, it seems to me that although the sale was substantially for discharging an earlier mortgage and the mortgage in fact was discharged by the first respondent, inasmuch as the second respondent obtained a benefit for himself under the sale to the extent of Rs. 78, which he could have applied in discharge of his other debts, the sale was a fraudulent one within the meaning of section 53 of the Transfer of Property Act. This conclusion is reinforced by the other circumstances already referred to, and the particular time in which the sale was executed. In my opinion, the sale, dated 23rd September, 1955, was, therefore, voidable at the instance of the appellant and the mere fact that the bulk of the consideration for the sale went

in discharge of an earlier mortgage on the very property covered by the sale did not, in any way, affect that position.

The second respondent in E. A. No. 117 of 1955 claimed that he was an agriculturist entitled to the benefit of section 4 of Act (I of 1955) and on that ground prayed that the Execution Petition No. 116 of 1954 should be dismissed. That application was allowed by the learned District Munsiff by his order, dated 12th April, 1955, on a finding that the second respondent was an agriculturist entitled to the benefit of that Act. No fresh considerations appear to have been placed before the lower Courts or proved by the repondents to justify the assumption that the second respondent ceased to be an agriculturist subseqeunt to 12th April, 1955. In fact it was not disputed before me by the learned counsel for the first respondent that Act (I of 1955) was applicable to the second respondent. Sub-section (1) of section 7 of that Act states:

> "Every transfer of immovable property made by a debtor entitled to the benefits of this Act after the 1st October, 1958 and before the complete discharge of his debt, shall, in any suit or other proceeding with respect to such transfer, be presumed until the contrary is proved, to have been made with intent to defeat or delay the creditors of the transferor."

The sale-deed in favour of the first respondent having been executed by the second respondent on 23rd September, 1955, the presumption enjoined by the above statutory provision applies to it and it has, therefore, to be deemed to be a transfer made with intent to defeat or delay the creditors of the second respondent. The only way the trial Court attempted to get over the presumption was by stating that the sale was to discharge an earlier mortgage. But the fact is that the sale was not only to discharge an earlier mortgage but the second respondent obtained a benefit for himself though to the extent of only a minor portion of the consideration and retained it with him to the detriment of his creditors. On that ground and in the light of other circumstances mentioned by me, I have already held that the sale came within the mischief of section 53 of the Transfer of Property Act. On the same reasoning it follows, therefore that the statutory presumption applicable to the sale in question has not been rebutted.

Disagreeing with the Courts below, I hold that the sale-deed Exhibit A-4, dated 23rd September, 1955, is not binding on the appellant and that the first respondent is not entitled to a decree as prayed for by her. The Second Appeal is allowed, the judgment and decrees of both the Courts below are set aside and the suit will stand dismissed with costs throughout. But inasmuch as the first respondent had paid Rs. 522 and discharged the earlier mortgage under Exhibit A-1, the first respondent will have a charge on the suit property for that amount namely Rs. 522. In fact Sri R. Gopalaswami Ayyangar, the learned counsel for the appellant, conceded that the first respondent is entitled to the charge. The charge in favour of the first respondent will therefore, be provided for in the decree dismissing the suit.

No leave.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VEERASWAMI.

Sundarambal ... *Appellant**

v.

Suppiah Pillai ... *Respondent.*

Hindu Adoption and Maintenance Act (LXXVIII of 1956) sections 4, 20 and 24—Effect of on rights under prior Hindu Law and usage.

The Hindu Adoption and Maintenance Act, 1956, is an amending and codifying legislation and has an overriding effect and prevails over all other laws or usages relating to maintenance among Hindus for which provision is made under the Act. Hence on and from the date on which the Act

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*S.A. No. 957 of 1958. 9th September, 1960.
(18th Bhadra, 1881, Saka.)

came into force *viz.*, 21st December, 1956, the liability of a Hindu father to provide for the maintenance of his daughter will be governed by the statutory provision under which the right to claim maintenance will cease on conversion of the daughter to another religion. The right to claim maintenance being a personal right, a person who has lost the right as a result of conversion to another religion cannot sue for past maintenance either after the coming into force of the Act.

Appeal against the decree of the District Court of Madurai, in Appeal Suit No. 219 of 1957, preferred against the Decree of the Court of the District Munsif of Madurai Town at Madurai in O.S. No. 345 of 1956.

K. V. Srinivasa Ayyar, for Appellant.

N. S. Srinivasan, for Respondent.

The Court delivered the following

JUDGMENT.—The appellant, a Hindu unmarried girl, sued her father for past maintenance from 20th December, 1948 to 20th September, 1958 and future maintenance from the date of the suit. Pending the suit she got employed on 1st June, 1956, became a convert to Christianity and married a Christian husband on 7th July, 1957. The Hindu Adoption and Maintenance Act, 1956, came into force in the meantime on 21st December, 1956. The trial Court granted a decree for past maintenance as prayed for but restricted future maintenance upto 23rd January, 1957, on the erroneous assumption that the said Act came into force on that date. The rate at which maintenance was decreed is not material for purposes of this Second Appeal. The father having appealed against the decree, the lower appellate Court allowed the appeal and dismissed the suit on the view that by reason of the first plaintiff's conversion to Christianity she could no longer claim maintenance under the said Act and the Act itself had to the extent to which it made provision, had repealed Hindu law and usage relating to maintenance. Hence the Second Appeal by the first plaintiff.

Sri K. V. Srinivasa Iyer, the learned counsel for the appellant contended that as the repeal of Hindu Law and usage relating to maintenance took effect only from the date on which the Act came into force, there was nothing in the Act which *pendente lite* extinguished the first plaintiff's right to maintenance under Hindu Law in force until the date of its repeal. On the other hand, Sri N. S. Srinivasan, the learned counsel for the respondent, urged that the right to sue for maintenance being not a vested right, the law as it stood at the date of the decree governed the rights of the parties. According to him the only law under which the first plaintiff could sustain her claim being the Act and not Hindu Law which it had repealed and as by reason of her conversion, the Act no longer applied to her, the suit was rightly dismissed by the lower appellate Court.

The relevant provisions of the Act are these :

"4. Save as otherwise expressly provided in this Act—

(*a*) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(*b*) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act !

* * * * * *

20 (1). Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

Explanation.—In this section ' parent ' includes a childless step-mother.

* * * * * *

24. No person shall be entitled to claim maintenance under this chapter if he or she has ceased to be a Hindu by conversion to another religion."

The object of the Act is not merely to amend but to codify the law relating to maintenance of Hindu dependents. Section 4 provides, therefore, that Hindu Law and usage to the extent to which the Act has made provision for rmaintenance, shall cease to have effect and that all other laws inconsistent with its provisions shall also cease to have effect. The Act has thus an overriding effect and prevails over all other laws relating to Hindu maintenance for which it has made provision. On and from the date on which the Act came into force, it is the provisions of the Act and not Hindu Law that regulate the liability of a Hindu to provide maintenance. Section 20 enjoins that a Hindu father is bound to maintain among others, his unmarried daughter who is unable to maintain herself from her own earnings or other property. Under Hindu Law, of course, the father's liability was wider and did not depend on his unmarried daughter's ability to maintain herself. Section 24, which is important for purposes of this appeal, is clear that if a person ceases to be a Hindu, he or she is disentitled to claim maintenance under the Act.

Obviously on account the fact that the plaintiff ceased to be a Hindu and became a Christian, she has lost her right to claim maintenance any longer under the Act. By reason of section 4, Hindu Law relating to maintenance is no longer in force either from 21st December, 1956. The result, therefore, is that the first plaintiff is not entitled to maintenance either under the Act or Hindu Law of maintenance which has ceased to exist after that date. The question then is whether her claim for the period anterior to that date is enforceable any more.

It seems to me that the answer to the question will depend on the nature of the right to claim maintenance. It is well-settled that the right to claim maintenance is no more than a mere personal right. It is certainly not a vested right which can be assigned. A decree for maintenance fixed at a specified rate is another matter. The personal right itself stemmed from the relationship of the parties and the provisions of Hindu Law relating to maintenance. Being a personal right, it cannot naturally survive the person claiming it. I think the same result will follow upon a conversion of a Hindu to another religion. After ceasing to be a Hindu she or he cannot enforce his or her right to past maintenance under Hindu Law. Can a Hindu daughter after her marriage bring and sustain an action to recover past maintenance? On principle and having regard to the nature of the personal right, she cannot.

From what I have said above, it appears to follow that when once Hindu Law of maintenance ceases to operate, the right of a Hindu to claim past maintenance also ceases automatically. In my opinion, this conclusion inevitably flows from the fact that the right to claim maintenance, past or future, is not a vested right but a personal one depending on the personal law. If the personal law ceases, the personal right to sue under that law too ceases. In other words, the continued existence of Hindu Law of maintenance is the foundation on which the right to sue for maintenance is founded.

In this case, therefore, Hindu Law of maintenance to the extent provided by the Act having ceased to have force from 21st December, 1956 and as the plaintiff due to her conversion to Christianity became disentitled to claim maintenance under the Act, the lower appellate Court rightly dismissed the suit. Sri K. V. Srinivasa Iyer contended that the Act was not retrospective in its operation. But on the view I have expressed above, the question does not arise for consideration.

The Second Appeal fails and is dismissed. But in the circumstances, there will be no order as to costs.

Leave granted.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Subbaroya Chettiar .. *Appellant**

v.

Vythianatha Mudaliar .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938), *section* 13—*Scaling down of debts under—Re-opening of transaction—Scope of.*

Section 13 of the Madras Agriculturists' Relief Act, 1938, is a specific provision with regard to debts incurred after the Act and there is no provision under it to scale down debts by tracing the debt back to its inception as in cases under sections 8 and 9 of the Act. Hence where a debt incurred for the first time after the Act, has been renewed several time by adding interest in excess of the statutory rate in a suit brought on the last promissory note the debtor cannot claim to reopen the last transaction and get the interest calculated on the original debt at the statutory rate.

S. M. Tharaganar v. *Sankarapandia Mudaliar*, (1958) 2 M.L.J. 568 (F.B.), referred.

Appeal against the Decree of the Court of the Subordinate Judge of Cuddalore, in Appeal Suit No. 242 of 1955, preferred against the Decree of the Court of the District Munsif of Vridhachalam, in Original Suit No. 478 of 1953.

V. C. Viraraghavan, for Appellant.

M. Natesan, for Respondent.

The Court delivered the following

JUDGMENT.—The appellant in this Second Appeal instituted O.S. No. 477 of 1953 on the file of the District Munsif's Court, Vridhachalam, for recovery of a sum of Rs. 1,819, alleged to be due to him on a promissory note, dated 3rd January, 1948, executed by the defendants along with another, one Velamarudai, in his favour. There were prior transactions between the parties, and one of the grounds raised by the defendant was that he was an agriculturists entitled to the benefits of Madras Act (IV of 1938), and that the suit promissory note being only a renewal of earlier promissory notes executed by him, the suit debt claimed should be scaled down appropriately in accordance with the provisions of the Act. The learned District Munsif of Vridhachalam decreed the suit as prayed for, overruling the contentions of the defendant. There was an appeal by the defendant which was heard by the learned Subordinate Judge of Cuddalore in A.S. No. 242 of 1955. The learned Subordinate Judge allowed the appeal in part, holding that the suit promissory note merely represented renewals of prior transactions and that the plaintiff could not recover anything more than the amount advanced at the time of the origin of the debt together with the statutory rate of interest prescribed under the Act. A joint memo. of calculation was filed before the learned Subordinate Judge and a decree was passed, giving effect to his judgment, as referred to above.

The plaintiff has now preferred this Second Appeal. It is now common ground that the transaction between the parties originated as early as 11th November, 1941. On that date, the defendant, along with Velamarudai, executed a promissory note (Exhibit A-2) in favour of the plaintiff for Rs. 1,200. Contemporaneously with the execution of the promissory note, the executants of the note also executed a security bond, Exhibit A-1, dated 11th November, 1941, furnishing security of immovable properties for the debt incurred under the promissory note. The amount referred to in the security bond is a sum of Rs. 1,500. It is possible that it was within the contemplation of the parties that there might be future advances by the plaintiff to the defendant and Velamarudai. On 11th January, 1944, the plaintiff received a sum of Rs. 500 towards the debt in his favour. Exhibit A-3 is the endorsement of payment on Exhibit A-2. Thereafter, the plaintiff attempted to recover the debt by filing a suit. But the plaintiff and the defendant came together and settled the accounts, with the result that, on 31st December, 1944,

* S.A. No. 304 of 1958 and the Memorandum of objections. 11th July, 1960.
(20th Asadha, 1882, Sala).

the defendant and Velamarudai executed a fresh promissory note, Exhibit A-4, for a sum of Rs. 930, the total liability undertaken by the defendant as per the settlement reached. On 3rd January, 1948, the defendant and Velamarudai executed another promissory note, Exhibit A-5, for a sum of Rs. 1,192, this being a renewal and consolidation of the earlier debt due under Exhibit A-4. There was an endorsement of payment of Re. 1 made on Exhibit A-5 on 2nd January, 1951, by the defendant. The suit was filed on 11th November, 1953.

On these facts, it is plain that the plaintiff will be entitled to sue for the recovery of the principal amount found mentioned in Exhibit A-5 together with the statutory rate of interest at five and half per cent. per annum, it being admitted that the defendant is an agriculturist entitled to the benefits of the Act. The contention of the defendant, however, was that Exhibit A-5 was merely a renewal of Exhibit A-4, which was in turn a renewal of Exhibit A-2, and that the plaintiff could recover only the principal originally advanced together with the statutory rate of interest provided for under the Act. A Full Bench decision of this Court reported in *S.M. Tharaganar* v. *Sankarapandia Mudaliar*[1], has now held that if a debt was incurred for the first time after the Agriculturists Relief Act and it has been renewed several times by adding interest at the contract rate in excess of the rate mentioned in section 13 and a suit brought upon the last pronote, bond or settlement of account, the debtor cannot claim to re-open the last transaction and get interest calculated on the original debt at the statutory rate. In this case, the first of the promissory notes was after the Act, having been executed on 11th November, 1941. The debt was therefore incurred after the Act. Section 13 of Madras Act (IV of 1938) is a specific provision with regard to debts incurred after the Act. It must be noted that there is no machinery under section 13 to scale down the debts covered by that provision by tracing the debt back to its inception. Sections 8 and 9 of the Act, which deal with the debts incurred before the commencement of the Act, contain express provisions for scaling down the debt by tracing the debt sued upon back to the inception or the commencement of the liability. The learned counsel for the respondent has sought to distinguish the decision of the Full Bench from the present case and contended that, though the defendant was precluded from seeking relief on the basis that the suit promissory note is a renewal of an earlier obligation, yet, part of the consideration for the suit promissory note consisted of interest in excess of the statutory rate provided for and therefore such consideration was unlawful and illegal. I do not think that the Full Bench case can be distinguished in such a manner. If the last promissory note, as held by the Full Bench, can alone be the foundation of the rights between the creditor and the debtor, it follows that the principal of that note is recoverable. It is not open to the Court to dissect the principal amount covered by the last promissory note and find out to what extent it comprised the interest due on the earlier transactions in excess of the statutory rate prescribed under the Act. There is nothing unlawful or opposed to public policy in the act or conduct of a debtor foregoing the benefit of the statutory reduction of his liability in order to perform his contractual obligations. Voluntary payments and settlement of accounts by the debtor without availing himself of the statutory benefits, knowingly or unknowingly, cannot *ipso facto* become illegal. In view of the decision of the Full Bench referred to above, the plaintiff-appellant will be entitled to a decree for a sum of Rs. 1,192 with subsequent interest from 3rd January, 1949 at 5½ per cent. per annum.

The plaintiff has framed the suit as one for recovery of the suit amount based upon a charge created under the security bond, dated 11th November, 1941, Exhibit A-1. The learned counsel for the plaintiff-appellant has frankly conceded that the suit promissory note, Exhibit A-5, must be treated as being independent of the earlier promissory notes and of the security bond, Exhibit A-1. It will not be open to the plaintiff to resist the claim of the defendant to trace the suit debt to Exhibits A-1 and A-2 and yet found his rights on Exhibit A-1. The learned counsel has therefore represented to this Court on instructions from his client that he is

1. (1958) 2 M.L.J. 568 (F.B.).

not pressing the charge decree prayed for by him in the plaint. The plaintiff having thus given up that part of the plaint claim which relates to the enforcement of the security bond, there can be no legal difficulty in the way of his getting a simple money decree for recovery of the principal amount covered by Exhibit A-5.

In the result, the Second Appeal is allowed. The judgment and decree of the Court below are set aside, and the plaintiff will have a decree as referred to already for recovery of the sum of Rs. 1,192 together with interest at 5½ per cent. per annum from 3rd January, 1948. The parties will bear their respective costs in the Courts below. The appellant will get his costs from the respondent in this Second Appeal.

In view of the concurrent findings of the Courts below, there are no merits in the Memorandum of objections. The objections are accordingly dismissed. There will be no order as to costs.

R.M. —— *Appeal allowed. Memorandum of objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VEERASWAMI.

The Palayamkottai Municipality, through its Commissioner Subramaniam .. *Appellant**

v.

G. N. Kantayya and another .. *Respondents.*

Madras District Municipalities Act (V of 1920), section 88 (4)—Effect of—Transferee of part of property—If liable to pay the tax on the entire property due to failure of transferor to give notice of the transfer.

It is clear from the terms of sub-section (4) of section 88 of the Madras District Municipalities Act, that it only provides for the transferor's continued liability in the event of his failure to notify the Municipality within the time specified in sub-section (1) of the section, of the transfer effected by him. The penalty for non-intimation is that notwithstanding the transfer made by an owner of a portion of his property, his liability to pay the entire tax in respect of the whole property would continue till the change is made in the registry of the Municipality. Sub-section (4) (*a*) no doubt also provides that the liability of the transferee to pay the tax on that part of the property purchased by him is not in any way affected by reason that the transferor's liability to pay the tax on the entire property continues. But that does not mean that a transferee of a part of a property will be liable to pay the tax even in respect of the part not transferred to him.

Appeal against the Decree of the Court of the Subordinate Judge, Tirunelveli, in Appeal Suit No. 2 of 1957, preferred against the Decree of the Court of the District Munsif of Tirunelveli, in Original Suit No. 257 of 1955.

B. V. Viswanatha Ayyar, for Appellant.

K. Srinivasan and *K. Shanmugam,* for Respondents.

The Court delivered the following

JUDGMENT.—Palayamkottai Municipality, which was the first defendant in the suit, is the appellant in this Second Appeal. The suit was to recover a sum of Rs. 522-8-6. The basis of the claim was that this amount had been illegally collected from the plaintiff as property tax, and that the Municipality was bound to refund the amount. In 1944 the plaintiff purchased the second defendant-inamdar's interest in 1.7 acres out of a larger extent of 25.25 acres of land and also acquired subsequently in about 1945 the kudiwaram interest in the 1.7 acres. The Municipality claimed that the plaintiff was liable to pay tax for the property from 1st October, 1948 to 31st March, 1952, even in respect of the remaining extent of 25.25 acres not transferred to him. As the plaintiff had to stand as a candidate for the municipal election and if the tax was not paid the Commissioner, as the Election Officer, threatened to reject his nomination, the plaintiff was compelled to pay the tax under protest. The plaintiff's case was that whatever might be the liability of the transferor to the property tax for the entirety of the property consequent upon the fact that he failed to give notice within the time prescribed by the statute, his liability to tax was only confined to the property transferred to him. The pro-

*S.A. No. 73 of 1959. 8th November, 1960. (17th Kartika, 1882, Saka.)

perty that was transferred to him, *viz.*, 1.7 acres was a defined area described by boundaries and extent. The defence for the Municipality was that inasmuch as the second defendant-transferor failed to give notice of the transfer within the time prescribed by section 88 (1) of the District Municipalities Act, both the transferor and the transferee of a portion of the property would be liable to property tax for the entirety of the property. There were other defences also raised by the Municipality such as that the Court had no jurisdiction, that the suit was barred by limitation and that the payment of tax by the plaintiff was a voluntary one. Both the lower Courts repelled every one of them and decreed the suit.

In this Court, the only point argued on behalf of the first defendant was about the liability of the plaintiff to pay property tax even in respect of the property not transferred to him by the second defendant. Sri. B. V. Viswanatha Iyer, the learned counsel for the Municipality, contends that it being common ground that no notice was given by the second defendant of the transfer of 1.7 acres to the plaintiff as required by section 88 (1) of the District Municipalities Act, not only the transferor but also the transferee of the 1.7 acres would be liable for the tax for the whole of the property under section 88 (4) of the Act. The learned counsel contends that the property tax levied on the entire property of an extent of 25.25 acres was one and indivisible and that so long as the provisions of sub-section (1) of section 88 were not complied with, the liability of the transferor to pay the entire tax, notwithstanding the transfer of a position of the property, continued and that by virtue of the *non-obstante* clause in sub-section (4) of section 88 the transferee also became liable for the entire tax. It seems to me that this contention is based upon a complete misunderstanding of the true scope of section 88 (1) and (4). The liability to pay property tax arises under section 81. The method of assessment of property tax is provided for by section 82. Section 85 provides that the property tax shall be a first charge upon the relative property. Section 88 (1) runs :

"Whenever the title of any person primarily liable to the payment of property tax on any premises to or over such premises is transferred, the person whose title is transferred and the person to whom the same shall be transferred shall within three months after the execution of the instrument of transfer or after its registration if it be registered or after the transfer is effected, if no instrument be executed, give notice of such transfer to the Executive Authority."

Section 88 (4) runs :

"Every person who makes a transfer as aforesaid without giving such notice to the Executive Authority shall in addition to any other liability which he incurs through such neglect, continue liable for the payment of property tax assessed on the premises transferred until he gives notice or until the transfer shall have been recorded in the municipal registers but nothing in this section shall be held to affect—

(*a*) the liability of the transferee for the payment of the said tax . . . ."

For the purpose of this Second Appeal it is not necessary to set out clause (*b*) of sub-section (4) of that section. It is clear from the terms of sub-section (4) that it only provides for the transferor's continued liability in the event of his failure to notify the Municipality within the time specified in sub-section (1) of the transfer effected by him. The penalty as it were, for not complying with the provisions of sub-section (1) is that notwithstanding the transfer made by him of a portion of the property, his liability to pay the entire tax in respect of the whole of the property including the portion transferred would continue until a change in the registry is effected in the books of the municipality. The contention of Sri B. V. Viswanatha Ayyar, however, is that the words in sub-section (4) "but nothing in the section shall be held to affect. . . . (*a*) the liability of the transferee for the payment of the said tax" indicated that the transferee was equally liable to pay the entire tax which, according to him, is one and indivisible. Sub-section (4) has obviously provided for no liability and the words relied on by the learned counsel do not justify such a construction. The liability to pay property tax does not arise under sub-section (4) of section 88. The liability arises under the other charging provisions of the Act. Sub-section (4) of section 88 is not a charging provision. Its purpose is mainly to safeguard the revenue of the Municipality and with that object in view,

it provides that so long as the registry continues in the name of the transferor by reason of his default in notifying the transfer within time, he should continue to be liable to pay the property tax in respect of the transfered property as well. But sub-section (4) of section 88 at the same time takes care to provide that the fact that the transferor should be deemed to continue to be liable to pay the entire tax, should not be understood to invoke the consquence that the transferee is relieved of his liability to pay the property tax on that part of the property transferred to him. The transferee by virtue of the latter clause in sub-section (4) cannot plead that because the transferor is made liable by that provision for the entire tax, he would not at the same time be liable to pay property tax in respect of the property transferred to him. In my view, that is all the effect of sub-section (4) of section 88. I cannot, therefore accept the contention of the Municipality that the plantiff was liable to pay property tax even in respect of the property not transferred to him. In the circumstances therefore, the suit was rightly decreed. This Second Appeal fails and is dismissed with costs.

No leave.

R.M. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

A. K. Abdul Azeez .. *Appellant**

v.

V C. Ramalingam (deceased)
Kamalammal. } .. *Respondents.*

Contract—Contract of sale of goods—Stipulation as to mode of transport—If an essential term—Breach of —If would give the buyer the right to repudiate the contract.

Where a particular mode of transmission of goods stipulated in a contract of sale is expressly or impliedly agreed upon between the parties, then such stipulation as to mode of transport would be a material stipulation, breach of which would give the buyer a right to repudiate the contract.

Appeal against the Decree of the City Civil Court, Madras, dated 31st October, 1957, in Appeal Suit No. 15 of 1956, preferred against the Decree of the II Additional Judge of the City Civil Court, Madras, in O.S. No. 265 of 1950.

V. S. Rangachari, for Appellant.

C. Vasudevan, for Respondents.

The Court delivered the following

JUDGMENT.—The appellant entered into a contract with the respondent who was the agent of the Maya Engineering Works, Calcutta, on 27th May 1949, for the pupose of 42 pumps. An advance of Rs. 100 was paid on the date of the contract. The balance of the purchase-money was agreed to be paid against the delivery of railway receipt which was to be sent through the respondent's banker. The terms of the contract were that the goods should be sent by train to the Madras Salt Cotaurs, and that the responsibility of the same was to cease with the delivery of the goods to the carrier at Calcutta. The Maya Engineering Works did not however send the goods by rail. It is unnecessary now to ascertain the reasons which prevented them from adhering to the terms of the contract. In August, 1949, they sent by ship the goods agreed to be purchased and sent the appellant the relative invoice with a request to honour the bill. The appellant did not pay the bill or receive the document, as he was not sure that he would get the goods undamaged and intact under a sea transport. Correspondence followed between the parties. The appellant wanted an assurance that the goods would reach him in good condition without pilferage, and that any loss in the account should be compensated by the seller. The correspondence and negotiations that followed led

* S.A. No. 164 of 1958. 18th August 1960
(27th Sravana, 1882—Saka.)

to a delay and the appellant further insisted as a condition of his paying the bill that there should be a guarantee from the respondent to compensate him in respect of demurrage payable, and also for the overdue interest, in respect of the unpaid purchase-money ; the respondent offered that, if there was any defect in the goods on account of defective manufacture, they would replace them, but they did not agree to bear the loss in transit, whether due to pilferage or other causes. From the correspondence, it is clear that the appellant was ready to take delivery of the goods, if the respondent would meet his demands regarding compensation. The respondent, on the other hand, insisted that the responsibility of the supplier ceased with putting the goods on board the ship and all risks, demurrage, etc., would have to be taken by the appellant. Furrther correspondence did not induce the parties to change their respective attitudes. The appellant finally repudiated the claim of the respondent on the ground that, as the latter had not acted up to the terms of sending the goods by train, but instead sent them by steamer, he was absolved from all obligations under the contract but that the respondent being guilty of breach in not sending the goods in accordance with the contract, was answerable in damages to him, besides returning the advance paid. The respondent cleared the goods, after paying the charges due to the Port Trust, etc. But the respondent filed the suit, out of which this appeal arises, for recovery of the entire balance of price of the goods, namely Rs. 876-11-3, incurred by them and subsequent interest. There was an offer to deliver the goods taken by the respondent. The appellant countered it by instituting a suit or recovery of the advance paid, and a further sum of Rs. 145 as damages.

Both the trial and appellate Judges held that the mode of transport stipulated in the contract was an immaterial term, and that the appellant was not entitled to refuse to take delivery of the goods or pay for the same. In that view, the suit was decreed. The appellant's claim for refund of advance and damages was rejected, and as the suit was originally laid as a small cause suit, no further appeal was possible and no other proceedings appear against that decree of the trial Court.

This present appeal is, therefore, concerned with the question, whether the seller was entitled to recover the price of the goods on the ground that the buyer was in default. It is not disputed that the contract of sale expressly stipulates that the goods should be depatched by train. The respondent stated in the plaint that an alteration of that term enabling a despatch by sea was agreed to between the parties. This was denied in the written statement. No issue was raised on the question or evidence tendered. Both the trial as well as the appellate Judges proceeded on the footing that Exhibit A-1 governed the rights of the parties, namely, that the mode of transport agreed between the parties was through rail. But they held that the term relating to the carriage of goods by train was an immaterial one.

If the term is held to be material one, it cannot be said that the stand taken by the appellant was incorrect. Under section 39 (3) of the Sale of Goods Act, where goods are sent by sea the seller (in the absence of specific agreement), should give sufficient notice to enable the buyer to insure the goods, failing which he would be responsible for the risk. In the present case, transport by sea was not agreed to : and the respondent could not rely on the contract which absolves him of all risk after delivery to the carrier, *viz.*, the railway. It was perfectly open to the appellant to stipulate his terms, when a different method of transport was adopted unilaterally by the respondent or his principal. Reliance is, however, placed on the admission of the appellant in his evidence, where he has stated :—

> " I did not accept the goods. My only grievance or apprehension was that the goods might be found broken. The mode of transport is not important or material term in Exhibit A-1 and it is no grievance to me that the goods were sent by sea. It did not matter to me whether the goods were sent by sea or by train."

It may be that the appellant thought that so long as he got the goods in the condition stipulated, he should not, personally speaking, mind the mode in which they were sent. But that cannot mean that he agreed to the despatch of goods by sea or even agreed that it was open to the appellant, at his own choice, to change

the manner of delivery, and that, on such choice being made so as to send the goods by sea, he should take all the risks of a sea transport. I cannot agree with Mr. Vasudevan, the learned counsel for the respondent, that the admission of the appellant amounts to proving of the fact that the term as to the carriage of the goods was immaterial term.

The substantial question then is whether, under the law, the term relating to the carriage of goods, which is specifically inserted in a contract of sale, is an unessential term of the contract. The law on this subject is stated by Benjamin on the Sale of Personal Property, 8th Edition, at page 342 thus :

> " On the same principle, if a particular mode of transmission be expressly or impliedly prescribed by the contract, as, for example, delivery to a specified carrier, or by a particular route, the goods must be delivered to that carrier, or by that route."

Then again, at page 738, the learned author states, after considering the provisions of section 32 (1) of the English Sale of Goods Act :—

> " 'Whether named by the buyer or not' shall be read subject to the preceding words, ' in pursuance of the contract ', so that if the buyer names a particular carrier the seller must deliver to him, otherwise there will be no proper delivery."

This question has been considered by the Court of Appeal in *Sutro & Co. & Heilbut Symons & Co.*, In re[1], where it was held that, where the contract specifically provided for a sea carriage, it would not be open to one of the parties, in the absence of agreement, to send the goods partly by sea and partly by land, even though there was a usage which entitled them to do so. The purchaser in the case who repudiated the contract, sought to jusitfy his repudiation by stating that a transit by rail would prejudice him, by reason of its uncertainty in regard to the date of arrival. Swinfen Eady, L.J., observed that even that was not required under the law. In other words it was not necessary to justify in a Court of law the mercantile reasons for inserting any particular stipulation in a contract. The learned Judges held that, on a consideration of the terms of the contract, which provided only for a sea carriage from the loading port to the ultimate port of discharge, transports by rail was not permissible. The learned Judge further stated, at page 357 :—

> " The contract is to send by a specified method of conveyance by ship. This is a usual method, and the route by sea is a usual route. Where a method of conveyance and route, namely, a sea route, are specified, it is immaterial that there may co-exist some other usual mode of conveyance and route. The terms of the contract must be observed."

After referring to the usage pleaded, the learned Judge continued :

> " Any such usage, if found, would be inconsistent with the terms of the written contract, and repugnant to them, and therefore inadmissible to annex a new term or condition to the contract. It is not like a case where words or phrases employed in commerce are alleged to have been used in some special technical sense other than their ordinary sense. Moreover, the whole context of the contract shows that the parties were employing the words used in their ordinary sense".

Bray, J., who agreed with the view, also stated that the custom or practice, or whatever it be, could not be read into the contract. In the present case, the respondent failed to make out his case, that there was an agreement between the parties, under which the seller and the buyer might have varied the original term as to transport. It must, therefore, follow that the only term contained in the contract was transport by rail. Such stipulation would be a material stipulation, and the observation of Swinfen Eady, L.J., in the case just now cited will be apposite in this connection. As stated already, once it is conceded that the term as to transport by rail is material one, the respondent should be found to be guilty of breach of the contract, as his principal did not send the goods in conformity with the contract. The appellent was not bound to accept the goods sent without his prior sanction through sea route. A decree for damages against the appellant cannot, therefore, be sustained.

The appeal is allowed with costs throughout.

Leave refused.

R.M. — *Appeal allowed.*

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1. L.R. (1917) 2 K.B. 348.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

The Madras State Electricity Board, represented by its Secretary. *Appellant**

v.

The Commissioner of Labour, Madras-5 and others .. *Respondents.*

Madras Shops and Establishments Act (XXXV of 1947), sections 2(3) and 4—Commercial establishment —State Electricity Board—If a commercial establishment—If exempt from the operation of the Shops Act.

In order to bring a person within the definition of a commercial establishment in section 2 (3) of the Madras Shops and Establishments Act, 1947, all that is necessary is that the person should be a member of the clerical staff employed in the clerical department of an industrial undertaking. It is not necessary that the whole department should be in one particular office.

The Madras State Electricity Board created under the provisions of the Madras Electricity Supply Act is not a department, agent or servant of the Government nor is it a local authority. Hence the Board is not exempt from the provisions of the Madras Shops and Establishments Act under section 4 (1) (*c*) of the Act. In order to attract the exemption under section 4 (1) (*f*) of the Act the separate law contemplated therein should necessarily be a law which comprises all the details of the Madras Shops and Establishments Act and should in effect and substance cover the same field as covered by the Shops and Establishments Act. A separate law in relation to one or a few of the matters dealt with by the Shops Act cannot to that extent exclude the operation of the said Act.

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Rajagopalan dated 15th July, 1960 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 128 of 1960, presented under Article 226 of the Constitution of India to issue a writ of *csertiorari* calling for the records in Madras Shops and Establishments Act, Application No. 3 of 1959, on the file of the Commissioner of Labour, Madras and quash the order therein dated 23rd December, 1959.

P. R. Gokulakrishnan, for Appellant.

R. G. Rajan for the Additional Government Pleader (*M. M. Ismail*), for Respondents 1 and 3.

S. Ramachandran for *Messrs. Row* and *Reddy*, for Respondent 2.

The Order of the Court was made by

Kailasam, J.—This writ appeal is preferred by the Madras State Electricity Board represented by its Secretary against the decision of Rajgopalan, J., holding that the clerical staff of the Board, which is an industrial undertaking, is a commercial establishment as defined by the Madras Shops and Establishments Act. The appellant, the Madras State Electricity Board, was constituted under the Electricity (Supply) Act (LIV of 1948). The Madras Electricity Board was constituted with effect from 1st July, 1957. On its constitution the Board took over the employees, who were upto then in the employment of the Government of Madras in the Electricity Department. Many of them were clerks and typists appointed by the Government on a temporary basis. According to the rules, their services were liable to be terminated without notice. After the clerks and typists came under the Electricity Board, the Board recruited its own clerical staff and many of the clerks and typists, who were recruited on a temporary basis by the Government, were ousted on giving a month's notice. The discharged clerks and typists appealed to the Commissioner for Workmen's Compensation under section 41 of the Madras Shops and Establishments Act. The Electricity Board applied to the Commissioner of Labour for determination of the question whether the employees were governed by the provisions of the Madras Shops and Establishments Act. In these proceedings the contention of the Electricity Board was that the provisions of the Madras Shops and Establishments Act were not applicable to these employees. The Commissioner of Labour by his order, dated 23rd December, 1959, held that the provisions of the Madras Shops and Establishments Act applied to the discharged clerical employees.

* W.A. No. 138 of 1960. 15th December, 1960. (24th Agrahayana, 1881—Saka).

Against the said order a writ petition was preferred and the writ petition was dismissed by Rajagopalan, J., and this appeal is preferred by the Electricity Board against that judgment.

The questions that arise for consideration in this appeal are whether the Madras State Electricity Board is a commercial establishment as defined in the Madras Shops and Establishments Act and whether the Electricity Board is exempted from the operation of the Act by section 4 of the Act. The Madras Shops and Establishments Act (XXXVI of 1947) was enacted for the purpose of regulating the conditions of work in shops, commercial establishments, etc. The Act regulates among others the hours of work, spread over periods of work, holidays, employment of children and young persons, health and safety, leave, wages, etc. The word 'establishment' is defined as meaning a shop, commercial establishment, restaurant, etc. The definition of 'commercial establishment' so far as it is relevant to this case is an establishment which is a clerical department of industrial undertaking. The term 'person employed' is defined under section 2 (12) of the Act, as , in the case of a factory or an industrial undertaking, a member of the clerical staff employed in such factory or undertaking. The Preamble to the Electricity (Supply) Act provides that the Act is for the rationalisation of the production and supply of electricity and for taking measures conducive to electrical development. As the purpose of the Act is production and distribution of electricity, it cannot seriously be contended that the Board is not an industrial undertaking. In *State of Bombay* v. *Hospital Mazdoor Sabha*[1], the Supreme Court in dealing with the Industrial Disputes Act observed that there would be no difficulty in holding that the State is carrying on an undertaking when it runs a group of hospitals. Their Lordships observed that there could be no doubt that if a hospital was run by private citizens for profit, it would be an undertaking, that the presence of profit motive was not essential and that if a private citizen runs an hospital without charging any fees from the patients treated it would nevertheless be an undertaking. In their Lordships opinion the character of the activity decides the question and whether the hospital is run by the Government or by private persons does not make any difference. In this case if the production and distribution of electricity was undertaken by a private body, there can be no doubt that it would be an industrial undertaking and the fact that the undertaking is by the State Government cannot make any difference.

The learned counsel for the appellant contended that the clerks employed under the Board could not be said to constitute a clerical department of an industrial undertaking. He submits that the Board has innumerable offices situated all over the State and the clerks so situated cannot be said to form the clerical department of the industrial undertaking. In order to make a person come under the definition of section 2, clause (3), all that is necessary is that the person should be a member of clerical staff employed in the clerical department of the industrial undertaking. It does not require that the whole department should be in one particular office and the section will be applicable to all the clerks employed by the Electricity Board.

The next question that has to be considered is whether the Madras State Electricity Board is exempted under section 4 of the Act. The two clauses that are relied on by the learned counsel for the appellant are (*c*) and (*f*) of section 4. According to clause (*c*) of section 4, nothing contained in the Act shall apply to establishments under the Central and State Governments, local authorities, etc. The learned counsel contends that the Electricity Board is an establishment under the State Government. He also urges that it will also come under the definition 'local authority'. The question under what circumstances an establishment can be said to be one under the Central or the State Government was considered in a recent decision of this Court reported in *Narayanaswamy* v. *Krishnamurthi*[2]. Their Lordships were considering the question whether the Life Insurance Corporation of India was a department of the Government or a servant or an agent of the Government. Their

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1. (1960) S.C.J. 679.
2. (1958) 1 M.L.J. 367 : I.L.R. (1958) Mad. 513 : A.I.R. 1958 Mad. 343.

Lordships observed that service under the Life Insurance Corporation of India is not a service under the Government. The Life Insurance Corporation Act, 1956 (XXXI of 1956) created the Life Insurance Corporation. The Electricity (Supply) Act created the Central Exlectricity Authority and the State Electricity Board. Under the Life Insurance Corporation Act the Life Insurance Corporation is a body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property and to sue and be sued in its own name. The members of the Corporation as well as the Chairman shall be appointed by the Central Government. Under section 28, after allocating 55 per cent. of the surplus, available, the balance may be utilised for such purpose and in such manner as the Central Government may determine. Under section 21, it is provided that the Corporation shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing. Under the Electricity (Supply) Act also it is provided that the Board shall be a body corporate by a name having perpetual succession and a common seal with power to acquire and hold property both movable and immovable and shall by the said name sue and be sued. The Central Electricity Authority shall be constituted by the Central Government, and the State Government shall constitute the State Electricity Board. In the discharge of the functions the Board shall be guided by such directions on questions of policy as may be given to it by the State Government. Thus, it will be seen that the provisions of the Life Insurance Corporation Act and the Electricity (Supply) Act are more or less identical. In dealing with the Life Insurance Corporation Act their Lordships in *Narayanaswami* v. *Krishnamurthi*[1], after referring to the judgment of Devlin, J., in *Bank Veer Handel* v. *Slatford*[2], and the judgment of Denning, L.J., in *Tamlin* v. *Hanneford*[3], observed at page 355 as follows :

" (2) The Government created for themselves the sole ownership of that business, in other words, they excluded private enterprises from this field. For these purposes legislation was essential. So far there could be no dispute, nor any doubt, that at that stage it was open to the Government to have created a wing, so to speak, of the Ministry of Finance or the Ministry of Economics to carry on this insurance business. But this was not what was done. The Government did not desire to assume the responsibility for the day-to-day administration.

For that purpose, Parliament created an autonomous Corporation, though sufficient power to control and guide its general policy was vested in the Government. The object and purpose of the statute was the creation of a body autonomous in regard to its day-to-day administration and free from ministerial control except as to broad lines of policy, and therefore outside plenary Parliamentary surveillance, save perhaps in regard to the directions given by the responsible minister under section 21.

It was this freedom that was sought to be achieved by the creation of a separate legal entity in the form of a statutory Corporation. There was not, therefore, merely a difference in form between a department of the Government and this statutory Corporation but one in substance.

The necessary concomitant of the form, with this difference in substance, was to remove it, so to speak, from its character as a Government department and to render it the same type of body as that with which Lord Denning had to deal in *Tamlin's case.*[3] It appears to us therefore that in these circumstances it would run counter to the very intentions of Parliament to hold that the newly created body was either a Government department or a servant or agent of the Government."

We most respectfully agree with the above observations of their Lordships. The observations are applicable in full to the present case.

The term ' local authority ' is defined in the Madras General Clauses Act (I of 1891). Section 3 (17) runs as follows :

" ' Local authority ' shall mean a Municipal Committee, District Board, body of Port Commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund."

The learned counsel contended that the Electricity Board is an authority legally entitled to or entrusted by the Government with the control or management of local fund. Without deciding the question whether the term ' local fund ' is applicable to the Electricity Board, we are of opinion that the statute has created the Electricity

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1. (1958) 1 M.L.J. 367 : I.L.R. (1958) Mad. 513 : A.I.R. 1958 Mad. 343.
2. (1952) 1 All E.R. 314.
3. L.R. (1950) 1 K.B. 18.

Board, as an independent corporation and there is no entrustment by the Government with the control or management of any fund. This contention, therefore, fails.

The only question that remains to be considered is whether the Electricity Board comes under the exemption provided under section 4 (1) (*f*). Section 4 (1) (*f*) exempts establishments which are in respect of matters dealt with in this Act governed by a separate law for the time being in force. The contention of the learned counsel for the appellant is that under section 79 of the Electricity (Supply) Act, the Board is empowered to make regulations, and the Board has made transitory regulations for the regulation of the duites of officers and servants of the Board and their salaries, allowances and other conditions of service. The learned counsel submitted that these regulations promulgated by the Board under section 79 (*c*) of the Electricity (Supply) Act is as 'law' within the meaning of section 4 (1) of the Madras Shops and Establishments Act, and as such comes under the exception provided by the Act. Section 4 (1) (*f*) provides that the establishments which are in respect of matters dealt with in the Act or governed by a separate law for the time being in force, will be exempted. The matters that are dealt with under this Act are, as previously referred to, hours of work, employment of children, health and safety, holidays with wages, etc., to all persons employed. To come under section 4 (1) (*f*) the separate law for the time being must provide for the matters above referred to. The 'separate law' should necessarily deal with the essential matters that are governed by the Madras Shops and Establishments Act. The learned counsel for the appellant contends that in view of the Regulations promulgated by the Board under section 79-C of the Electricity Act which must be held to be 'a separate law' within the meaning of section 4 (1) (*f*) of the Shops and Establishments Act the applicability of the Act as a whole is excluded. The Preamble of the Shops and Establishments Act recites that it is an Act to provide for the regulation of conditions of work in shops and commercial establishments. Amongst other matters the Act regulates (1) the hours of work and the spread over; (ii) holidays and leave; (iii) prohibition of employment of children and employment of young persons only during prescribed hours; (iv) the health and safety of the persons employed and (v) payment of wages and termination of services. We are not expressing any opinion on the question whether the transitory provisions constitute 'separate law' within the meaning of section 4 (1) (*f*) of the Act. Instructions issued by the Executive Authority cannot have the force of a statute unless such instructions are issued in exercise of a statutory power. Section 4 (1) (*f*) of the Act can apply only where there is a separate law providing for matters dealt with under the Madras Shops and Establishments Act. The object of this provision is only to avoid conflict of jurisdiction which may result by applying two parallel sets of law to the same establishment. It is not necessary that the separate law, the existence of which would exclude the applicability of Madras Shops and Establishments Act under section 4 (1) (*f*), should be a law comprising within its scope all the details of the Madras Shops and Establishments Act with precision and minuteness. Nor can it be said that a separate law in relation to one or a few of the matters governed by the Madras Shops and Establishments Act will to that extent exclude the operation of the Act. A separate law which can exclude the operation of the Act in accordance with the provisions of section 4 (1) (*f*) of the Act is one which in substance and in effect must cover the same field as that covered by the Act. We are of opinion that the Regulations framed under section 79-C of the Act, even if it can be called a separate law, upon which however we express no opinion, are not such as to bring about the exclusion of the applicability of the Madras Shops and Establishments Act.

We agree with Rajagopalan, J., that there are no grounds for the issue of a writ of *certiorari* as prayed for by the appellant. The appeal fails and is dismissed with costs. Counsel's fee Rs. 150.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

The Proprietor, Murugan Transports, Cuddalore N.T., South Arcot District .. *Petitioner**

v.

P. Radhakrishnan and others .. *Respondents.*

Minimum Wages Act (XI of 1948), section 20—Summary procedure under—If could be availed of by discharged workmen.

A claim under section 20 (2) of the Minimum Wages Act by discharged workmens would be cognisable by the authority under sub-section (1) of the section.

Vanguard Fire General Insurance Co. v. *Messrs. Fraser and Ross*, (1959) 1 M.L.J. 213, differed.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in M.W. No. 8 of 1958, dated 17th November, 1958, on the file of the Presiding Officer, Labour Court, Madras, relating to the order of the Labour Court, Madras (The Authority appointed under section 20 (2) of the Minimum Wages Act XI of 1948) and quash the said order.

K. K. Venugopal, for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) to assist the Court and *B. Lakshminarayana Reddi* (*amicus curiae*), for Respondents.

The Court made the following

ORDER.—The employer of Murugan Transports, Cuddalore, has filed this petition challenging the Order of the Authority appointed under section 20 (2) of the Minimum Wages Act (Central Act XI of 1948) directing payment of Rs. 693 and Rs. 422 respectively to respondents 1 and 2 who were employed in the Transport service conducted by the former. Radhakrishnan and Chinnathambi were taken from July, 1954 and November, 1955, as cleaner and learner apprentices by the employer. Their services were terminated in July, 1957. On 19th July, 1958, respondents 1 and 2 along with one other employee applied to the Authority appointed under section 20 (2) of the Minimum Wages Act for payment of certain sums of moneys as representing the difference between the minimum wages payable under the notification of the Government contained in G.O. Ms. No. 1247 (Industries, Labour and Co-operation) dated 30th March, 1957, and the actual wages paid to them.

The employer contested the claim on three grounds, namely (1) that a petition under section 20 (2) of the Minimum Wages Act could not be entertained by the Authority at the instance of a discharged employee; (2) that the claim was barred by limitation and (3) that the claim was excessive. Overruling the objections the Authority appointed under the Minimum Wages Act allowed the claim of respondents 1 and 2 for the sums mentioned above and directed the emloyer to pay the same. The validity of that order is questioned in this petition on the identical grounds that were taken before the Authority.

It is contended on behalf of the employer that an employee who seeks relief under section 20 of the Minimum Wages Act must be one coming within the definition contained in section 2 (*k*) of the Act, namely one who *is* in actual employment, and that a discharged employee would have no right to take advantage of the summary procedure prescribed under section 20 of the Act *albeit* he might have a remedy under the general law.

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* W.P. No. 1022 of 1958. 24th November, 1960.
(3rd Agrahayana, 1882, Saka).

Section 20 (2) enables an employee to apply to the Authority appointed under sub-section (1) for a direction as to payment to the employee of the amount by which the minimum wages fixed under the Act exceeded the amount actually paid. The term 'employee' is defined in section 2 (*i*) "as any person who *is* employed for hire or reward to do any work" (The rest of the section is omitted as unnecessary). The contention urged on behalf of the employer is that on a strict application of the definition of the term contained in section 2 (*i*) the employee who would be entitled to apply to the Authority appointed under section 20 should be one who is actually employed at the time the application was filed and not one who had ceased to be employed.

This contention is supported by the decision in *Wakefield Estate* v. *Perumal*[1], of Balakrishna Ayyar, J., wherein the learned Judge held that having regard to the definition of the term " employee " under section 2 (*i*) of the Minimum Wages Act, past employees would not be entitled to obtain the benefit of the summary remedy provided by section 20 of the Minimum Wages Act. This view of the learned Judge was mainly based on the circumstances that section 2 (*i*) while defining the term " employee " described him as a person "who is employed". The learned Judge also adverted to the fact that wherever a statute intended to include past employees suitable words were used, and from the omission of those words, the legitimate conclusion should be that past employees were not intended to be benefited by the terms of that section.

The interpretation of section 20 which commended itself to the learned Judge will have the effect of excluding a large class of employees from the remedy provided by that section. Section 3 of the Act empowers the appropriate Government to fix the minimum rate of wages in regard to employments specified in the Schedule to the Act. A reference to the Schedule would show that minimum wages were intended to be fixed not merely for permanent workers but to casual workers as well. For example Part II of the Schedule refers to the employees in agriculture. It will be anomalous that the Legislature while empowering the appropriate Government to fix the minimum wages in respect of even casual or temporary workers should in providing the machinery for enforcement of the minimum wages omit a large body of workers whose employment would have by its very nature ceased at the time when they make the application. The learned Judge himself realised this difficulty. But he observed that as any such sum of money payable to the past worker would be a debt, he could resort to the ordinary Court for realising the same.

It is obvious that section 20 was intended to give a summary remedy to any person who having been an employee complaints that he had not been paid the minimum wage. Apart from the terms of the definition to which I shall advert to presently, what all appears to be necessary is that the applicant should have been an employee at the time when he earned the minimum wage. If full effect were to be given to the intention with which the section was enacted, it would be necessary to bring within its scope not merely the present but also past employees. Section 2 (*i*) no doubt would suggest that an employee should be one who is in service; but the application of the definition contained in that section should conform to the context in which the term " employee " is used, in the relevant portions of the Act. Section 2 says that the definition of the term contained therein was to prevail " unless there is anything repugnant in the subject or context ". In *Vanguard Fire & General Insurance Co.* v. *M/s. Fraser & Ross*[2], a Bench of this Court was concerned with the question whether section 33 of the Insurance Act would apply to a compnay which had ceased to carry on business. The definition of the term ' insurer ' in the enactment as a body corporate carrying on business of insurance, would imply a present activity. An argument similar to the one which found favour with Balakrishna Ayyar, J., was advanced in that case. The learned Chief Justice rejected the contention and observed in the course of his Judgment :

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1. (1959) 1 M.L.J. 213.
2. (1959) 2 M.L.J. 104 : I.L.R. (1959) Mad. 681.

"Undoubtedly when a term is defined in an enactment, wherever that term occurs, the definition would ordinarily apply ; but there is a well-known canon of construction that in certain circumstances when a strict adherence to the rule would lead to an anomaly or repugnance, the rule would apply only when there is nothing repugnant to it in the context. Section 2 of the Act, which is the definition section, opens with the words " unless there is anything repugnant in the subject or context ". Blackburn, J., said in *R.* v. *Ramsgate*[1]. 'It is, I apprehend, in accordance with the general rule of construction that you are not only to look at the words, but you are to look at the context, the collocation and the object of such words relating to such matter, and interpret the meaning according to what would appear to be meaning intended to be conveyed by the use of the words under the circumstances ". Craies draws from this rule the following inference : " It follows from the rule thus variously stated that all statutory definitions or abbreviations must be read subject to the qualification, variously expressed, in the definition clauses which create them, such as : ' unless the context otherwise requires', or ' unless a contrary intention appears ' ; or ' if not inconsistent with the context or subject-matter". The word ' insurer ' occurs in several sections of the Act but it is obvious that in every place where it is used it would be anomalous to import the definition contained in section 2 (9) (*b*) in its entirety ....In our opinion, the term insurer in section 2 (*d*) must in certain circumstances be also understood as a body corporate which had been carrying on insurance business."

This view is in conformity, if I may say so with respect, with the decision of the Privy Council in *The Karnani Industrial Bank, Ltd.* v. *Satya Niranjan Shaw*[2]. In that case a question arose as to whether an ex-tenant can take advantage of the summary remedy provided under section 15 of the Calcutta Rent Act of 1920. The Privy Council held that the provision in the statute giving a summary remedy to a tenant was intended to give relief to any person who having been a tenant came within the period of limitation to assert his claim to recover the excessive rent paid whether at the time he made the claim he was actually a tenant or not. Adverting to the inconvenience of a contrary construction, their Lordships observed :

" If it were otherwise the exorbitant landlord who had succeeded in obtaining the excessive rent could relieve himself of his liability by determining the tenancy, which in the case of poor tenants holding on a month's tenancy could easily be done."

In that case the High Court had held that section 15 of the Calcutta Rent Act only provided for the Controller granting a certificate on the application of a tenant whose tenancy had not expired. Rejecting that view as one proceeding upon too narrow a construction of the words their Lordships observed :

" In order to give any working effect to the Act it is necessary that the words landlord and tenant must include, as they often do in ordinary parlance, ex-landlord and ex-tenant. An action by an ex-landlord against ex-tenant might ordinarily be described as an action of landlord against tenant..................

Their Lordships would further observe that though, for the reasons they have given, in the Act the word tenant must include in its proper context an ex-tenant the definition of clause 2 (*g*) which defines tenant " as any person by whom or on whose accounts rent is payable for any purpose, would in its strictest sense cover the case of the present appellants, by whom in fact arrears of rent were payable at the date of the application."

Applying the foregoing observations to the instant case, it will be seen that there being a sum of money due and payable by the employer to the employee as representing the difference between the Minimum Wages Act and the actual wages paid, the claimant would be an employee within the provisions of section 20.

Recently I had to consider a similar question in W.P.No. 658 of 1959 a case arising under section 33 (*c*) (2) of the Industrial Disputes Act. There was a claim by a discharged worker. It was contended that the claim being not an industrial dispute the definition of the term ' workman ' contained in section 2 of that Act contemplated only a workman in actual employment and that a discharged workman could not apply to the Labour Court under the provisions of section 33 (*c*) (2). I held that although the definition of the term ' workman ' if strictly construed would only cover a case of a person in actual employment, the claim of the discharged worker could be entertained under section 33 (*c*) (2). I am therefore unable though with regret, to agree with the view of Balakrishna Ayyar, J. in *Wakefield Estate* v. *Perumal*[3]. In my opinion a claim under section 20 (2) of the Minimum Wages Act by a discharged worker would be cognisable by the Authority under sub-section (1) of that provision.

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1. (1827) 6 B. & C. 712 at 717 : 108 E.R. 613.
2. (1928) 55 M.L.J. 464 : L.R. 55 I.A. 344 : I.L.R. 56 Cal. 80 (P.C.).
3. (1959) 1 M.L.J. 213.

It was next contended that the application having been filed nearly 3½ years after the minimum wage accrued due and payable was barred by limitation. This question was considered by the Authority who found that there was sufficient reason for excusing the delay in making the application. In my opinion that is not a matter for interference in these proceedings. Mr. Venugopal for the petitioner contended that the Authority had no jurisdiction in the circumstances of the case to excuse the delay as the original case with which the petitioner came forward was that he did not file the application as he was hoping that the employer would do his duty by paying the minimum wage, whereas at the time of an enquiry it was stated that the emloyee did not know that under the law he had to file the application within a prescribed period of time. It is no doubt true that there has been a change of case, but that does not mean that the employee admitted that he was aware of the rule of law in regard to the time within which the application before the Authority had to be filed. The two employees had given evidence in the matter and there had been no serious cross-examination on the question of their ignorance of law. Whether in a particular case a *bona fide* ignorance of law could be excused or not is one for the Authority to decide and not a matter for interference in these proceedings.

There was a contest before the Authority as to the capacity in which the two employees worked under the petitioner. On behalf of the employer it was said that throughout their service the employees remained as cleaner and learner apprentices. On the other hand, the employees contended that after a period of one year they were given regular jobs. The Authority did not accept the case of the employees but held that the two employees continued to be apprentices only during the entire period of their service. Having given this finding, the Authority held that the first year of their service as apprentice should be treated as service as an apprentice and thereafter they should be treated as unskilled workers. I can see no warrant for this conclusion. It is not the case of any party that after the period of one year the employees were treated as unskilled workers by the employer. It would not be open to the Authority to treat them as unskilled workers and calculate minimum wages on that basis. The finding of the Authority itself is that throughout the entire period of service the two employees had been working only as apprentices. Under G. O. M/s No. 1247, dated 30th March, 1957, the minimum wage for apprentices in a public motor transport was specified as Rs. 20 all inclusive "upto a period of one year". That would show that no minimum wage was fixed for apprentices who did duties as apprentices beyond a period of one year. Any service beyond the period of one year, would be governed only by the contractual rate of wages stipulated between the parties. Respondents 1 and 2 would therefore be entitled to only the difference between the minimum wage and the actual wage paid upto a period of one year of their service. The order of the Authority appointed under section 20 of the Minimum Wages Act directing the employer to pay the difference between the actual amount already paid and the minimum wage fixed on the footing of the employees being apprentices for one year and unskilled workers for the rest of the period, cannot be sustained. It is quashed. The result is that the Authority has to take up the matter afresh and fix the difference between the minimum wage payable and the actual wage paid for a period of one year when respondents 1 and 2 were doing duties as apprentices in the transport service belonging to the petitioner.

Before concluding I must express my obligations to the learned Advocate-General and to Mr. B. Lakshminarayana Reddy Respondents 1 and 2 were not represented. I requested Mr. B. Lakshminarayana Reddy to appear *amicus curiae* and safeguard the interests of the employees. The learned Advocate-General generously offered to assist the Court as to the correctness of the view taken by Balakrishna Ayyar, J., in *Wakefield Estate* v. *Perumal*[1]. I express my thanks to both of them for assisting me in the case and for representing the case of the employees. Rule *nisi* is made absolute. There will be no order as to costs.

R.M. *Rule* nisi *made absolute.*

1. (1959) 1 M. L. J. 213.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

K. Palaniappa Nadar ... *Petitioner**

v.

The State of Madras represented by the Deputy Commercial Tax Officer, Villupuram .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), *section* 22—*Exemption under—Pre-requisites.*

What section 22 of the Madras General Sales Tax Act, 1939, requires is not only that a sale or purchase should be for consumption within the State of Madras, but that the delivery in Madras should be the direct result of the sale or purchase. Where an assessee purchases the goods in Madras there could be no element of transport at all to bring it as a case of delivery, direct or otherwise, within the meaning of section 22.

Petition under section 12-B (1) of the Madras General Sales Tax Act praying the High Court to revise the Order of the Slaes Tax Appellate Tribunal, Madras, dated 31st January, 1958 and made in T.A. No. 358 of 1957.

A. Shanmugavel, for Petitioner.

The Government Pleader (*A. Alagiriswami*), for Respondent.

The Order of the Court was made by

Rajagopalan, J.—The view taken by the Tribunal on the evidence placed before it, that the assessee was the first purchaser of the tobacco within the State within the meaning of section 5 (*viii*) of the Act, as it stood in the relevant year—now it has been re-enacted in the same form and renumbered as section 5 (*iv*)—is correct and calls for no interference in revision.

The facts found by the Tribunal were as follows. The assessee, a dealer in tobacco, buys his tobacco from a wholesale merchant resident within the State of Madras who holds a licence under L-5. The assessee's seller, the wholesaler, buys tobacco both within the State of Madras and also outside, particularly in Andhra. The wholesale merchant has no L-5 licence to store his purchases in Andhra State. What he does is to employ a commission agent in Andhra to buy tobacco on his behalf and to get it bonded in the warehouse of the commission agent, for which the commission agent holds a L-5 licence. Purchases are effected through the representatives of the wholesaler sent over to Andhra. Subsequently whenever the wholesaler requires tobacco to be sent over to the State of Madras the commission agent sends that tobacco. That tobacco is then bonded in the warehouse of the wholesaler, in this State. It is that tobacco that is delivered to the assessee when he buys it.

It should be remembered that the assessee's seller the wholesaler buys tobacco on his own in Andhra and not only to comply with any orders of the assessee. From this it should be clear that when purchases are effected in Andhra they are effected by the wholesaler either through his representatives or through his commission agent, and the tobacco purchased in Andhra is taken delivery of on behalf of the wholesaler in Andhra itself. The sale is complete by delivery within the State of Andhra. Only the tobacco so purchased is not brought over immediately but kept in the bonded warehouse in Andhra, to be drawn upon whenever necessity arises, that is whenever the wholesaler requires tobacco to be brought over from Andhra to meet the demands for such tobacco within the State of Madras. When his tobacco is so brought over by the wholesaler, there is no element of sale incidental to which that transport is effected. The sale, as we pointed out, is completed by delivery within the State of Andhra, and thereafter the tobacco kept in the bonded warehouse in Andhra is kept there as the tobacco that belongs to the wholesaler, though the bonded warehouse belongs to the commission agent.

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* T.C. No. 96 of 1958.

7th November, 1960.
(16th Kartika, 1882, Saka).

Learned counsel for the assessee relied upon section 22 of the Act as amended in 1955. But section 22 will not help to establish that the assessee's seller is the first purchaser within the State of Madras. The assessee's seller the whole-saler bought the tobacco in Andhra. It may be that he bought the tobacco for eventual consumtion in Madras. The evidence disclosed that out of the purchases effected by the wholesaler in Andhra and kept in the bonded warehouse of the commission agent the commission agent was in some cases instructed to sell a portion of the tobacco within the State of Andhra itself. These purchases at any rate could not be said to be for consumption within the State of Madras. What section 22 of the Act requires is not only that a sale or a purchase should be for consumption within the State of Madras, but that the delivery in Madras should be the direct result of the sale or purchase. In this case the position was that as a result of the purchase of the tobacco by the wholesaler within the State of Andhra, the delivery of that tobacco was within the State of Andhra. The subsequent transport of that tobacco by the wholesaler was that of his own goods, and that could not be said to be the direct result of his purchase in Andhra. When the assessee effected his purchase in Madras there was no element of transport at all to bring it as a case of delivery direct or otherwise within the meaning of section 22.

Learned counsel for the assessee endeavoured to establish that whenever the assessee's seller brought over his own tobacco from Andhra, it would be a case of delivery direct as a result of the purchase. We have pointed out earlier that the delivery in the case of the assessee's seller was within the State of Andhra, and the subsequent transport did not bring it within the scope of section 22 of the Act.

Another contention of the learned counsel for the assessee was that there might be discrimination in the imposition of tax, because if the wholesaler was not the first purchaser within the State of Madras, the assessee would have to pay sales tax on a turnover which included not only the purchase price of the tobacco in Andhra but also the excise duty paid, because the assessee would not be entitled to the benefit of the exemption provided by rule 5 (i) of the Turnover and Assessment Rules. We are unable to see any real basis for any charge of discrimination to invalidate either section 5 (*viii*) or the Rules. What the assessee had to pay his vendor constituted the purchase turnover on which the assessee had to be taxed. All the elements that went into the price charged by the assessee's vendor would be relevant only for determining the price charged to the assessee, and no charge of discrimination could be based on the price the assessee had to pay to his vendor.

As we said, the view taken by the Tribunal on the evidence placed before it, that it was the assessee and not the wholesaler the assessee's vendor, resident in the State of Madras that was the first purchaser of the tobacco within the State of Madras is correct.

The petition fails and is dismissed with costs. Counsel's fee Rs. 100.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATADRI.

Mohamed Abubucker Lebbai and another .. *Petitioners**

v.

The Zamindar of Ettayapuram Estate, Koilpatti, through his authorised agent Sri K. Raman Nair and others .. *Respondents.*

Madras Cultivating Tenants' Protection Act (XXV of 1955) as amendned by Act (V of 1956), section 2 (a) *and* (ee)—*' Cultivating tenant '—Meaning of—Contributing physical labour—What amounts to.*

In order to fall within the definition of cultivating tenant a person should carry on persona' cultivation which again requires that he should contribute physical labour. The use of physica

* C.R.P. No. 1038 of 1957. 18th November, 1960. (27th Kartika, 1882, Saka).

labour connotes the idea of physical strain—the use of muscles and sinews and implies a distinction from mental or intellectual work. Mere supervision of the work of cultivation or maintaining of account or disbursements of wages will not be such contribution of physical labour as to attract the definition.

Kunchitapatham Pillai v. *Ranganatham Pillai*, (1958) 1 M.L.J. 272, held too wide.

Petition under section 6-B of Act XXV of 1955 as amended by Act XIV of 1956 read with section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Revenue Divisional Officer, Sivakasi, dated 16th July, 1957 and made in R. P. No. 49 of 1956.

S. Mohankumaramangalam and *S. Gopalaratnam*, for Petitioner.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This Civil Revision Petition arises out of an application made to the Revenue Divisional Officer, Sivakasi, by the two petitioners before us, Mohamed Abubucker and Sankaralingam Pillai, under sub-section (5) of section 4 of Act XXV of 1955 (The Madras Cultivating Tenants' Protection Act), as amended by Act XIV of 1956. The provision runs thus :

"Any cultivating tenant, who, after the commencement of this Act, has been evicted except under the provisions of sub-section (4) of section 3, shall be entitled to apply to the Revenue Divisional Officer within two months from the date of such eviction or within two months from the date of coming into force of the Madras Cultivating Tenants' Protection (Amendment) Act, 1956, for the restoration to him of the possession of the lands from which he was evicted and to hold them with all the rights and subject to all the liabilities of a cultivating tenant. The provisions of sub-section (4) shall, so far as may be, apply to such an application."

The petitioners alleged that they had taken the lands on lease from the first respondent till the end of Fasli 1365. The case came up once before this Court ; but it is not necessary to refer to the earlier proceedings. The petitioner' application was opposed mainly on the ground that they were not cultivating tenants within the meaning of the definition of 'cultivating tenant', in the Act. The definition, so far as it is material, runs as follows :

" 'Cultivating Tenant' in relation to any land means a person who carried on personal cultivation of such land, under a tenancy agreement, express or implied, and includes :—

(i) any such person who continues in possession of the land after the determination of the tenancy agreement."

Sub-clause (*ee*), which was added by the amending Act, explains the term 'personal cultivation' thus :

"A person is said to carry on 'personal cultivation' on a land when he contributes his own physical labour or that of the members of his family in the cultivation of that land."

On a consideration of the evidence adduced before him, the Revenue Divisional Officer held that the two petitioners were not carrying on 'personal cultivation', and, therefore, were not cultivating tenants, as defined in section 2 (*a*) of the Act. On this finding, he dimissed the petition. The petitioners seek a revision of this order.

The material facts which emerge from the evidence of the petitioners themselves, have been fully set out in the order of the Revenue Divisional Officer. The first petitioner was merely a financier for the second petitioner. The second petitioner, as P.W. 1 spoke to all he used to do regarding the cultivation of the lands. He used to supervise the lands once in a month. He lives 22 miles away from the land and employs servants to carry on the cultivation. The question is whether these facts would justify the conclusion that the petitioners carry on personal cultivation on the land.

When the Civil Revision Petition orginally came up before one of us, attention was drawn to divergent views expressed by learned Judges of this Court. The case was therefore referred to a Division Bench.

Balakrishna Ayyar, J., was inclined to take a very liberal view of the definition in *Kunchithapatham Pillai* v. *Ranganatham Pillai*[1]. According to the learned Judge,

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1. (1958) 1 M.L.J. 272.

in order to qualify as a 'cultivating tenant' within the meaning of section 2 (*a*) of Madras Act XXV of 1955, it was not necessary that a person should put his own muscular effort into the soil. The learned Judge observed :

" It is not necessary that he himself should plough the field or irrigate it or weed it or harvest it or thrash the grain that the field may yield. It is sufficient if the land is cultivated under his direct supervision and if further he assumes the risk of the cultivation. If he can decide what crops he would grow, when he would grow them and where he would grow them, if he can direct what labour should be employed and when and where and for what purposes, if he can decide what fertilizer he would use and in what proportions, if he can decide and direct when the field should be harvested and how the harvest should be disposed of, if he has direct control over such operations and if further he is not the paid agent in this respect of someone else, he would be a cultivating tenant within the meaning of the Act. The contention of the respondent that, as he does not contribute his physical labour to the cultivation, he is not a cultivating tenant, must fail."

In W.P. No. 426 of 1953, Rajagopala Ayyangar, J., was actually dealing with a provision of the Tanjore Tenants and Pannaiyal Protection Ordinance IV of 1952. But it was necessary for him to deal with the scope of the definition of 'cultivating tenant' in that Act. The definition was :

" Cultivating tenant ' or ' tenant ' means a person who contributes his own physical labour or that of the members of his family in cultivation of any land belonging to another, under a tenancy agreement, express or implied, and includes the heirs of such person but shall not include a mere intermediary or his heirs."

It was contended before him that, to satisfy the definition of a 'cultivating tenant', it was sufficient if the tenant was cultivating the lands as pannai and exercised supervision over the pannaiyal and hired labour and that it was not necessary that he should himself get into the lands and plough or do other agricultural operations. But the learned Judge repelled that contention thus :

" Before a person can be a cultivating tenant, he or members of his family must contribute his or their own *physical labour*. I do not consider that the supervision of panniyals could be characterised as physical labour within the meaning of the definition clause."

The same definition came up for construction again before Rajagopalan, J., in W.P. No. 695 of 1953. The person who claimed to fall within the dsfinition in that case relied on the following acts, namely, supervising the operations in the various fields, giving seeds for cultivation, supplying manure and the other requisites for cultivation, and generally directing the cultivation, maintenance of cattle and their feeding, etc. The learned Judge, after adverting to the fact that the definition does not specify the quantum of physical labour necessary to satisfy the test prescribed by it and that it does not correlate the physical labour to any given agricultural operation, referred to the observation of Rajagopala Ayyangar, J., quoted earlier in this judgment, and proceeded to say as follows :

" Whether the acts of supervision of cultivation on the part of the lessee themselves involve contribution of his physical labour in the cultivation of the lands must necessarily be a question of fact in any given case. An act of supervision of the cultivation of lands may involve physical labour. Even the payment of wages to a pannaiyal does involve some physical labour. But, what section 2 (*d*) of the Act requires is " contribution of physical labour in the cultivation of the land ". It is neither possible nor desirable to attempt an exhaustive catalogue of all acts of supervision which would constitute contribution of physical labour in the cultivation of the land."

No other decision of this Court bearing on the point was brought to our notice.

We looked up several decisions of the English Courts to get, if possible, assistance in construing the definition, particularly with regard to the meaning to be given to the words " contributes his own physical labour." Though none of the decisions, to which we shall presently refer, related to a provision *in pari materia* with the provision in the Madras Act some light is thrown on the question, what would constitute " physical labour ". In a very early case, *Crofton* v. *Poole*,[1] a person who was employed to remove furniture, and who, in the course of the employment, procured vans, supplied packing cases and employed men in packing and unpacking and conveyance of the goods, was not considered to be a man using his personal labour. In *Morgan* v. *London General Omnibus Co.*,[2] it was held by the Court of Appeal

1. 1 B. & Ad. 568. 2. (1884) 13 Q.B.D. 832.

that an omnibus conductor cannot be said to be engaged in manual labour. Brett, M.R., had no doubt however that a man employed to dig the ground could be a "servant in husbandry". It seemed to Bowen, L.J., that 'manual labour' could only mean 'labour performed by hand', and he had no doubt that an omnibus conductor was not engaged in work of that kind. The driver of a tramcar was similarly held to be not engaged in manual labour (*Cook* v. *North Metropolitan Tramways Company*[1]. The following opinion of A.L. Smith, J., (as he then was) is valuable :—

> "The expression used, it should be noted, is not manual work, but manual labour, for many occupations involve the former but not the latter, such as telegraph clerks, and all persons engaged in writing. I cannot see the distinction between driving and other occupations which involve no manual labour though they do involve mannual work."

Lord Esher, M.R., was apparently of opinion that real labour is that which tests one's muscles and sinews (*Yarmouth* v. *France*[2]). In *Hunt* v. *Great Northern Railway Company*[3], the principle of the earlier decisions of the Queen's Bench Division was followed in holding that a railway guard was not a person engaged in manual labour. His duty was described as requiring care, skill, and experience, and the labour which it involved as mental rather than physical. *Bound* v. *Lawrence*[4], related to a grocer's assistant, whose duty was to serve customers in a shop, make up parcels for them, carry the parcels from the shop to the cart and to bring up goods from the cellar to the shop. The Court of Appeal, reversing the decision of the Queen's Bench Division, held that he was not engaged in manual labour. Lord Esher, M.R., said:

> "There can be no manual labour without user of the hand ; but it does not at all follow that every user of the hands is manual labour, so as to make the person who does it a manual labourer."

The following passage in the judgment of Fry, L.J., is instructive :

> "It is to be observed that it is difficult to imagine any work done by man so purely intellectual as to require no kind of work with the hands ; and the converse is equally true, that there can hardly be work with the hands that requires no intellectual effort. If, then, the words 'manual labour' are to have the full significance which could be put on them, they would be extended to every kind of employment. That cannot be the true meaning of the statute, but some more confined interpretation must be arrived at."

In the course of the judgment, the idea of physical exertion occurs as being a relevant factor. In *Smith* v. *Associated Omnibus Company*[5], in holding that the employee there was engaged in manual labour, one material fact that was taken into consideration was that the person had to do work with his hands and feet ; sometimes, the work might be hard, and at other times, less arduous.

Clause (*ee*) of section 2 of Act XXV of 1955 requires that a person should contribute his own physical labour or that of the members of his family in the cultivation of the land before he can be said to carry on personal cultivation on the land. The general principles which can be gathered from the English decisions cited above, appear to be of assistance in deciding what is meant by 'physical labour'. There is, first, the idea of physical strain, the use of muscles and sinews. There is also the implied distinction between mental or intellectual work and bodily labour. There is also the idea of using one's hands and feet with the implication that such user is the essential part of the work. An author writing a poem may also use his hand in writing, but, surely, that is only incidental to the main thing, namely, the composition of a work of art. The Head of an Administrative Department may have to walk through several sections of the office on an inspection, and thus be using his feet. He may also undergo a certain amount of physical strain, but, surely, he cannot be said to be doing any physical labour. All that appears from the evidence in the case before us is that one of the petitioners who lives 22 miles away from the land supervises the work of cultivation. We have no hesitation in holding that, on this evidence, the Revenue Divisional Officer was right in holding that the petitioners were not cultivating tenants within the meaning of section 2 (*a*) of Act XXV of 1955.

1. (1887) L.R. 18 Q.B.D. 683.
2. (1887) L.R. 19 Q.B.D. 647 at 651.
3. L.R. (1891) 1 Q.B. 601.
4. L.R. (1892) 1 Q.B. 226.
5. L.R. (1907) 1 K.B. 916.

They were not entitled, therefore, to any of the benfits conferred by the provisions of that Act.

The Civil Revision Petition is dismissed with costs.

R.M. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VEERASWAMI.

The Working Journalists of "The Hindu", Madras .. *Appellant**

v.

The Management of "The Hindu", Madras (M/s. Kasturi & Sons, Ltd., Madras-2 and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *sections* 2 (*k*), 10 (1) (*c*) *and* 15—*Scheme and scope of—Industrial dispute referred for adjudication—If could cease to be an industrial dispute subsequently—Jurisdiction of Labour Court.*

An industrial dispute within the contemplation of the Industrial Disputes Act, 1947, is a collective dispute that existed or was apprehended prior to the date of its reference to the Labour Court for adjudication. Whether such a dispute referred for adjudication continued, even after its refeerence, to retain its character as such has no bearing upon and does not affect the jurisdiction of the Labour Court to proceed and make an award on the industrial dispute referred to it. The jurisdiction of the Labour Court springs from the reference made to it and is confined to the dispute as referred to it, which means the dispute which existed or was apprehended prior to the date of its reference.

(1959) 2 M.L.J. 272, *reversed.*

(Scheme and provisions of the Act analysed—Object of the legislation indicated).

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Balakrishna Ayyar, dated 7th April, 1959[1] and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 428 of 1956 presented under Article 226 of the Constitution of India to issue a writ of prohibition prohibiting the Labour Court, the 2nd Respondent herein from proceeding with the enquiry in I.D. No. 54 of 1957 on its file.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for Appellant.

R. Ramamurthi Ayyar, for Respondent.

The Order of the Court was made by

Veeraswami, J.—This appeal raises an important point of industrial law, namely, whether a Labour Court, to which a valid reference of an industrial dispute for adjudication had been made, ceases to have jurisdiction to proceed to deal with it by reason of the fact that a majority of the workers, who had collectively sponsored the cause of a workman and raised an industrial dispute in regard to the propriety of the termination of his services, had subsequently, and pending adjudication of that dispute, retracted and withdrawn their support. The Labour Court, by its preliminary award dated 25th April, 1958, answered the question in the negative. On a petition filed by the Management under Article 226 of the Constitution, Balakrishna Ayyar, J., by his order dated 7th April, 1959, took a contrary view holding that the dispute referred to the Labour Court lost its character as an industrial dispute and was no longer such, and, therefore, the Labour Court would have no jurisdiction to proceed further in the matter. Accordingly the learned Judge issued a rule to that effect. This appeal is directed against that order.

By his order dated 12th July, 1957, the Managing Editor of "The Hindu" terminated the services of R. Narasimhan with effect from 14th July, 1957. He was then employed as a sub-editor in the concern. The termination of services was preceded by a notice from the Chief Editor dated 9th July, 1957, to Narasimhan to show cause against it, and the explanation of the latter dated 11th July, 1957. The ground for terminating the services of Narasimhan was a finding by the Managing Editor that he

* W.A. No. 144 of 1959.

28th October, 1960.
(6th Kartika, 1882—Saka.

1. (1959) 2 M.L.J. 272.

(Narasimhan) had committed a gross mistake in editing a certain report from Salem dated 23rd June, 1957. The mistake was this. The report stated that a member of a certain political party in Salem was stabbed on 21st June, 1957, and that the injured man was admitted in a hospital and later di charged. Narasimhan edited this report and published it in " The Hindu " dated 24th June, 1957, as an incident in which the man concerned died of stab injuries on 21st June, 1957. The Managing Editor rejected Narasimhan's plea that he was being victimised for his trade union activities. On 13th July, 1957, some of the working journalists of " The Hindu", who belonged to the Madras Union of Journalists, resolved to go on a strike with effect from the following day and remain on strike till the order terminating the services of Narasimhan was suspended and the matter was reconsidered. The same day the Executive Committee of the Madras Union of Journalists also passed a resolution extending their support to the stand taken by the working journalists of " The Hindu " and called upon all other newspaper employees in the State, and elsewhere, to rally behind the employees of " The Hindu ". The strike, however, did not actually materialise on 14th July, 1957, as evidently, in the meantime, conciliation proceedings had started which eventually brought no result. In view of the conciliation proceedings, the Madras Union of Journalists wrote to the Management of " The Hindu " on 14th July, 1957, that they were calling off the strike. Conciliation having failed, the State Government made an order on 17th July, 1957, referring to the Labour Court the following question for adjudication :

> " Whether the termination of services of Sri R. Narasimhan, sub-editor, is justified and to what relief he is entitled ? "

The order of reference contained two mistakes, (1) that it made no reference to the provisions of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 and (2) that it assumed Narasimhan to be a workman within the meaning of section 2 (*s*) of the Industrial Disputes Act. On 20th September, 1957, the Government passed another order amending their earlier order rectifying the two mistakes. When on 11th November, 1957 the matter came up before the Labour Court, it was agreed on all hands that the reference of the dispute for adjudication should be deemed to have been made on 20th September, 1957. The parties also filed before the Labour Court a joint consent memorandum stating that all the proceedings taken prior to that date should be taken to be proceedings under the amended reference. With the leave of the Labour Court, the Management filed an additional counter statement on 18th November, 1957, which, *inter alia* stated :

> " The dispute referred to is one affecting an individual, *viz.*, Sri R. Narasimhan and not one affecting the employees of " The Hindu " as a whole or a considerable section of those employees. The employees of " The Hindu " as a whole or of the editorial department to which Sri R. Narasimhan belonged have not made common cause with Mr. Narasimhan and treated his dispute with the Management as their own.
>
> The mere fact that the Madras Union of Journalists has taken up the cause of Sri R. Narasimhan will not make the dispute one between the working journalists of " The Hindu " and the Management. The Madras Union of Journalists is not connected with any particular newspaper establishment. Its membership is open to all journalists in the Madras State. The allegation in the claims statement that the majority of working journalists employed in " The Hindu " are members of the Madras Union of Journalists is not correct. The Madras Union of Journalists is therefore, not competent to represent or speak on behalf of the working journalists of The Hindu."

To this the union filed a reply on 25th November, 1957, which, *inter alia* stated :

> " The Union submits that the dispute referred for adjudication is one taken up by the Madras Union of Journalists which has among its members working journalists from various different newspaper establishments, including " The Hindu "............
>
> The Union submits that there is a dispute between the working journalists of "The Hindu" and the Management within the meaning of section 2 (*k*) of the Industrial Disputes Act, read with section 3 (1) of the Working Journalists Act...................."

The Union's reply also reiterated the fact that the dispute had been referred by the Government for adjudication as a dispute between the working journalists of " The Hindu " and the Management and that the Management was put to strict proof of their assertion that the working journalists of " The Hindu " had not collec-

tively espoused the cause of Narasimhan. On these additional pleadings, the Labour Court framed the following additional issue on 3rd December, 1957.

"Is there no industrial dispute between the working journalists of 'The Hindu' on the one hand and the Managenment of 'The Hindu' on the other in relation to the termination of the services of Sri R. Narasimhan as contended by the Management?"

At the hearing before the Labour Court on the additional issue, which was tried as a preliminary issue, the Management raised several contentions. One of them was that there was no industrial dispute in existence either on the date of the first reference, 17th July, 1957 or on the date of the amended reference, 20th September, 1957. This contention raised the question whether on and prior to 20th September, 1957, the dispute had the support of a substantial section of the working journalists of "The Hindu". The Labour Court found that the dispute on the said dates and subsequently till the middle of November, 1957, had the support of 60 out of 90 working journalists of "The Hindu", that all the 60 of them were members of the Madras Union of Journalists and that, therefore, the dispute referred was an industrial dispute and was validly referred for adjudication. Even on the footing that only 34 out of 60 members of the Union, who were among the working journalists of "The Hindu", attended the meeting on 13th July, 1957, in which was passed the resolution espousing the cause of Narasimhan, the Labour Court was prepared to hold that a substantial or considerable section of the working journalists of "The Hindu" supported his case, thereby making it an industrial dispute. Another contention raised by the Management before the Labour Court, with which we are concerned in this appeal, was that even though it might have been an industrial dispute at the time when it was referred, it subsequently ceased to be such a dispute because many of the working journalists, who had supported Narasimhan, had since withdrawn their support and that only a very small section of the working journalists of "The Hindu", if at all, continued to support him. This contention was based upon certain events which occurred subsequent to 11th Novembr, 1957. On 13th November, 1957 the Editor of "The Hindu" convened a conference of the working journalists of the establishment with the ostensible purpose of explaining to them what according to the Editor were the true facts and situation in relation to the termination of the services of Narasimhan and of acertaining their view whether the Union was justified in making the allegation that the termination of the services of Narasimhan was an act of victimisation for his trade union activities. On 14th November, 1957, the Editor received a declaration signed by 48 working journalists of "The Hindu" in which they stated that the charge against the Editor, *viz.*, that the termination of Narasimhan's services was victimisation for his trade union activities and not punishment for a grave mistake in his editorial work, amounted to imputing *mala fides* to him, that the impression that the charge so levelled against the Editor had a backing of a substantial section of the journalists in "The Hindu" was wholly unwarranted and that the declarants had every confidence in the sense of fairness of the Editor and did not, therefore, support the charge made against him of victimising Narasimhan. On the side of Nrasimhan, it would appear that he too was able to secure a statement signed by 41 of the working journalists of "The Hindu" and expressing a re-affirmation of their support to his cause. The 41 journalists comprised of those who either voted for the resolution at the meeting of the working journalists on 13th July, 1957 or were otherwise supporting the cause till then. But these journalists and 14 others later signed certain fresh declarations to the effect that they had either attended the working journalists' meeting on 13th July, 1957 or signed the earlier declaration supporting the cause of Narasimhan, not knowing the full facts, that they wished to make it clear that they never meant to support any allegation by the Union of *mala fides* against the Editor and that the signatures to the earlier declaration supporting the cause of Narsimhan should be treated as withdrawn. In addition to the declarations above referred to, were produced before the Labour Court four affidavits sworn to by more than a majority of the working journalists of "The Hindu" which said :

"We do not either individually or collectively support Sri R. Narasimhan in that dispute or the stand taken by him and the Madras Union of Journalists in that regard."

Evidently because the Union wanted to cross-examine the working journalists, who had sworn to the affidavaits, and made declarations as already mentioned, 41 working journalists of " The Hindu " gave evidence before the Labour Court. The examination of the other witnesses out of the remaining working journalists who had retracted, so to speak, was, however, dispensed with at the instance of the Union. The Labour Court on a consideration of the evidence summed up the position thus :

" Therefore, it must be found that 75 out of 90 working journalists of this concern have given evidence saying that they are not now supporting this dispute. About 45 to 50 of them are persons who were parties either to the resolution or to Exhibit W-2 and their evidence must be treated as a withdrawal of their support even though some of them have deposed to the effect that they never supported the cause, that they were never aware of the resolution and that they were under misapprehension about the true facts when they signed the Exhibit W-2 or that their signatures were obtained in Exhibit W-2 under express promises that it should not be used in the Court."

Based on those facts, the argument on behalf of the Management before the Labour Court was that insamuch as continued support of a substantial section of the working journalists was a *sine qua non* for the subsistence of an industrial dispute and as such support had been withdrawn pending adjudication of the dispute, the dispute ceased to be an industrial dispute and it no longer existed as such with the result that the Labour Court had no further jurisdiction to proceed with the matter. This argument, however, did not find favour with the Labour Court. The Labour Court held that the crucial date for deciding whether there was an industrial dispute was the date of its reference and that the fact that subsequent to the reference more than a majority of the working journalists, who had formerly supported the dispute, withdrew their support thereto, had no effect upon the jurisdiction of the Labour Court to proceed with and adjudicate upon the industrial dispute which had been validly referred to it.

On the petition filed by the Management for quashing the above preliminary award of the Labour Court, Balakrishna Ayyar, J., was not prepared to uphold the said view of the Labour Court. The learned Judge considered that the moment a collective dispute became reduced to an individual dispute by reason of a substantial number of workmen withdrawing their support after the reference of the dispute for adjudication, the Labour Court at once lost its jurisdiction to proceed with the matter. This conclusion was reached by the learned Judge on two grounds which he stated thus :

" When considering these arguments two circumstances must be borne in mind. One is that the jurisdiction of a Labour Court or Labour Tribunal is not a general jurisdiction like that of an ordinary civil Court ; it is a limited jurisdiction, limited by the statute which has created it. The statute confers on it power to deal with disputes of a particular class, *viz.*, industrial disputes, and, once a dispute goes out of that category it would normally lose its jurisdiction to proceed further in the matter. In the present case, during the pendency of the proceedings before the Labour Court, the dispute which was referred to it lost its character as an industrial dispute and ceased to be such. The second consideration that must be borne in mind is that Courts cannot issue orders in a vacuum, that they must deal with the actual facts before them and that to refuse to take notice of facts subsequent to the date on which a Court takes cognizance of a matter would be to act very unrealistically."

On that view, the learned Judge held that the Labour Court had no jurisdiction to proceed further in the matter and quashed the preliminary award.

Sri Mohan Kumaramangalam, the learned counsel for the appellants, contested the correctness of the above view of the learned Judge and contended that such a view could not be supported having regard to the true scope and object of the relative statutory provisions providing for industrial adjudication. His contention was that once a valid reference had been made to a Labour Court of an industrial dispute for adjudication, its only jurisdiction was to proceed with the matter and make an award and that the question whether the industrial dispute so referred continued to be as such in the sense that it had the continued support of a substantial section of the workers of the concern was wholly irrelevant to and did not in any way affect the jurisdiction of the Labour Court to proceed with the matter and make an award. On the other hand, Sri R. Ramamurthi Ayyar, the learned counsel for the respondent-management, reiterated before us the same contentions which he

had urged before Balakrishna Ayyar, J., and the Labour Court. He argued that the collective support was of the very essence of an industrial dispute, that the jurisdiction of the Labour Court was to adjudicate on an industrial dispute and that, therefore, if before making an award, the industrial dispute referred for adjudication degenerate, as the learned counsel would put it, into an individual dispute, the Labour Court would have no further jurisdiction to deal with it. According to the learned counsel, the crucial date for determining whether an industrial dispute existed was not merely the date on which a reference was made for adjudication but also it could be shown at any moment, before an award had actually been made, that the industrial dispute referred ceased to exist as such in the sense that no longer a substantial section of the workers concerned stood behind it.

Before dealing with the above contentions it is first necessary to notice the relevant statutory provisions. The Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955, was enacted to regulate certain conditions of service of working journalists and other persons employed in newspaper establishments. Clause (*f*) of section 2 defines a working journalist as a person whose principal avocation is that of a journalist and who is employed as such in, or in relation to any newspaper establishment, and includes, among others, sub-editors, reporters and proof-readers. Sub-section (1) of section 3 provides that the provisions of the Industrial Disputes Act, as in force for the time being, shall, subject to the modifications specified in sub-section (2), apply to, or in relation to, workmen within the meaning of that Act. The modification contemplated by sub-section (2) of section 3 is not material for the purpose of the present appeal. We have, therefore, to turn to the provisions of the Industrial Disputes Act, 1947. That Act makes provisions for the investigation and settlement of industrial disputes by setting up, among others, Labour Courts and providing for reference thereto for adjudication of certain specified categories of industrial disputes. Clause (*k*) of section 2 defines what an industrial dispute means. It states, *inter alia* that any dispute or difference between employers and workmen which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person is an industrial dispute. Section 7 provides for the composition and constitution by the appropriate Government of Labour Courts for adjudication of industrial dispute relating to any matter specified in the Second Schedule to the Act. Section 10 (1) (*c*) which empowers the appropriate Government to refer any industrial dispute, existing or apprehended, to a Labour Court for adjudication reads as follows :—

"10. (1) Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing :—

(*a*) ....

(*b*) ....

(*c*) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matters specified in the Second Schedule, to a Labour Court for adjudication ; or

....

The other provisions of the section including the Provisos do not require notice for our present purpose. Section 15 which is important for this appeal and which defines the duties of a Labour Court reads :

"15. Where an industrial dispute has been referred to a Labour Court, Tribunal, or National Tribunal for adjudication, it shall hold its proceedings expeditiously and shall, as soon as it is practicable on the conclusion thereof, submit its award to the appropriate Government."

Section 17 requires that every award of a Labour Court should be published by the appropriate Government within a specified time and in the manner which the appropriate Government may think fit. As provided by section 17-A an award becomes enforceable on the expiry of 30 days from the date of its publication.

Though the definition of an industrial dispute does not in so many words state that a dispute or a difference between an employer and an individual employee of his in connection with his employment or the conditions of labour of any person

is not within its scope, it is well-settled that it is only a collective dispute that can constitute an industrial dispute. A collective dispute does not of course mean that all the workmen or a majority of them of the establishment concerned should sponsor and support the dispute. All that is necessary is that the dispute in order to become an industrial dispute should have the support of a substantial section of the workmen concerned in the establishment. What a substantial section of workmen may mean will depend upon the particular facts of each case. If such a collective dispute exists in relation to the matters specified by the definition of an industrial dispute, then the conditions required on the appropriate Government to make a reference of the dispute for adjudication are satisfied. Whether such an industrial dispute exists is a matter left to the opinion of the appropriate Government making the reference. It is clear from section 10 that the actual existence of an industrial dispute is not an essential condition to the making of a valid reference for adjudication but that the appropriate Government is competent to make such a reference, even if it apprehends an industrial dispute. But what falls to be particularly observed is the requisite that before a reference is made, there should be an industrial dispute either existing or apprehended. Once that requisite is satisfied, all the conditions of a valid reference under section 10 (1) are also satisfied. There is no indication in section 10 of any further requisite or condition to be satisfied in order to sustain the continued validity of the reference until it ends in an award. When an industrial dispute has been referred to a Labour Court, section 15 directs that it should hold its proceedings expeditiously and should on the conclusion thereof submit its award to the appropriate Government. In our opinion, the industrial dispute within the contemplation of section 15 obviously appears to be the industrial dispute that existed or was apprehended prior to the date of its reference to a Labour Court for adjudication. So much is explicit from the opening words of the section : " Where an industrial dispute has been referred to a Labour Court......" It is on that dispute the section enjoins the Labour Court to hold its proceedings and make its award. In other words, the jurisdiction of a Labour Court to adjudicate upon an industrial dispute springs from the reference made to it and is confined to the industrial dispute as referred to it, which means the industrial dispute which existed or was apprehended prior to the date of its reference. What the reference called upon the Labour Court to adjudicate was the industrial dispute that existed or was apprehended prior to the time when the same was referred to for adjudication. It follows from these premises that the question, whether the industrial dispute referred to for adjudication continued even after its reference to retain its character as such, has no bearing upon and does not affect the jurisdiction of the Labour Court to proceed and make an award on the industrial dispute referred to it for adjudication. That, in our opinion, is the real scheme and true scope of sections 2 (*k*), 10 (1) (*c*) and 15 of the Industrial Disputes Act, 1947.

It seems to us that our above view of the statutory provisions is fortified by certain other provisions of the Act. Section 20 lays down when a proceeding before a Labour Court to which a reference of an industrial dispute has been made for adjudication commences and concludes. Sub-section (3) of that section, so far as is material, reads :

> " Proceedings......before a Labour......shall be deemed to have commenced on the date of the reference of the dispute for......adjudication......and such proceedings shall be deemed to have concluded on the date on which the award becomes enforceable under section 17-A."

The proceeding, which starts upon a reference, continues and shall be deemed to have concluded only when the award becomes enforceable under section 17-A. The sub-section does not contemplate that the proceeding so started can conclude or can be concluded at an earlier time. It seems to follow from sub-section (3) that the only way by which the proceedings started on a reference can conclude is by making an award. Actually the point of time at which the proceeding concludes is even later, namely, the date on which the award becomes enforceable under section 17-A. Sub-section (3) of section 10 which states that where an industrial dispute has been referred to a Labour Court, the appropriate Government may by

order prohibit the continuance of any strike or lock-out in connection with such dispute, which may be in existence on the date of the reference, shows again that the industrial dispute which is the basis for reference and adjudication, is the industrial dispute in existence on the date of the reference. It is again on that basis that section 23 prohibits strikes or lock-outs during the pendency of the proceedings before a Labour Court. Section 23 (*b*), so far as is relevant, states :

"23. No workman who is employed in any industrial establishment shall go on strike in breach of contract and no employer of any such workman shall declare a lock-out—

(*a*) ....

(*b*) during the pendency of proceedings before a Labour Court........and two months after the conclusion of such proceedings ;......"

We have already referred to the provisions of section 20 which lay down when a proceeding commences or concludes before a Court to which a reference of an industrial dispute has been made for adjudication.

If we accept the argument of Sri R. Ramamurthi Ayyar that the Labour Court ceases to have jurisdiction to proceed further the moment, pending the reference, the industrial dispute loses its character as such, it will, in our opinion, be contrary to and even in conflict with the statutory provisions we have referred to. We cannot, therefore, accept his contention. Balakrishna Ayyar, J., stated that the jurisdiction of the Labour Court was not like that of an ordinary civil Court but it was a limited jurisdiction, limited by the statute which created it. We agree with the learned Judge that it is so in one sense. But the learned Judge's attention, as far as we can see from his judgment, does not appear to have been invited to the particular statutory provisions we have referred to above which confer, control and limit the jurisdiction of a Labour Court. We cannot agree, therefore, with the learned Judge that once an industrial dispute ceases to be as such because subsequent to the date of its reference a substantial section of its sponsors or supporters had withdrawn their support, and that the Labour Court loses its jurisdiction to proceed further in the matter. We hold that the jurisdiction of the Labour Court to proceed with the matter wholly depends on whether the industrial dispute referred to it for adjudication existed or was apprehended on the date of the reference and not on any subsequent date. We have reached this conclusion on the basis of the provisions of the Act themselves. But it seems to us that any other interpretation of those provisions may lead to startling results and will hardly be in consonance with the object and policy of the Act, namely, to conserve and promote industrial peace and welfare. Further it will be subversive to industrial justice, labour relations and fair play, if the jurisdiction of the Labour Court to proceed with the matter referred to it for adjudication, is to depend on the shifting convictions, exigencies and strength of the rival parties to the industrial dispute.

In the view we have taken we are not called upon in this case to decide whether a Labour Court is generally entitled to take into account events that occurred subsequent to the date of the reference. It seems to us that it is not possible to formulate a general or uniform rule for universal application. Whether subsequent events may be taken into account by the Labour Court may depend upon the particular circumstances in each case. For instance, if there is a settlement between the management and the workmen, who sponsored and supported an industrial dispute for adjudication, it is not expected that the Labour Court, although the Industrial Disputes Act itself contains no provision for recording the settlement, may refuse to take note of the settlement and make an award on that basis. Again considerations which may apply to a case where a particular workman whose reinstatement is the subject-matter of an industrial dispute referred for adjudication, has died, may not govern the case of industrial dispute involving questions of wages and the like. All that we need say here is that having regard to the statutory provisions, as interpreted by us, the jurisdiction of the Labour Court to proceed with and adjudicate upon an industrial dispute stems from and is sustained, until it makes an award and the same becomes enforceable, by the reference

itself which has been made on the basis of an industrial dispute existing or apprehended on the date of the reference and that the jurisdiction of the Labour Court to proceed in the matter is not in any way affected by the fact that subsequent to the date of the reference, the workers or a substantial section of them, who had originally sponsored and supported the cause, had later resiled and withdrawn from it.

There appear to be no decided cases directly in point. But our attention was invited to the decision of the Supreme Court in *Pipraich Sugar Mills Limited* v. *Pipraich Sugar Mills, Mazdoor Union*[1], in which a dispute arising before a closure was referred for adjudication after the concern was closed. Their Lordships of the Supreme Court repelled an argument that as the industry was not in existence and as the relationship between the employer and the employees had ceased prior to the reference, the reference itself was not a valid one, and held :

"We think that on a true construction of section 3, the power of the State to make a reference under that section must be determined with reference not to the date on which it is made but to the date on which the right which is the subject-matter of the dispute arises, and that the machinery provided under the Act would be available for working out the rights which had accrued prior to the dissolution of the business."

The facts and the point for decision in that case were different, but it has to be observed that although the industry itself had been closed even prior to the date of the reference, the Supreme Court did not regard that fact as, in any way, affecting the jurisdiction of the Labour Court to proceed with the matter referred to for adjudication. Reference was next made at the Bar to another decision of the Supreme Court in *State of Bihar* v. *D. N. Ganguly*[2], in which it was held that the scheme of the relevant provisions of the Act would *prima facie* seem to be inconsistent with the power of the appropriate Government to cancel a reference made under section 10 (1) once it had been made. In the process of arriving at that conclusion, their Lordships considered the scope and effect of a reference under section 10 (1) and observed :

"But once an order in writing is made by the appropriate Government referring an industrial dispute to the Tribunal for adjudication under section 10 (1), proceedings before the Tribunal are deemed to have commenced and they are deemed to have concluded on the day on which the award made by the Tribunal becomes enforceable under section 17-A. This is the effect of section 20 (3) of the Act. This provision shows that after the dispute is referred to the Tribunal, during the continuance of the reference proceedings, it is the Tribunal which is seized of the dispute and which can exercise jurisdiction in respect of it........... The scheme of the provisions in Chapters III and IV of the Act would thus appear to be to leave the reference proceedings exclusively within the jurisdiction of the Tribunals constituted under the Act and to make the awards of such Tribunals binding between the parties, subject to the special powers conferred on the appropriate Government under sections 17-A and 19."

This decision too was not concerned with the specific question we have to decide in this case.

In the result, with respect to Balakrishna Ayyar, J., we are unable to agree with him that the Labour Court has no jurisdiction to proceed to deal with the industrial dispute referred to it for adjudication. The appeal is allowed and the order of Balakrishna Ayyar, J., is set aside. The appellants will have their costs throughout. Advocate's fee Rs. 150 here and before Balakrishna Ayyar, J.

R.M. *Appeal allowed.*

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1. (1957) S.C.J. 38 : 1956 S.C.R. 872 : A.I.R. 1957 S.C. 95.

2. (1955) S.C.J. 533.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Nalla Kumara Gounder .. *Appellant**

v.

Thangammal and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 63—*Suit to set aside a claim order—Onus on the plaintiff to prove he is the real owner.*

In a suit by the defeated claimant under Order 21, rule 63 of the Civil Procedure Code, to set aside a claim order made against him, the onus of proof is on the plaintiff to prove that he is the real owner of the property in question and he cannot rest content with relying on the deed conferring an ostensible title on him.

Perayya v. *Venkayamma*, (1925) 47 M.L.J. 14, referred.

Appeal against the Decrees of the Court of the Subordinate Judge, Erode, in Appeal Suit Nos. 20, 87 and 136 of 1958 preferred against the Decree of the Court of the District Munsif of Erode in Original Suit Nos. 498 and 561 of 1957 and 1025 of 1955, respectively.

D. Ramaswami Ayyangar and *P. R. Varadarajan*, for Appellant.

K. S. Desikan and *K. Raman*, for Respondents.

The Court delivered the following

JUDGMENT.—One Thangammal filed three suits O.S. No. 1025 of 1955, O.S. No. 498 of 1957 and O.S. No. 561 of 1957 on the file of the District Munsif's Court of Erode seeking to set aside three summary orders passed in E.A. No. 2694 of 1953, dated 2nd June, 1955, in E.A. No. 1370 of 1955 and in E.A. No. 7 of 1956, dated 31st August, 1956, on the file of the same Court. These suits were necessitated as she was unsuccessful in her claim petitions intervening in execution proceedings in original suits in which the first defendant in all the three suits had obtained decrees against the other defendants in the suits. The plaintiff is the wife of one Palani Goundan. They had two sons, Nachimuthu Goundan and Kasianna Goundan. The properties to which she laid claim, which were the subject-matter of the attachment in execution of simple money decrees against her sons, were properties purchased in her name under Exhibit A-1, dated 16th September, 1933. The plaintiff's case was that it was her exclusive property in respect of which neither her husband nor her sons had any right, title or interest. The creditor against the sons, the first defendant in all the suits, however contended that the properties though standing in the name of the plaintiff were joint family properties which had been partitioned between the sons with the consent of their father and with the consent of the plaintiff herself.

The learned District Munsif of Erode, who tried the suit negatived the plaintiff's claim and dismissed all the suits. She accordingly preferred three Appeals, A.S. Nos. 20, 87 and 136 of 1958 on the file of the Subordinate Judge's Court of Erode challenging the correctness of the judgment and decree of the trial Court in all the suits.

The learned Subordinate Judge who heard the appeals reversed the judgment and decree of the trial Courts in all the suits and granted a decree in favour of the plaintiff as prayed for with costs throughout.

These three Second Appeals have been preferred by the first defendant in all the suits. Learned counsel for the appellant contended that the finding of the lower appellate Court on the question of title to the suit properties is vitiated by a wrong approach made by the learned Subordinate Judge by throwing the entire burden of proof on the defendants in the suit. The learned Subordinate Judge was apparently of the opinion that as the ostensible title stood in the name of the plaintiff she must also be presumed to be the real owner of the properties, unless

* S.A. Nos. 1141 of 1958 and 828 and 829 of 1959. 4th November, 1960. (13th Kartika, 1882—Saka).

it is established by persons contending against her that she was only a benamidar for the joint family of her husband and his sons. It is no doubt true that ordinarily when a person impugns a transaction as being sham and nominal or as being benami for another person the onus of establishing such a case will be upon the person who puts forward such a plea. But it has been pointed out by a number of decisions of which reference need be made only to the decision in *Perayya* v. *Venkayamma*[1], that a defeated claimant in a claim proceeding has the burden upon him to prove that the claim is well founded. The headnote of this decision is as follows :

" Ordinarily it will be for the party who sets up that a particular transaction is not real but benami to make out affirmatively the case put forward by him. But where the ostensible owner has been defeated in a claim proceeding and sues to set aside the order made on the claim petition under Order 21, rule 63, Civil Procedure Code, the onus is on him to establish that he is the real owner of the property and it is not sufficient for him to rely merely upon the deed which shows his ostensible title."

As the learned Subordinate Judge has failed to apply this principle of law his finding on the question of title cannot be upheld. I may point out that there are other fundamental mistakes committed by the learned Subordinate Judge. The learned Subordinate Judge has observed that the partition karar Exhibit B-1 in the case does not contain either the mark or the thumb impression of the plaintiff. But a reference to Exhibit B-1 will show that the mark purported to be that of the mark of Thangammal finds a place therein. Whether it was really the mark of Thangammal or not will of course be a matter for consideration by the lower appellate Court. But as I am satisfied that the learned Subordinate Judge has committed an error of law in not appreciating the correct legal position on the question of onus of proof, his judgment has to be set aside. I am not expressing any opinion on the merits of the case of the respective parties.

These Second Appeals are allowed. The judgment and decree of the learned Subordinate Judge are set aside and the Appeals Nos. 20, 87 and 136 of 1958 are remanded to the file of the Sub-Court, Erode, to be heard afresh and disposed of according to law and in the light of the observations contained in this judgment. The appellant will be entitled to a refund of the Court-fee paid on the memorandum of appeals in all the three appeals. Costs will abide and will follow the result.

V.S. *Appeals allowed and remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

State of Madras represented by the Deputy Commissioner of Commercial Taxes, Coimbatore Division, Coimbatore .. *Petitioner.*

v.

Messrs. Asher Textiles Ltd., Tiruppur .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), *section* 12 (2)—*Revisional powers under—Escaped turnover—What amounts to—Amendment of law—Effect of.*

Where the law relating to levy of sales tax is amended with retrospective effect, it was the amended law that should be deemed to have been administered even on the date of the original order. An order made on the basis of the law as it then stood, though valid then, would become wrong by virtue of the subsequent amendment of the law with retrospective effect. It cannot be treated as escaped turnover. But the wrong order can be revised under section 12 (2).

Petition under section 12 (*b*) (i) of the Madras General Sales Tax Act praying the High Court to revise the Order of the Sales Tax Appellate Tribunal, Madras, dated 27th May, 1958 and made in T.A. No. 144 of 1958 (S.M.R.P. No. 12 of 1957-58) Deputy Commissioner of Commercial Taxes, Coimbatore division).

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1. (1925) 47 M.L.J. 14.

* T.C. No. 151 of 1958.

8th November, 1960.
(17th Kartika, 1882—Saka).

G. Ramanujam for the Government Pleader (*A. Alagiriswami*) for Petitioner.

T. R. Ramachandran and *S. Jagannadhan*, for Respondent.

The Order of the Court was made by

Rajagopalan, J.—In the assessment finalised by the Commercial Tax Officer on appeal on 24th December, 1955, he applied the principle laid down in *Bengal Immunity Co., Ltd.* v. *The State of Bihar*[1], and held that a turnover of Rs. 7,87,671-2-0 was not assessable as that represented the turnover of inter-State sales. Subsequent to that, on 30th January, 1956, the President promulgated the Sales Tax Validation Ordinance, which was followed up by the Sales Tax Validation Act (VII of 1956). Under that enactment the ban imposed by Article 286 on the levy of tax on inter-State sales was lifted so that what were called "*Explanation* sales" could be taxed if the appropriate State Legislature provided for that. The Deputy Commissioner, Coimbatore, purporting to exercise the revisional powers vested in him by section 12 of the Act, issued a notice to the assessee to show cause why the order of the Commercial Tax Officer, dated 24th December, 1955, should not be revised, and why the turnover of Rs. 7,87,671-2-0 which had been exempted from tax by the Commercial Tax Officer, should not be subjected to the levy of sales tax at the appropriate rate. The Deputy Commissioner eventually overruled the objections of the assessee and revised the order of the Commercial Tax Officer and directed the levy of sales tax on the turnover in dispute. The assessee appealed to the Tribunal. The Tribunal set aside the order of the Deputy Commissioner. The Tribunal held that there was nothing improper or illegal in the order of the Commercial Tax Officer, because it was correct and legal as the law stood on the date that order was passed by the Commercial Tax Officer. Subsequent enactment with retrospective effect did not make the order of the Commercial Tax Officer illegal. The Tribunal was also of the view that it was really a case of escaped turnover, and the Tribunal held that the revisional jurisdiction vested by section 12 (2) of the Act did not authorise the Deputy Commissioner to assess escaped turnover.

The Tribunal's view, that it was a case of escaped turnover, cannot be sustained. The Tribunal referred to the decision of Krishnaswami Nayudu, J., in *Louis Dreyfus and Co., Ltd.* v. *The Province of Madras*[2]. Apparently it was not brought to the notice of the Tribunal that the decision on that point was reversed by the Full Bench of this Court in *State of Madras* v. *Louis Dreyfuse and Co., Ltd*[3]. In that case the difference between escaped and under-assessment or non-assessment of a disclosed turnover was explained and the relative fields of the revisional jurisdiction and the power to assess escaped turnover—it is now rule 17 (1) of the General Sales Tax Rules—was also explained by the Full Bench. At page 328 it was pointed out:

> "............in cases where the entire turnover of an assessee is before the assessing authority and is considered by it and such authority by error of fact or law treats the turnover or any part thereof as not assessalbe or grants a deduction or exemption to which the assessee is not entitled under the Act, the case is not one of escaped turnover but of an improper or illegal assessment order which is revisable under rule 14(2)."

Revisional jurisdiction in the present case was exercised under section 12 (2) of the Act, but the principle remains the same. The Tribunal was thus in error in treating it as a case of escaped turnover. Incidentally, we have to point out that, even if it had been the escaped turnover, the Deputy Commissioner would have had jurisdiction to assess that escaped turnover under rule 17 (3) (*a*) read with rule 17 (1) of the Sales Tax Rules. But that question, of course, does not arise for further investigation.

The next question is, whether the Deputy Commissioner was entitled to revise the order of the Commercial Tax Officer, which was quite consistent with the law, as it stood on the date that order was passed by the Commercial Tax Officer, but

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1. (1955) 2 M.L.J. (S.C.) 168: (1955) S.C.J. 672 : (1955) 2 S.C.R. 603 : (1955) 6 S.T.C. 446.
2. (1950) 3 S.T.C. 19.
3. (1956) 2 M.L.J. 327 : I.L.R. (1956) Mad. 1285 : 6 S.T.C. 318.

was inconsistent with the provisions of Act VII of 1956. The view taken by the Tribunal, that it could not be treated as a case of impropriety or illegality within the meaning of section 12 (2) of the Act, because on the date the Commercial Tax Officer passed his order it was quite consistent with the law as it stood then, will have to be overruled in the light of the observations of the Supreme Court in *Venkatachalam* v. *Bombay Dyeing &Manufacturing Co., Ltd.*[1]. Those principles were applied in the *State of Madras* v. *Asher Textiles Ltd.*[2], in exercise of revisional jurisdiction vested in the High Court under section 12-B of the Act. The same principle would also govern either cases of rectification for which the Income-tax Act provides or cases of revisional jurisdiction under section 12 (2) of the Act. The principle remains the same. When the law is amended with retrospective effect, it was the law that should be deemed to have been administered even on the date of the original order. Judged by that test, the original order of assessment finalised by the Commercial Tax Officer was wrong, because, if what was enacted by Act VII of 1956 was the law on the date of the original assessment, the original assessment was illegal. Learned counsel for the respondent-assessee urged that the ambit of section 12 (B) was more circumscribed than that for instance of section 12-B of the Act, and that the order of the Commercial Tax Officer should not be characterised either as illegal or improper when it was correct and consistent with the law as it stood on that date. But that contention we must negative in view of what we have stated above. The principle laid down in *Venkatachalam* v. *Bombay Dyeing & Manufacturing Co., Ltd.*[1], applies with equal force to cases of revision under section 12 (2) of the Act also.

The petition is allowed. The order of the Tribunal is set aside and the order of the Deputy Commissioner is restored. The petitioner will be entitled for the costs of this petition. Counsel's fee Rs. 100.

R.M. —————— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Ganesa Pillai and another .. *Petitioners**

Criminal Procedure Code (V of 1898), *section* 350—*Procedure—Transfer of case after examination of some prosecution witnesses—Examination of remaining witnesses by transferee Magistrate and conviction—Legality—Duty to proceed* de novo—*Criminal Procedure Code, sections* 192 (1) *and* 528—*Scope and effect of.*

A conviction is illegal if it is based on the evidence partly recorded by one Magistrate and partly by another Magistrate to whom the case has been transferred. When a case is transferred, it must be for "trial or enquiry ", whether it is under section 192 (1) or under section 528, Criminal Procedure Code. When a case is transferred to another Magistrate after the examination of some of the prosecution witnesses, the Magistrate to whom it is transferred must examine the witnesses *de novo* and not proceed to examine the remaining witnesses and record a conviction. There must be a fresh trial when it is transferred to him, as " enquiry or trial " means full trial and not a partial trial based on the evidence partly recorded by him and the evidence recorded by the other Magistrate from whose file the case was transferred.

Tota Venkanna and others, In re, (1900) 2 Wair, 152 ; *Natesan Servai* v. *State*, 1950 M.W.N. (Crl.) 259, followed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Sub-Divisional Magistrate, Poonamallee and made in C.C. No. 22 of 1960.

R. Sundaravaradan and *P. S. Narasimhan*, for Petitioners.

M. Narayanamurthi, for the Public Prosecutor, for the State.

The Court made the following

ORDER.—This revision is by the two accused against their convictions and sentences under section 332, Indian Penal Code, by the Sub-Divisional Magistrate,

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1. (1958) 2 M.L.J. (S.C.) 182 : (1958) 2 An. W.R. (S.C.) 182 : (1958) S.C.J. 1054 : 1959 S.C.R. 703 (S.C.).
2. 10 S.T.C. 584.

*Crl. R.C. No. 329 of 1960. 9th November, 1960.
(Crl. R.P. No. 321 of 1960). (18th Kartika, 1882-Saka).

Poonamallee. As the sentence is only a fine of Rs. 50 in each case and is non-appealable, the revision has been preferred to this Court. The point of law taken before me by Sri R. Sundaravaradan, learned counsel for the petitioners, is this. This case was originally tried by the Special First Class Magistrate, Saidapet. Before him P.Ws. 1 to 5 were examined. Subsequently the case was transferred to the file of the Sub-Divisional Magistrate, Poonamallee. He examined the sixth witness and acting on the evidence of P.Ws. 1 to 5 recorded by the Special First Class Magistrate and also on the evidence of P.W. 6 recorded by him, he convicted the petitioners. It is contended that when the case was transferred after the examination of the five witnesses to the file of the Sub-Divisional Magistrate, he must have examined all the witnesses *do novo*. This right of getting the witnesses examined *de novo* which was originally granted by section 350, Criminal Procedure Code, has no doubt been taken away by the present amendment. The discretion of the examination of witnesses *de novo* is now vested in the Magistrate to whom the case is transferred or the Magistrate who succeeds the prior Magistrate.

But a Bench of this Court, consisting of Govinda Menon and Basheer Ahmed Sayeed, JJ., in *Natesan Servai* v. *State*[1], has taken the view that a conviction is illegal if it is based on the evidence partly recorded by one Magistrate and partly by another Magistrate to whom the case has been transferred. There it is pointed out that when a case is transferred it must be for trial or enquiry whether it is under section 192 (1) or under section 528, Criminal Procedure Code. In a case of transfer under section 192 (1) the Magistrate mentioned therein may transfer any case of which he has taken cognizance for enquiry or trial to any Magistrate subordinate to him, whereas under section 528 (2), Criminal Procedure Code, the Magistrate mentioned in the section can withdraw any case from or recall any case which he has made over to any Magistrate subordinate to him or may transfer for trial and enquiry to any Magistrate competent to enquire into. The expression " for enquiry or trial " is used in both the sections. The transfer for enquiry or trial has been considered in the above decision of Govinda Menon and Basheer Ahmed Sayeed, JJ. They have held that the transfer is illegal. But I do not construe it as saying that the Court has no power to transfer a case at such a stage. What they have meant is that a conviction is illegal if it is based on evidence partly recorded by one Magistrate and partly recorded by another Magistrate. If the transfer is effected under the provisions of section 528 (2) the Magistrate to whom it is transferred must examine the witnesses *de novo*. They purport to follow the ruling in *Tota Venkanna and others*, In re,[2] wherein it was held that the Magistrate to whom the case had been transferred must rehear the witnesses. This is consistent with the interpretation sought to be given by Sri Sundaravaradan that when the case was transferred at the stage at which this was transferred to a new Magistrate, he should examine the witnesses afresh and dispose of the case. That is to say, there must be a fresh trial when it is transferred to him as the expression used " for enquiry or trial " means full trial and not a partial trial based on the evidence partly recorded by him and on the evidence recorded by the other Magistrate for whose file the case was transferred. In this view, inasmuch as the Sub-Divisional Magistrate has not examined all the witnesses afresh, the conviction is vitiated by this illegality. The only question is whether the case should be sent back for fresh trial. Since the sentence is only a fine of Rs. 50 in each case, I do not think that the ends of justice require that the case should be sent back for fresh trial.

The convictions and sentences are set aside and the petitioners are acquitted. The fines if collected will be refunded.

P.R.N. *Revision allowed. Convictions and sentences set aside.*

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1. 1950 M.W.N. (Crl.) 259. 2. (1900) 2 Weir 152.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

Union of India repre-ented by the General Manager, Southern Railway Park Town, Madras .. *Appellant**

v.

R. Akbar Sheriff .. *Respondent.*

Constitution of India (1950), *Article* 311(1) *and* (2)—*Applicability and scope—Article* 311 (2), *Proviso* (a) —*Scope of—Dismissal of Government servant on ground of conviction by criminal Court— Subsequent setting aside of conviction by higher Court—Effect—Reinstatement after acquittal—Right of Government servant to salary for period between dismissal and reinstatement—Suit for arrears of salary—Maintainability—Railway Fundamental Rules—(Service Conditions Pay and Deputation), Rule,* 2044.

It is no doubt true that the remedy of a civil servant complaining of an injury caused to him by reason of the violation of the statutory rules lies only in the hierarchy of authorities within the domain of administration and resort cannot be had to a civil Court, having regard to the principle that a civil servant holds office during the pleasure of the President. But a violation of a constitutional provision does certainly give rise to a right in favour of the aggrieved individual enforceable in a Court of Law.

A violation of Article 311 (1) or 311 (2) is a justiciable issue in a Court of Law, as the terms thereof are mandatory and not permissive, qualifying the provisions of Article 310 and providing a condition precedent to the exercise of the power under Article 310. Any purported removal or dismissal from service of a civil servant without conformity to the prohibitory and mandatory provisions of Article 311 (1) and (2) of the Constitution is inoperative and void.

This immunity from dismissal or removal from service or reduction in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken against him is taken away under Proviso (*a*) to Article 311 (2) in cases where the dismissal or removal from service or reduction in rank is based upon the ground of conduct which resulted in the civil servant's conviction on a criminal charge and in order to sustain an order of dimissal, etc., without compliance with the provisions of Article 311 (2), there must be a conviction of that person on a criminal charge by a competent Court. But once the conviction is set aside or quashed on appeal or revision by a higher Court of law, the order of dismissal must fall to the ground. The setting aside of a wrong order of conviction and the acquittal of the civil servant by a higher Court would be tantamount to that person not having been convicted at all. The result of the last proceeding becomes indefeasibly final.

Dilbagh Rai v. *Divisional Superintendent, Northern Railway,* A.I.R. 1959 Punj. 401; *R. S. Dass* v. *Divisional Superintendent,* A.I.R. 1960 All. 538, followed.

When as a result of acquittal, the civil servant is reinstated, the Government cannot deprive him of his salary for the period between the date of the dismissal consequent on the conviction and the date of the acquittal by the higher Court, on the ground that the conviction was legal until set aside by the higher Court, and that the civil servant was not on duty during that period and could not be entitled to any salary. A suit will therefore lie for recovery of such arrears of salary.

Case-law reviewed.

A plea of estoppel being a point of mixed law and fact cannot be permitted to be raised for the first time in appeal when it was not raised either in the pleadings or at trial in the first Court.

Appeal against the Decree of the Court of the Subordinate Judge of Tiruchirapalli in O.S. No. 10 of 1956.

S. S. Ramachandra Iyer and *S. R. Kumarasamy*, for Appellant.

M. Natesan and *B. Venkateswara Iyer*, for Respondent.

The Judgment of the Court was delivered by

Jagadisan, J.—This is an appeal by the Union of India represented by the General Manager, Southern Railway, Madras, against the Judgment and Decree in O.S. No. 10 of 1956 on the file of the Court of the Subordinate Judge of Tiruchirapalli whereby the Union of India, the defendant in the suit, was directed to pay the plaintiff the sum of Rs. 11,115 with interest thereon at 6 per cent. from 18th January, 1954, the date of the plaint together with costs amounting to Rs. 1,799-4-0.

R. Akbar Sheriff, the plaintiff in the suit, presented the plaint on 18th January, 1954, on the Original Side of this Court and it was transferred to the City Civil Court,

* Appeal No. 229 of 1957. 30th November, 1960.

Madras, on 22nd July, 1955, for trial. Before the City Civil Court, the Union of India the defendant in the suit, raised a preliminary issue that that Court had no jurisdiction to try the suit. By order, dated 12th October, 1955, the City Civil Court held that it had no jurisdiction and returned the plaint for presentation to the proper Court. The plaintiff received the plaint by registered post on 8th December, 1955, at Mathurai and re-presented the plaint on 12th December, 1955, before the Sub-Court of Tiruchirapalli.

The plaintiff was employed as the Permanent Way Inspector in the Southern Railway and was dismissed from service as and from 1st April, 1949. The order of dismissal of the plaintiff from service was because of the plaintiff's conviction of offences under sections 420 and 477-A, Indian Penal Code, by the learned Assistant Sessions Judge of Mangalore. This conviction was set aside by an order of acquittal passed by this Court in Criminal R.C. No. 1442 of 1949, dated 25th January, 1951. The plaintiff was thereupon reinstated in service on and from 13th July, 1951. The present suit was filed for recovery of salary and allowance due to the plaintiff from 1st April, 1949 to 13th July, 1951, which aggregated to the sum of Rs. 11,115 as the Union of India refused to pay such salary and allowance despite the order of reinstatement in service. The Union of India defended the suit and contended that the plaintiff had no right to claim the arrears of salary and allowance in a Court of Law, that such payment depended entirely on its discretion, and that in any event the suit claim was barred by limitation. The learned Subordinate Judge of Tiruchirapalli who tried the suit over-ruled the defence put forward by the Union of India and granted a decree in favour of the plaintiff as prayed for with costs. This appeal has therefore been preferred by the Union of India challenging the correctness and legality of that judgment and decree.

The events that preceded the suit lie in a short compass and may therefore be set out before dealing with the points in controversy arising for determination in this appeal. The plaintiff was entertained in service by the Southern Railway on 22nd April, 1931. In the year 1946 he was employed as a Permanent Way Inspector and was stationed at Mangalore. The plaintiff had some misunderstandings with one G. C. Raman, P.W. Sub-Inspector and another Govindan, Fitter, both employed under the Railway. According to the plaintiff these two persons were responsible for filing false complaints against him to the Section Officer attached to the Special Police Establishment at Podanur. A charge-sheet was filed against the plaintiff before the Sub-Divisional Magistrate, Mangalore, in R.C. Nos. 1 and 2 of 1947 charging the plaintiff with having committed offences under sections 420 and 477-A, Indian Penal Code. The charge was that the plaintiff who was entrusted with the duty of replacing sleepers in the Railway line near Mangalore carried out the work with the help of the gang coolies employed under the Railway but made it appear as if he had employed casual labourers to do the job and created false entries of payments. The cases were committed for trial before the Assistant Sessions Judge of Mangalore and were taken up on his file as S.C. Nos. 11 and 12 of 1948. After trial the plaintiff was acquitted by order of Court, dated 4th August, 1948. The charges against the plaintiff were split up before the Assistant Sessions Judge, Mangalore and a batch of two more cases, S.C. Nos. 11-A and 12-A were tried separately by the learned Assistant Sessions Judge, Mangalore, on 31st January, 1949, S.C. No. 11-A ended in an acquittal but S.C. No. 12-A ended in a conviction against the plaintiff. The plaintiff was sentenced to three years' simple imprisonment and fine of Rs. 75. He preferred an appeal before the learned Sessions Judge of Mangalore, in C.A. No. 11 of 1949. The learned Sessions Judge while confirming the conviction of the plaintiff reduced the sentence of imprisonment alone to a period of 18 months from a period of three years. Then he preferred Crl.R.C. No. 1442 of 1949 before this Court. Somasundaram, J., by his order, dated 25th January, 1951, set aside the conviction and sentence of the Courts below and directed an acquittal of the plaintiff. The order of acquittal of this Court has been marked as Exhibit A-1 in the case.

The plaintiff while he was on casual leave between 17th January, 1949 and 28th January, 1949, was served with an order of suspension by the Railway Authorities granting him a subsistence allowance of 50 per cent. of his salary with full dearness allowance. This suspension order is evidenced by Exhibit A-3, dated 24th January, 1949. Consequent on the conviction and sentence passed by the learned Assistant Sessions Judge of Mangalore the plaintiff was dismissed from service with effect from 31st March, 1949 The dismissal order is Exhibit A-4, dated 15th March, 1949. The order recites as follows:

"You are hereby dismissed from the service with effect from 31st March, 1949, on account of criminal conviction".

The plaintiff by his letter, dated 25th March, 1949, Exhibit A-5, addressed to the General Managar stated that he had already appealed to the Sessions Court of Mangalore against the order of conviction passed by the Assistant Sessions Judge of Mangalore and requested for suspension of order of dismissal till the decision of the appellate Court. But this request on the part of the plaintiff was not given heed to by the Railway Authorities. The Railway Authorities however wrote a reply to the plaintiff, Exhibit A-7, dated 23rd April, 1949 stating that the conviction of the Court holds good until reversed by the higher Court and that the position that may result if that conviction were to be set aside on appeal will be considered at the proper stage, if and when such a stage arises. The result was that the plaintiff was dismissed from service with effect from 31st March, 1949 and ceased to hold office.

There was another charge against the plaintiff which was tried by the Assistant Sessions Judge, Tirunelveli, in S.C. 104 of 1950. By order of Court, dated 17th March, 1951, this also ended in an acquittal. The learned Assistant Sessions Judge in the course of his order of acquittal observed thus:

"as I find that he has been unduly harassed by the prosecution having been launched against him as a result of conspiracy the railway administration will not only reinstate him but make adequate recompense for the mental pains and suffering that he had to undergo."

On 24th April, 1951 the plaintiff wrote Exhibit A-11 to the General Manager stating that all the prosecutions against him had ended in orders of acquittal, that the order of dismissal passed by the Railway can no longer stand, and that he should be restored to his job as Permanent Way Inspector, maintaining his seniority, and that the whole period from the date of suspension from duty to reinstatement should be treated as special leave on duty and that he should also be given the benefit of the annual increments on the due dates. As there was no response from the Railway the plaintiff addressed to the General Manager further letters, Exhibits A-12, dated 27th April, 1951 and A-13, dated 14th May, 1951. He followed this up by a registered notice through his counsel at Mathurai to the General Manager which is Exhibit A-15, dated 2nd June, 1951. The demand contained in the notice on behalf of the plaintiff was couched in the following terms:

"This is to give you notice that my client will be forced to the painful necessity of filing a suit for reinstatement and for damages and back pay if he is not reinstated within a week of receipt of this notice".

The Railway sent a reply, Exhibit A-14, dated 9th June, 1951, stating that the matter was under consideration. On 10th July, 1951, the plaintiff received the communication, Exhibit A-16, in the following terms:

"This office No. A-34/44/I-E. of 15/22-3-1949, dismissing you from service with effect from 31st March, 1949, is hereby cancelled and the Chief Engineer has been advised to reinstate you in service immediately. Please note that you will not draw anything more than what has already been paid to you for the period from 4th February, 1949, to the date of reinstatement".

The plaintiff submitted the petition, dated 23rd July, 1957, to the General Manager for reconsideration of the decision withholding salary for the period between the date of dismissal and the date of reinstatement. To this the Railway sent a reply Exhibit B-3, dated 20th September, 1951, stating that the period of absence from 31st March, 1949 to 12th July, 1951, will be treated as leave without pay. The

plaintiff again wrote to the General Manager by his letter Exhibit A-22, dated 9th November, 1951, pleading for payment of salary and allowance for the period in which he was out of office by reason of the order of dismissal which was subsequently set aside and cancelled. The plaintiff gave instances in that letter where the Railway was pleased to grant full pay and allowance to other employees who were dismissed but subsequently reinstated. The Railway sent a reply stating that there was no justification for modifying the orders already issued by them. Then the plaintiff wrote another letter, Exhibit A-10, dated 4th March, 1952, addressed to the General Manager complaining that persons junior to him in service had been promoted to higher grade and that the Railway should give him also the benefit of promotion. The Railway sent a reply, Exhibit A-24, dated 7th April, 1952, observing that it was not possible to set aside the results of the Selection Board during the period he was absent from duty from 31st March, 1949 to 12th July, 1951, but that the plaintiff will maintain his seniority in his grade amongst those not selected for higher posts. After some further correspondence the plaintiff caused a notice to be issued through his counsel intimating the Railway of the intended suit to which the Railway sent a reply, Exhibit A-25 stating that the plaintiff was at liberty to move the Court at his own risk. The plaintiff was therefore compelled to launch the present suit.

From the facts set out above which are not in dispute it is clear that the plaintiff was dismissed from service by reason only of the conviction and sentence passed against him by the Assistant Sessions Judge of Mangalore on 31st January, 1949. The dismissal order Exhibit A-4 in the case specifically states that the plaintiff was dismissed on account of ' criminal conviction '. It is also clear that the plaintiff was reinstated in service only as a result of the conviction against the plaintiff having been set aside by this Court by order, dated 25th January, 1951. The contention of the plaintiff is that the order of dismissal from service was illegal as it merely followed a wrong order of conviction which was ultimately set aside by the highest Court in the State. If the plaintiff was not reinstated in service he could have filed a suit in the Civil Court for a declaration that the order of dismissal was illegal, void and inoperative as the foundation for the order of dismissal, namely, the conviction by a competent criminal Court, was absent the conviction itself, having been set aside, and as there was no compliance with the provisions of Article 311 of the Constitution. We shall refer to the terms of Article 311 and discuss the rights of the civil servant holding office under the Union of India a little later. The plaintiff's case, therefore, is that he cannot be deprived of the salary and allowance by reason of an illegal and void order of dismissal passed by the Railway. On behalf of the Union of India this contention is met on the ground that the order of dismissal at the time when it was passed was quite legal and proper as it merely gave effect to the conviction of the plaintiff by a competent criminal Court, and that the subsequent setting aside of the conviction by a Court of superior jurisdiction cannot retrospectively affect the legality of the dismissal order so as to enable the plaintiff to claim the salary and allowance for the period for which he was out of office.

Every civil servant employed under the Union of India holds office during the pleasure of the President except as expressly provided by the Constitution. Both under the Government of India Acts of 1919 and 1935 every person in the civil service of the Crown in India held office during His Majesty's pleasure. This pattern of tenure of office by a person serving the Union is adopted from the English system of Civil Service. The underlying conception of the rule is based upon public policy. The conditions of services are regulated by statutory rules. Section 240, clauses (2) and (3) of the Government of India Act, 1935, introduced two safeguards in favour of the civil servants, that he shall not be dismissed from the service by any authority subordinate in rank to that by which he was appointed and that he shall not be dismissed from service or reduced in rank until he has been given a reasonable opportunity of showing cause against the proposed action against him. Article 311, clauses (1) and (2) of the Constitution now provide the same safeguards not merely for dismissal from the service and reduction in rank, but also for removal from service of a civil servant. These provisions operate as retrictions on the otherwise unfettered

powers of the President or the Governor. A violation of Article 311 (1) or 311 (2) is a justiciable issue in a Court of Law as the terms thereof are mandatory and not permissive, qualifying the provisions of Article 310 and providing a condition precedent to the exercise of the power under Article 310. The observation of Lord Thankerton delivering the judgment of the Judicial Committee in *High Commissioner for India and High Commissioner for Pakistan* v. *I. M. Lal*[1], interpreting the provisions of section 240 (2) and section 240 (3) of the Government of India Act is fully applicable and affords guidance to the interpretation of Articles 311 (1) and 311(2) of the Constitution. Any purported removal or dismissal from service of a civil servant without conformity to the prohibitory and mandatory provisions of Articles 311 (1) and 311 (2) of the Constitution is void and inoperative. The Proviso to Article 311 (2) is as follows :

> " Provided that this clause shall not apply :
>
> (*a*) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge :
>
> ....".

The immunity of a civil servant under the Union of India from dismissal or removal from service or reduction in rank until he has been given a reasonable chance of showing cause against the action proposed to be taken against him is taken away under Proviso (*a*) to Article 311 (2) in a case where the dismissal or removal from service or reduction in rank is based upon the ground of conduct which resulted in his conviction on a criminal charge. In order to sustain an order of dismissal from service of a civil servant without compliance of the provisions of Article 311 (2), there must be a conviction of that person on a criminal charge by a competent Court. Once the conviction is set aside or quashed the dismissal order must fall to the ground. An acquittal of a person of a criminal charge by a higher Court setting aside the conviction passed by a subordinate or an inferior Court is tantamount to the person not having been convicted at all. The setting aside of a wrong order of a Court results in the position as if such order was never in existence, though as a fact the order was passed and lasted till it was set aside. This view of the matter is not a legal fiction as the proceedings forming the subject-matter of a criminal charge against a person from the primary Court of trial to the ultimate Court of final appeal or revision really constitute one proceeding and however varying the fortunes of the person indicated may be, the proceeding can always have only one result, and that is the result of the last proceeding which becomes indefeasibly final.

In *Dilbagh Rai* v. *Divisional Superintendent, Northern Railway*[2], the petitioner before the High Court was prosecuted for an offence under section 509, Indian Penal Code, for having wished *namaste* to a lady on a railway platform in circumstances which were not considered proper. He was convicted and sentenced to a term of three months' simple imprisonment by the trial Magistrate on 29th December, 1955. His appeal to the Court of Session against the said conviction failed. He preferred a revision in the High Court of Punjab, but was again unsuccessful. Thereafter be obtained Special Leave from the Supreme Court of India and finally the Supreme Court by its decision, dated 7th March, 1957, set aside the conviction and sentence and acquitted him. The petitioner was however dismissed from service in view of the conviction and sentence passed against him by the trial Magistrate. After the order of acquittal passed by the Supreme Court the petitioner prayed for reinstatement to service but the Railway Authorities refused to reinstate him. The petitioner therefore moved the High Court under Article 226 of the Constitution for an appropriate writ to quash the order of dismissal as being wholly void and ineffective. The question for consideration by the Punjab High Court was whether the provisions of Article 311 (2) of the Constitution were really complied with in a case of this description. The High Court held that an order of dismissal passed upon a conviction which was set aside

1. (1948) 2 M.L.J. 55 : L.R. 75 I.A. 225 (P.C.).
2. A.I.R. 1959 Punj. 401.

subsequently is not an order in conformity with Article 311 (2). At page 402 the High Court observed thus:

"Now the aforesaid Proviso, becomes applicable only if a person has been convicted on a Criminal charge. Conviction here can have only one meaning namely that the person must have been convicted finally. In other words, if a person is acquitted by a Court of appeal, then it cannot be said that there is any conviction in the sense in which it is used in the aforesaid provision. In the present case the petitioner had been acquitted by the highest Court of the land. It could not possibly be said that his case fell within the aforesaid Proviso. He was, therefore, fully entitled to the protection guranteed by Article 311".

In *R. S. Dass* v. *Divisional Superintendent*[1], the petitioner before the High Court was prosecuted for offence under section 409, Indian Penal Code, in relation to certain acts done by him in the performance of his duties as relieving train clerk at Aligarh. The Magistrate who tried the petitioner convicted him for the said offence by his order, dated 18th December, 1956. Appeals were preferred before the Sessions Judge, Aligarh, who allowed the same on 15th February, 1958. Before the appeals could be disposed of by the Sessions Judge the Divisional Superintendent, Allahabad, dismissed the petitioner from service by his order, dated 25th February, 1957. The petitioner was not charge-sheeted separately before the Departmental Authority. No enquiry was held against him on any alleged charge by the Department. The order of dismissal was passed on the strength of the finding reached by the Magistrate who convicted him for an offence under sections 409 and 477-A, Indian Penal Code. The question for consideration by the Allahabad High Court was whether the dismissal order of the petitioner can be sustained after the conviction itself upon which it was based was set aside. At page 539 the High Court observed thus:

"But apart from the above consideration the main thing to be considered is the true meaning of the words in the Proviso 'which has led to his conviction on a criminal charge'. Do these words merely indicate as the respondent has contended, that there was at one stage of the proceedings a conviction against the public servant, or do they further imply a conviction finally upheld? The words 'led to his conviction', mean, in the context they have been used, not merely to bring a criminal charge against the delinquent servant but further imply that as a result or consequence it has ended in conviction also.

A proceeding will not be said to have led to his conviction if it has not resulted ultimately in conviction or as a consequence of appeal, has failed in an acquittal. Appeal is a continuation of the proceedings commenced on the criminal charge and it does not conclude in a conviction where an appeal is preferred against the order of the trial Court or of any subsequent Court until the subsequent proceedings have finally ended...At the same time it is clear that the order of dismissal passed by the Divisional Superintendent cannot be supported on the ground stated in sub-clause (*a*) of the Proviso under clause (2) of Article 311. This is so because of the finding arrived at earlier, that the sub-clause implies a final conviction. If that is so, the very foundation on which the dismissal order was based and which in its turn gave occasion for a reinstatement order to be passed has fallen, and if the foundation should disappear, the edifice must also necessarily go".

We respectfully agree with the principle laid down in the decisions cited above as it follows from the plain provisions of the Constitution enshrined in Article 311 (2). Admittedly there has been no Departmental enquiry against the plaintiff on a charge of any kind. The order of dismissal of the plaintiff was a consequence, and perhaps a necessary consequence of his conviction on a criminal charge by a competent Court. The setting aside of the conviction by the order of acquittal passed by this Court necessarily undermined the previous order of dismissal which, however lawful it might have been at the inception when it was passed, cannot survive the disappearance of the conviction caused by the acquittal. In fact the defendant acted quite rightly and properly by setting aside the order of dismissal and ordering reinstatement of the plaintiff thus giving effect to the change of circumstances caused by the order of the acquittal. We are of opinion that the order of dismissal of the plaintiff from the service became illegal, void, and inoperative by reason of the chain of events narrated above, and that it is impossible to contend, as was attempted on behalf of the defendant that the order of dismissal can in some way be treated to have

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1. A.I.R. 1960 All. 538.

had a legal subsistence during the period for which it lasted till it was cancelled by the order of reinstatement.

The question that arises for determination in this appeal is whether the plaintiff is entitled to recover the salary and allowance due to him between 1st April, 1949 and 13th July, 1951, by instituting the action in a civil Court. He must be deemed to have been in service during that period as the purported order of dismissal was void and inoperative. The plaintiff's claim cannot be barred by the constitutional provision under which he held office during the pleasure of the President as he had a right to continue in office till terminated with due regard to the provisions under Article 311. Under the English Law the subject cannot maintain an action against the Crown for a declaration of improper or illegal termination of service or for recovery of arrears of salary. In Wade and Phillips Constitutional Law, Fifth Edition, page 334, the legal position is thus set out:—

"The security of the civil service depends upon convention rather than law. The agreements reached between the Treasury and representatives of the staffs of Government departments in joint councils (Whitley Councils) and afterwards confirmed by the Treasury do not give rise to contractual rights : *Rodwell* v. *Thomas*[1]. No remedy exists where an officer appointed under statutory authority loses his office through its premature termination by Act of Parliament without compensation, since the agreement has become impossible of performance; *Reilly* v. *The King*[2]. Members of the armed forces cannot sue for arrears of pay, for no engagement between the Crown and members of the armed forces can be enforced by a Court of Law : *Leaman* v. *The King*[3] ; *Kynaston* v. *Attorney-General*[4]."

The footnote at page 335 indicates that even a civil servant cannot sue for arrears of pay. (*Lucas* v. *Lucas and High Commissioner for India*[5]).

In *Lal's case*[6] the Judicial Committee held that a civil servant cannot sue for recovery of arrears of pay though the order of dismissal can be declared to be void as the claim depended on the bounty of the Crown, and not on a contractual debt. In *Punjab Province* v. *Tara Chand*[7], it was held that a servant of the Crown in India (as he then was) had a right to maintain a suit for recovery of arrears of pay which have become due to him. At page 27 Zafrulla Khan, J., observed thus :

"It is thus obvious that the prerogative right of the Crown to dismiss its servants at will having been given statutory form in sub-section (1) of section 240 it can only be exercised subject to the limitations imposed by the remaining sub-sections of that section and it must follow as a necessary consequence that if any of those limitations is contravened the public servant concerned has a right to maintain an action against the Crown for appropriate relief. There is in our judgment no warrant for the proposition that that relief must be limited to a declaration and should not go beyond it ".

In *The State of Bihar* v. *Abdul Mujid*[8], the Supreme Court of India approved the principle laid down by the Federal Court in *Tara Chand Pandit's case*[7]. In that case a Sub-Inspector of Police in the State of Bihar and Orissa was dismissed from service by the Deputy Inspector-General of Police of that State on a charge properly framed and found to have been proved against the Government servant. The dismissed employee filed a suit for a declaration that the order of the Deputy Inspector-General of Police dismissing him from service was illegal and, that he should be regarded as continuing in office. He also claimed a sum of Rs. 4,241 as arrears of salary due to him. After the institution of the suit the Government reinstated the employee in service as the order of dismissal by the Deputy Inspector-General of Police was obviously illegal, in view of the fact that the Sub-Inspector was appointed by the Inspector-General of Police but was dismissed by an officer subordinate in rank to the Inspector-General of Police. The question that arose for consideration before the Supreme Court was whether the employee could maintain the action as far as it related to recovery of the arrears of salary. Their Lordships of the Supreme Court differed from the view taken by the Judicial Committee in *Lal's case*[6] and expressed their approval of the principle laid down by the Federal Court in *Tara Chand Pandit's case*.[7] Referring to *Lal's case*[6] Mahajan, C.J., observed thus at page 795 :

"We are therefore of the opinion that the rule laid down by their Lordships of the Privy Council in *I. M. Lal's case*[6], without a consideration of the provisions of the Code of Civil Procedure relevant

1. L.R. (1944) K.B. 596.
2. L.R. 1934 A.C. 176.
3. L.R. (1920) 3 K.B. 663.
4. (1933) 49 T.L.R. 300.
5. L.R. (1943) P. 68.
6. (1948) 2 M.L.J. 55 : L.R. 75 I.A. 225 (P.C.).
7. A.I.R. 1947 F.C. 23 : 1947 F.C.R. 89 : (1947) F.L.J. 56 : (1947) 2 M.L.J. 389.
8. 1954 S.C.J. 300 1954 S.C.R. 786.

to the inquiry and without a consideration of the reasoning of the Federal Court in *Tara Chand Pandit's case*[1], cannot be treated, particularly because the matter was not directly involved in the suit, as the final word on the subject.

At page 799 the learned Chief Justice observed further as follows :

"This rule of English law has not been fully adopted in section 240. Section 240 itself places restrictions and limitations on the exercise of that pleasure and those restrictions must be given effect to. They are imperative and mandatory. It follows therefore that whenever there is a breach of restrictions imposed by the statute by the Government or the Crown the matter is justiciable and the party aggrieved is entitled to suitable relief at the hands of the Court. As pointed out earlier in this judgment, there is no warrant for the proposition that the relief must be limited to the declaration and cannot go beyond it. To the extent that the rule that Government servants hold office during pleasure has been departed from the statute, the Government servants are entitled to relief like any other person under the ordinary law, and that relief therefore must be regulated by the Code of Civil Procedure."

The Supreme Court held in that case that a dismissed civil servant was entitled to recover arrears of salary due to him where the order of dismissal was illegal and void.

In *Om Prakash Gupta* v. *State of Uttar Pradesh*[2], the Supreme Court followed the previous decision in *Abdul Majid's case*[3]. At page 395: Imam J., observed as follows :

"It may be stated at once that in view of the decision of this Court in the *State of Bihar* v. *Abdul Majid*[3], there can be no question now that the appellant had the right to institute a suit for recovery of arrears of salary as he was dismissed illegally. It is unnecessary therefore to refer to the elaborate discussion of the law in this respect to be found in the judgment of the learned Judges of the High Court".

In *Parshotam Lal Dhingra* v. *The Union of India*[4], the principle laid down in *Abdul Majid's case*[3], was again referred to with approval by the Supreme Court. At page 835, Das, C.J., observed thus :—

"Under the English Common Law all servants of the Crown held office during the pleasure of the Crown and were liable to be dismissed at any time and without any reason being assigned for such dismissal".

"No action lay against the Crown in respect of such dismissal, even though it were contrary to the express term of the contract of employment, for the theory was that the Crown could not fetter its future executive action by entering into a contract in matters which concerned the welfare of the State. A servant of the Crown could not at Common Law sue the Crown even for the arrears of his salary, and his claim could be only on the bounty of the Crown. The established notion was that the implied condition between the Crown and its servant was that the latter held his office during the pleasure of the Crown, no matter whether it had been referred to when the engagement had been made or not and that public policy demanded this qualification. (*See* per Lord Blackburn in *Mulvenna* v. *The Admiralty*[5].) This rule was applied in full force in *Lucas* v. *Lucas and High Commissioner for India*[6], where it was held that the sterling overseas pay of an Indian Civil Servant was not a debt which could be attached in satisfaction of an order for the payment of alimony. In *State of Bihar* v. *Abdul Majid*[3], however this Court held, for reasons stated in the judgment delivered by Mahajan, C.J., that the Indian Law has not adopted the rule of English Law on the subject in its entirety".

At page 839 Das, C.J., further observed thus :

"..........The provisions of Article 311 operate as a Proviso to Article 310 (1). All existing laws have been continued by Article 372, some of which, *e.g.*, the Code of Civil Procedure make it possible for a public servant to enforce his claims against the State. It has accordingly been held by this Court in the *State of Bihar* v. *Abdul Majid*[3] that the English Common Law rule regarding the holding of office by public servants only during the pleasure of the Crown has not been adopted by us in its entirety and with all its rigorous implications".

There can therefore be no doubt that the plaintiff in the present case is entitled to sue for recovery of the salary and allowances due to him for the period claimed.

Learned Counsel for the appellant contended that there was discretion on the part of the Railway Authorities not to grant the salary under Rule 2044 (*Railway Fundamental Rules Service—(Conditions, Pay and Deputation)* where there was no honourable acquittal of the employee of the criminal charge and that such discretion has been exercised in this case and that it is beyond the competence of the Civil Court to question the exercise of that discretion. Rule 2044 is as follows :

1. A.I.R. 1947 F.C. 23 : 1947 F.C.R. 89 : (1947) F.L.J. 56 : (1947) 2 M.L.J. 389.
2. (1955) 2 M.L.J. 136 : (1955) S.C.J. 640 : (1955) 2 S.C.R. 391.
3. (1954) S.C.J. 300 : 1954 S.C.R. 786.
4. 1958 S.C.R. 828 : 1958 S.C.J. 217.
5. 1926 S.C. 842.
6. L.R. 1943 P. 68.

"Fundamental Rule 54. —*Pay after reinstatement*: when th suspension of a railway servant is held to have been unjustifiable or not wholly justifiable ; or when a railway servant who has been dismissed, removed or suspended is reinstated ; the revising or appellate authority may grant to him for the period of his absence from duty—

(*a*) if he is honourably acquitted, the full pay to which he would have been entitled if he had not been dismissed, removed or suspended and, by an order to be separately recorded, any allowance of which he was in receipt prior to his dismissal, removal or suspension ; or

(*b*) if otherwise, such proportion of such pay and allowances as the revising or appellate authority may prescribe.

In a case falling under clause (*a*), the period of absence from duty will be treated as a period spent on duty. In a case falling under clause (*b*), it will not be treated as a period spent on duty unless the revising authority so direct."

The Government of India has given a decision interpreting this rule as evidenced by Exhibit A-26. In their view the rule applies to departmental punishments and not to cases of punishments by a Court of law for alleged offences which had nothing to do with the official duties of the employee. Of course this interpretation by the Government cannot certainly bind the Court. It is very difficult to hold that rule 2044 can apply to a case like the present where both the order of dismissal and the order of reinstatement came to be issued as a corollary to the judgments of competent Courts. The words 'revising or appellate authority' occurring in the rule are suggestive of a reinstatement by the revising or appellate authority cancelling an order of dismissal or removal after acquitting the servant of the charges framed against him.

In *Union of India* v. *Bhagat Ram*[1], it was held that the word *may* in the rule was used only to indicate 'the empowering' of the authority, and not to indicate that the authority had vested in him a discretion in the matter.

In *General Manager, N. Rly.* v. *Swarooprai*[2], a Division Bench of the Rajasthan High Court had occasion to consider the scope of the rule 2044. At page 57 the learned Chief Justice, Wanchoo, C.J., observed thus :

" Then comes rule 2044. That rule lays down what is to happen when a railway servant, who has been dismissed, removed or suspended, is reinstated. The rule itself says nothing as to whether it applies to reinstatement after departmental proceedings only or also to reinstatement after a criminal prosecution resulting in an acquittal. But certain instructions were issued by the Government of India with the concurrence of the Auditor-General and it was said in those instructions that rule 2044 applied to departmental punishment and not to cases of punishment by a Court of law for an alleged offence which has nothing to do with his official duties ".

These instructions however only apply to offences which have nothing to do with his official duties. Therefore where the prosecution is for an offence which is connected with official duties, there seems to be nothing in these instructions which debar the application of rule 2044. But we would like to leave this question open in the present to be decided finally in a proper case......"

Rule 2044 was strongly relied upon by the learned counsel for the Appellant as vesting an absolute discretion in the railway authorities to withhold the salary during the period of purported dismissal. Learned counsel further contended that the plaintiff was not honourably acquitted and that therefore rule 2044 (*a*) cannot be taken advantage of by him. Granting so much it is obvious that the plaintiff will at least be eligible for a portion of the salary as may be fixed by the revising or appellate authority under rule 2044 (*b*). Even in a case where the acquittal is not honourable rule 2044 does not empower the railway authority to forfeit the whole of the salary. The denial of the salary to the plaintiff cannot be justified as an act of legitimate exercise of power or discretion under rule 2044.

It was then contended on behalf of the appellant that rule 2044 is merely a guide for administrative action the observance of which cannot be enforced in a Court of law and the non-observance of which cannot vitiate any proceeding so as to be called in question in a Court of law. The decision of the Bombay High Court in *S. Framji* v. *Union of India*[3], was referred to in this connection. Chagla, C.J., held in

1. A.I.R. 1958 All. 342.
2. A.I.R. 1959 Raj. 55.
3. A.I.R. 1960 Bom. 14.

that case that the rules contained in the Indian Railway Establishment Code are no doubt statutory rules but they were merely rules of guidance and are mere administrative rules which do not by themselves constitute a contract between the Union of India and the employee. The learned Chief Justice further referred to the principle laid down by the Supreme Court in *Abdul Majid's case*[1] as an exception and observed at page 17 thus :

" As a matter of fact, the Supreme Court in a very recent decision in *Parshotam Lal Dhingra* v. *Union of India*[2], has pointed out that subject to the exceptions contained in Article 311 our Constitution has adopted the English Common Law rule that public servants hold office during the pleasure of the President or the Governor as the case may be, and they also point out that all that *Abdul Majid's Case*[1], laid down was that the English Common Law rule regarding the holding of office by public servants only during the pleasure of the Crown has not been adopted by us in its entirety and with all its rigorous implications. But subject to these exceptions, the exception of Article 311 and the exception enunciated by *Abdul Maijd's Case*[1] with regard to the recovery of arrears of salary, it is not suggested with respect by the Supreme Court in its judgment that the doctrine of a Government servant holding office during the King's pleasure has been in any way further limited or cut down."

The Bombay case dealt with the question whether the upgrading or downgrading of an employee in service in accordance with the rules contained in the Railway Establishment Code is justiciable or not. That was not a case where there was a violation of the Constitutional provision under Article 311 of the Constitution.

We may also refer to a decision of this Court in *A. Sambandhan* v. *R.T.S. (Personnel)*[3], in which the head-note is as follows :

" A vilolation of a rule framed by the executive authority to determine seniority as one of the conditions of service of a Civil servant is not an actionable wrong for which the Court could grant redress. To hold that the Court has that jurisdiction would constitute an inroad on the concept that the Civil servant holds office during the pleasure of the Executive, not warranted by the terms of the Constitution. Service rules promulgated under Article 309 of the Constitution do not of their own force become part of the Constitution to come within the scope of the expression ' except as expressly provided by the Constitution ' in Article 310 (1). The position is not any different, if the rules in force are not those framed under Article 309, after the Constitution came into force, but are rules framed under earlier enactments but continued in force under the terms of Article 313."

Every violation of a statutory rule governing service conditions cannot give rise to a right in favour of the aggrieved person to seek redress in a Court of law. If it were to be otherwise, the constitutional doctrine of the Civil servant holding office under pleasure of the Executive will become a mirage and an empty shell. The observations of Lord Roche in *R. Venkata Rao* v. *Secretary of State for India in Council*[4], at page 63 may be usefully referred to :

" The argument for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far reaching to commend itself for acceptance. The rules are manifold in number and most minute in particularity, and are all capable of change. Counsel for the appellant nevertheless contended with most logical consistency that on the appellant's contention an action would lie for any breach of any of these rules as for example of the rules as to leave and pensions and very many other matters. Inconvenience is not a final consideration in a matter of construction, but it is at least worthy of consideration, and it can hardly be doubted that the suggested procedure of control by the Courts over Government in the most detailed work of managing its services would cause not merely inconvenience but confusion."

It is no doubt true that the remedy of a civil servant complaining of an injury caused to him by reason of the violation of the statutory rules lies only to the hierarchy of authorities within the domain of administration and resort cannot be had to a civil Court. But a violation of a constitutional provision does certainly give rise to a right in favour of the aggrieved individual enforceable in a Court of law.

The plaintiff's claim in this case cannot be defeated on the ground that the injury caused to him by deprivation of salary and allowance was merely due to infraction of a departmental rule. We are absolutely convinced that the plaintiff was deprived of his salary and allowance only as a direct result and the immediate consequences of the order of dismissal from service, which could not be sustained by

1. 1954 S.C.R. 786: (1954) S.C.J. 300.
2. 1958 S.C.R, 828: (1958) S.C.J. 217.
3. (1957) 2 M.L.J. 54 : A.I.R. 1958 Mad. 243.
4. (1937) 1 M.L.J. 529 : L.R. 64 I.A. 55: I.L.R. (1937) Mad. 532 (P.C.).

the authorities themselves lest they should infringe the provisions of Article 311 (2) of the Constitution. The gist of the cause of action of the plaintiff to sue for recovery of arrears of salary, in the instant case, rests upon a constitutional illegality committed by the defendant. The plaintiff's claim to recover the salary for the relevant period is really unanswerable as the denial of such a right by the defendant was inextricably mixed up with an illegal order of dismissal contravening the provisions of the Constitution. We are therefore of opinion that the suit claim is well founded and that the learned Subordinate Judge was right in granting a decree in favour in the plaintiff as prayed for.

Learned counsel for the appellant contended that the order of reinstatement made it plain that the plaintiff will not be entitled to draw any salary or allowance during the relevant period, and that the plaintiff having accepted office in pursuance of such an order of reinstatement was in some way estopped from putting forward the claim to the salary and allowance. This plea of estoppel which is certainly a mixed question of fact and law was not raised in the written statement filed by the appellant. We do not think that it will be proper to permit the appellant to raise this plea which involves investigation of fresh facts at this stage of the proceedings. We are also convinced that there is no substance in the plea sought to be raised. The terms of the order of reinstatement cannot be read so as to impose a condition that the plaintiff cannot have the benefit of reinstatement if he were to insist upon payment of the salary and allowance. There is no basis for invoking the doctrine of estoppel or for bringing in the doctrine of approbate and reprobate against the plaintiff. The order of reinstatement was an unconditional one though the plaintiff was intimated of the fact that he will not be given any salary or allowance for the period he was out of office. The plaintiff however protested against the with-holding of the salary and allowance and never abandoned his claim. In these circumstances we are of opinion that this plea on the part of the appellant must fail.

The only other question that remains for consideration is the plea of limitation urged by the defendant. It was urged that Article 102 of the Limitation Act governed the suit and that the plaintiff will therefore not be entitled to recover any salary for a period beyond three years prior to the institution of the suit. Article 102 is as follows :

For wages not otherwise expressly provided for in this Schedule.	Three years.	When the wages accrue due.

The learned counsel for the appellant referred to a decision of the Federal Court in *Punjab* v. *Tara Chand Pandit*[1]. Their Lordships held that the term ' wages ' occurring in Article 102 included pay or salary and that the period of Limitation for a suit to recover arrears of pay is governed by Article 102 and not by Article 115, 130 or 131. The question is when did the wages accrue due in the present case. It cannot be that the salary of each month fell due at the beginning of next month on the facts of the present case. So long as the dismissal order was in force against the plaintiff he had no right to claim salary. The plaintiff was reinstated in service only on 13th July, 1951 and it is only thereafter that he can sue for recovery of salary for the period for which the dismissal order was in force. The suit was filed on 18th January, 1954, well within three years from the order of reinstatement. We therefore hold that the suit is not barred by limitation.

In the result the appeal fails and is dismissed with costs.

P.R.N. *Appeal dismissed.*

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1. (1947) 2 M.L.J. 389 : (1947) F.L.J. 56: A.I.R. 1947 F.C. 23.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Kondammal and others .. *Petitioners.**

v.

Duraiswamy Naicker and another .. *Respondents.*

Criminal Procedure Code (V of 1898), *sections* 145 *and* 146—*Scope of—Reference to civil Court—Procedure for hearing—Right of parties to be heard and to get rid of adverse finding recorded* ex parte—*Civil Procedure Code (V of* 1908), *Order* 9—*Applicability—Duty of Magistrate to hold up proceedings under section* 145 *until receipt of orders of civil Court.*

Where in proceedings under section 145, Criminal Procedure Code, a Magistrate makes a reference to the civil Court under section 146 (1), it is in the interests of equity and justice that the parties should be heard before a finding is arrived at by the civil Court. All the provisions of the Civil Procedure Code are applicable to the reference and a party treated as *ex parte* could seek to have the order set aside and to request for an opportunity to be heard, under Order 9, rule 13, Civil Procedure Code or any other relevant rule of Order 9.

The criminal Court proceeding under section 145, Criminal Procedure Code, is bound to wait till such an application is made and disposed of on the merits and the orders of the civil Court are transmitted to it and then to act in accordance with the findings of the civil Court.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to quash the proceedings in M.C. No. 7 of 1959 on the file of the Court of the Ex-Officio First Class Magistrate and Revenue Divisional Officer, Usilampatti or direct the said Ex-Officio First Class Magistrate and Revenue Divisional Officer, Usilampatti, to proceed in accordance with law after making a fresh reference to the Court of the District Munsif, Tirumangalam, to afford an opportunity to the petitioners herein to participate in enquiry to cross-examine the witnesses and for examining the witnesses and to file documents on their behalf.

C. K. Venkatanarasimhan, for Petitioners.

M. Natesan, for Respondents.

The Court made the following

ORDER.—These petitions relate to pending proceedings under section 145 of the Code of Criminal Procedure in the Court of the Ex-Officio First Class Magistrate and Revenue Divisional Officer, Usilampatti. In both these petitions, it appears that the Magistrate made a reference to the civil Court for determination of the factum of possession and the right thereto, within the ambit of section 146 (1), Criminal Procedure Code, but, unfortunately, the revision petitioners (A party) appear to have failed to be present in the civil Court, upon the relevant occasion, for reasons that we need not now enter into ; at any rate, this much is clear that the civil Court treated them as *ex parte*, and proceeded to dispose of the references to it on that basis.

Now, it is obvious that the revision petitioners did not have an opportunity to show cause in the proceeding before the civil Court, against any finding adverse to their case as to possession. Certainly, it is in the interests of equity and justice that they should be heard, before a finding is arrived at by the civil Court. I am making this as a general observation, and without reference to the merits of the grounds upon which they failed to appear. In any event, it is now clear upon the authority, *Kochadai Naidu* v. *Narayanaswami Naidu*[1], that all provisions of the Civil Procedure Code are applicable to such matters as a reference to a civil Court under section 146, Criminal Procedure Code. This would necessarily involve the further proposition that a party, treated as *ex parte* in such proceedings, could seek to have that order set aside, and could request the civil Court to afford him an opportunity to be heard, in accordance with Order 9, rule 13 of the Code of Civil Procedure, or,

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*Crl. M.P. Nos. 968 and 970 of 1960. 7th December, 1960.
1. 1960 M.W.N. 811. (16th Agrahayana, 1882—Saka).

any other relevant rule of Order 9, Civil Procedure Code. In the present case, it is not clear whether such an application has been filed, or is about to be filed. In whichever contingency, the criminal Court is bound to wait till the civil Court receives such an application and disposes of it on the merits. If the civil Court, after hearing the revision petitioners, arrives at the same finding or at a different finding, the criminal Court is bound by it, whichever finding it may be. Hence, all that is necessary at the present stage is to direct that in these proceedings under section 145, Criminal Procedure Code, the criminal Court must wait for the civil Court to transmit the orders that it may ultimately pass in the matter, and then act in accordance with those findings.

With these observations, which constitute sufficient guidance for the Court seized of the subject-matter of dispute under section 145, Criminal Procedure Code, those miscellaneous petitions are dismissed. The papers will be returned to the civil Court for due action.

P.R.N. *Petitions dismissed; but directions given.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Hirudayasami Udayar .. *Petitioner**

v.

Ramaswami Nainar and others .. *Respondents.*

Criminal Procedure Code (V of 1898), *section* 207-*A* (6) *and* (7)—*Scope of—Police filing charge-sheet under section* 395, *Indian Penal Code—Sub-Magistrate framing charges under sections* 379 *and* 447 *and deciding to try case himself—Propriety—Revision—Interference.*

Where a Sub-Magistrate holding a preliminary inquiry into an alleged offence under section 395, Indian Penal Code, comes to the conclusion that no such offence exclusively triable by a Court of Session was involved and, therefore, frames charges under sections 379 and 447, Indian Penal Code and himself proceeds to dispose of the case, the procedure is no doubt justified by section 207-A (6) of the Criminal Procedure Code as amended in 1955. But if there is some material to show that two views are possible as to the applicability of section 392, or 395, Indian Penal Code, the Magistrate ought not ordinarily to take upon himself the duty and responsibility of impliedly discharging the accused of the graver offences by framing charges for lesser offences. The distinction between sections 379 and 392, Indian Penal Code, is a fine one, and it is desirable that when the police, after investigation, considered the case to be sufficiently grave to be dealt with as a preliminary register case after filing a charge-sheet under section 395, Indian Penal Code, there is an implication that in case of conviction either under section 379 or 447, Indian Penal Code, or both, the accused must be dealt with in an adequately deterrent manner and it would be clearly desirable that the case should be dealt with, at least after the framing of charges, by a First Class Magistrate of competent jurisdiction, and the case should, therefore, be transferred to a Sub-Divisional Magistrate.

Satyam v. *State*, (1952) 1 M.L.J. 278, referred to.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the District Magistrate (Judicial), Tiruchirapalli, dated 7th June, 1960, in Cr.M.P. No. 24 of 1960 in (C. No. 958 of 1960 on the file of the Court of the Sub-Magistrate, Jayankondam).

R. Santanam, for Petitioner.

P. Parthasarathi, for the Public Prosecutor, for the State.

M. Srinivasagopalan, for Respondents.

The Court made the following

ORDER.—This revision involves an interesting point whether interference by this Court will be justified, where a learned Magistrate holding a preliminary enquiry into an alleged offence under section 395, Indian Penal Code, has come to the conclusion that no such offence triable exclusively by a Court of session was involved, and has hence framed charges under sections 379 and 447, Indian Penal Code, and is himself proceedings to further dispose of the case according to law. Undoubtedly

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*Crl.R.C. No. 671 of 1960. (Crl. R.P. No. 647 of 1960). 23rd November, 1960. (2nd Agrahayana, 1882—Saka.)

the procedure adopted by the learned Magistrate is justified as a matter of strict form, and it is sufficient to refer to section 207-A (6) of the Code of Criminal Procedure (Amended Code), which permits such a procedure. But the more difficult question is whether, assuming that there is more material to show that two views are possible upon the question of the applicability of section 392, Indian Penal Code or 395, Indian Penal Code, to the facts, this Court ought to interfere in what is really a discharge by implication.

My attention has been drawn to certain observations of Ramaswami, J., in *Satyam* v. *State*[1], where the learned Judge points out that in regard to an offence exclusively triable by a sessions Court, the Magistrate ought not ordinarily to take upon himself the duty and responsibility of discharging the accused because he considers that the ingredients of that offence are not established because this really amounts to clutching at jurisdiction. But a distinction between sections 379 and 392, Indian Penal Code, has always been a fine one, a question depending very largely upon the application of the words

> "if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint".

The learned District Magistrate before whom the matter was originally taken up in revision, declined to interfere, because he thought that the committing Magistrate was not patently in error with respect to the application of the law to the facts of the present case.

I think that interference by this Court at this stage in criminal revision is not at all called for, under the circumstances. Accordingly, I do not propose to interfere upon this alleged discharge by implication of the accused with reference to the charge under section 395, Indian Penal Code.

But it seems to me to be equally clear that, *prima facie* the police considered the case after investigation, to be sufficiently grave to be dealt with as a preliminary register case after filing a charge-sheet under section 395, Indian Penal Code. This implies, that in case there is a conviction even for a lesser offence either under section 379, Indian Penal Code or section 447, Indian Penal Code, or both, the concerned offender or offenders must be dealt with in an adequately deterrent manner. Hence, it is clearly desirable, that the case should be tried from this stage onward, the charges having been framed, by a First Class Magistrate of competent jurisdiction. Consequently, I direct the transfer of the case from the file of the learned Sub-Magistrate to the file of the learned Sub-Divisional Magistrate, Ariyalur, for disposal according to law. In the interests of the accused, I desire to observe that these remarks do not contain any implication whatever upon the actual merits, or the extent to which the prosecution evidence justifies a conviction of any or of all the accused in the case.

Case transferred to Sub-divisional Magistrate.

P.R.N.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Gnanamuthu Nadar .. *Petitioner**

v.

The Election Commissioner, Tenkasi and others .. *Respondents.*

*Madras Village Panchayats Act (X of 1950)—Rules for the conduct of Elections of members to Panchayats, Part II—Scope of—Class II Panchayat—Election of members—Filing of more than one nomination paper—If prohibited—Rejection of second nomination paper on ground of there being no provision therefor—Legality—*Certiorari *to quash—Error apparent on the face of record—Constitution of India (1950), Article 226.*

There is no express provision in the rules in Part II, governing the conduct of Elections to class II Panchayats either for or against the receipt of more than one nomination paper for a candidate. Since

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1. (1952) 1 M.L.J. 278.

*W.P. No. 1242 of 1959.

14th October, 1960.
(22nd Asvina, 1882—Saka).

there is no prohibition, either express or by necessary intendment, in the rules against the receipt of a second nomination paper for the same candidate, it must be held that it is permissible for a candidate to file more than one nomination paper.

Where the Election Officer and the Election Commissioner reject the second nomination paper of a candidate on the ground that the rules do not provide for more than one nomination paper, the decision is vitiated by an error of law apparent on the face of the record, and it is liable to be quashed by a writ of *certiorari* under Article 226 of the Constitution of India.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in O.P. No. 54 of 1958 on the file of the Election Commissioner, Tenkasi, and quash the order, dated 12th August, 1959 and made therein.

T. R. Mani, for Petitioner.

C. A. Mohamed Ibrahim, for 3rd Respondent.

The Court made the following

ORDER.—Elections had to be held to fill four seats for Ward No. 4 of Karuvantha Panchayat in Tirunelveli district. It was classed as a Class II Panchayat. Nominations were filed on behalf of the petitioner and respondents 2 to 7. Before the notified date of election, 19th September, 1958, respondents 6 and 7 withdrew their nominations. On a scrutiny of the remaining nominations, the Election Officer rejected the nominations filed on behalf of the petitioner. Respondents 2 to 5 were the four candidates left in the field to fill the four seats. They were declared elected without a poll.

On behalf of the petitioner, two nomination papers, marked Exhibits A-3 and A-4 were filed before the Election Officer. It was not in dispute that Exhibit A-3 was filed prior to Exhibit A-4. The Election Officer rejected Exhibit A-3 on the ground that the person who had seconded the nomination of the petitioner was not a registered voter. The second nomination paper, Exhibit A-4, was rejected on the ground, that the rules did not provide for more than one nomination paper being filed by a candidate. The petitioner challenged the validity of the election of respondents 2 to 5 by an election petition, O.P. No. 54 of 1958. The Election Commissioner dismissed that application by his order, dated 12th August, 1959. The Election Commissioner was of the view that Exhibit A-3 had been rightly rejected by the Election Officer, though that conclusion was based on grounds different from those taken by the Election Officer. The Election Commissioner held that since Exhibit A-3 had not been signed either by the proposer or the seconder it was not a valid nomination paper ; it contravened rule 5 (2) of the Rules framed under the Madras Village Panchayats Act for conduct of elections of members to panchayats, Part II. The Election Commissioner agreed with the Election Officer that Exhibit A-4 had to be rejected, because there was no provision in the Rules for the receipt of a second nomination paper.

The petitioner applied under Article 226 of the Constitution for the issue of a writ of *certiorari* to set aside the order of the Election Commissioner.

There was no express provision in the rules in Part II governing the conduct of elections to Class II panchayats either for or against the receipt of more than one nomination paper for a candidate. With reference to elections for Class I panchayats, governed by Part I of the Rules, rule 4 (6) provided :

"The rejection of a nomination paper of any candidate on the ground of any irregularity in respect thereof shall not affect the validity of the nomination of the candidate, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed."

There was no corresponding provision in Part II with reference to Class II panchayats. Even rule 4 (6), I have referred to, does not in express terms authorise more than one nomination paper being filed for a candidate, but by necessary intendment it does provide for the receipt of more nomination papers than one. Any

of those nominations, if valid, could be accepted. The question now is, whether the absence of even such a provision, as rule 4 (6) of Part I, in rules in Part II amounts to a prohibition, by necessary intendment, of the receipt of more than one nomination paper for a candidate. It should be noted that the original set of rules for election to Class II panchayats, provided for voting by show of hands, without the formality of nomination papers and polls required in the case of Class I panchayat. The nomination was to precede the actual election only by two hours. When the Rules were revised providing for election to Class II panchayats also by poll and ballot, the rule-making authority did not incorporate in Part II all the rules found in Part I. Why it failed to re-produce the rules it is not for me to investigate. The question still remains whether the failure to provide in Part II a rule analogous to rule 4 (6) applicable to Part I by necessary intendment confines a candidate for election to Class II panchayats to one nomination paper only, and whether by necessary intendment there is a prohibition against the receipt of more than one nomination paper for a candidate. It should be realised that the practice with reference to election to all elective seats in Local Boards and Legislatures has all along been to permit more than one nomination paper with reference to each candidate. Whether the nomination papers were signed by the same set of proposers and seconders or different sets of proposers and seconders could make no difference in principle. In this case, it so happened that Exhibits A-3 and A-4 purported to emanate from the same set of persons as proposer and seconder. The question is, can there be a multiplicity of nomination papers. I am unable to agree with the Election Commissioner that failure to provide a rule analogous to rule 4 (6) of Part I in Part II prohibited the receipt of more than one nomination paper, and on that ground Exhibit A-4, being a nomination paper filed second in point of time, was liable to be rejected. As I have pointed out, there is no prohibition against the receipt of second nomination paper for the same candidate. Nor was there any prohibition by necessary intendment of the rules in Part II of the Rules. The view taken by the Election Commissioner on an interpretation of the rules in Part II was wrong, and it constituted *an error of law apparent on the face of the record.* The final conclusion of the Election Commissioner, that Exhibit A-4 was not a valid nomination paper, was vitiated by that error of law, and the petition will have to be allowed.

The rule *nisi* is made absolute and the order of the Election Commissioner in O.P. No. 54 of 1958 will stand set aside. That in effect means that the Election Commissioner will have to dispose of the petition afresh and in accordance with law on a correct interpretation of the relevant rules. The petition is allowed. No order as to costs.

P.R.N. — *Petition allowed; Order set aside; Rule made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMAKRISHNAN.

A. K. S. Muhammad Sultan Rowther & Co., a registered firm by its partner A.S. Khader Sahib .. *Petitioner**

v.

Manickam Chettiar .. *Respondent.*

Limitation Act (IX of 1908), Article 52—Applicability—Trader and customer—Supply of goods from time to time by trader and payments from time to time by customer—Right of trader to appropriate payments to earliest items of supply—Suit for balance due on account—Limitation—Starting point—Claim in respect of deliveries of goods made more than three years before suit—If barred—Contract Act (IX of 1872), sections 60 and 61—Scope of.

In cases of supply of goods by a tradesman to a buyer, where goods are supplied from time to time and payments are made from time to time, the relevant Article of the Limitation Act is Article 52 and each delivery of goods gives rise to an independent cause of action to recover the price thereof under the Article ; but it does not follow that the claim in respect of deliveries which took place more than three years before the filing of the suit is necessarily barred by time. The Court has to consider the right of the trader to appropriate the payments to the outstandings under successive deliveries of goods

*C.R.P. No. 639 of 1959. 25th October, 1960. (3rd Kartika 1882—Saka).

in order of time, irrespective of the question whether the claim for the value of such deliveries is barred by limitation or not.

In view of the provisions of sections 60 and 61, Contract Act, where payments are made by the customer from time to time without specifying the item of goods to which they are to be credited, the supplier is entitled to credit them to the earlier of the items sold and will, for purposes of limitation, be taken to have done so and not to the entire balance on the dealings in the sense of saving limitation for each and every item. Therefore the amounts credited from time to time will go to wipe off the debits against the goods supplied from time to time until a stage is reached where a particular delivery of goods on a particular date remains unadjusted in whole or in part by such appropriation. If the date corresponding to the delivery which remains thus unadjusted in whole or in part is beyond three years from the date of the suit, the claim in respect of that amount would be barred under Article 52. But if such date and the dates of subsequent deliveries remaining unadjusted fall within the three-year period prescribed by Article 52, the claim for the corresponding amounts would be in time and be recoverable.

Puttu Lal v. *Jagannath*, A.I.R. 1935 All. 53 and *Firm Gulabrai* v. *Firm Ilahi Bux*, A.I.R. 1945 All. 185, applied.

Atmaram Vinayak v. *Lalji Lakhamsi*, I.L.R. (1940) Bom. 127, referred to.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the Decree of the Court of the District Munsif of Tiruchirappalli, dated 6th November, 1958, and passed in S.C.S. No. 2378 of 1957.

S. K. Ahmed Meeran and *A. Syed Mohamed*, for Petitioner.

T. R. Ramachandran and *S. Jagannathan*, for Respondent.

The Court delivered the following

JUDGMENT.—This is a Revision Petition filed under section 25 of the Provincial Small Cause Courts Act, against the Judgment of the Fourth Additional District Munsif of Tiruchirappali, in S.C. S. No. 2378 of 1957. The prior facts necessary for the consideration of the petition are the following.

The plaintiff is a wholesale dealer who has been supplying goods from time to time on credit to the defendant, a retail dealer. The plaintiff kept a running account in a ledger for these transactions. The defendant paid amounts towards these purchases from time to time and the payments made by him were adjusted in the plaintiff's ledger towards the value of the goods supplied. According to the plaint, the balance of the amount due by the defendant to the plaintiff on 22nd July, 1957, was Rs. 59-3-9. This amount together with a small amount for interest represented the suit claim of Rs. 60. The suit was filed on 4th December, 1957. The defendant in his written statement made specific attacks on the accuracy of the extract from his accounts which the plaintiff had supplied along with the plaint. There was a final plea that the claim was barred by time.

The learned District Munsif, after considering the evidence, gave a finding that the accounts of the plaintiff were correct and that the defendant's objections on this score should be overruled. Apparently, there was a plea before the lower Court that the transactions amounted to a mutual, open and current account and the relevant Article of the Limitation Act which has to be applied for the purpose of limitation would be Article 85. The learned District Munsif rejected this contention. Then he concluded as follows :

"........Article 52 of the Limitation Act applies to the present case and the plaintiff cannot claim balances on account of purchases made prior to 4th December, 1954. From the copy of the accounts filed by plaintiff along with his plaint, it is seen that there is no outstanding dues by the defendant in respect of the sales subsequent to 4th December, 1954. In conclusion, I find that the suit claim which relates to delivery of goods prior to 4th December, 1954, is barred by limitation.

The suit was dismissed. The plaintiff has come up in revision to this Court. The plaintiff contended that the Court below came to an erroneous conclusion in the view which it took regarding the application of Article 52 of the Limitation Act. Though there is a ground taken in the Revision Petition that the Court below erred in holding that the suit claim is not governed by Article 85 of the Limitation Act, at the time of hearing of the petition this last-mentiond ground was not pressed and the only ground pressed was that though the proper Article to be applied was

Article 52, it was not properly applied by the learned District Munsif, to the facts of the present case.

Article 52 of the Limitation Act reads : " For the price of goods sold and delivered, where no fixed period of credit is agreed upon, three years " and the limitation commences from the date of the delivery of the goods. The learned District Munsif has observed in his judgment that from the accounts of the plaintiff it was seen there were no outstanding dues by the defendant in respect of the sales subsequent to 4th December, 1954. The extract from the plaintiff's ledger filed along the plaint contains debit and credit columns and also a column for the balance due. When goods are delivered by the plaintiff to the defendant, their value is debited to the defendant in the debit column and when amounts are paid by the defendant to the plaintiff, they are entered in the credit column. The difference is continuously struck in the column for balance. Apparently, the view of the learned District Munsif is that in such a state of account-keeping, when Article 52 of the Limitation Act is proposed to be applied in regard to a suit filed on 4th December, 1957, the entries prior to 4th December, 1954, in the debit, credit and balance columns of the account should be ignored and all the entries in the credit column should be adjusted against the entries in the debit column after 4th December, 1954 and the plaintiff could realise only the amount remaining as the excess of debit over the credit. Learned counsel for the plaintiff draws my attention to sections 60 and 61 of the Indian Contract Act, which are in the following terms :

" 60. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

" 61. Where neither party makes any appropriation the payments shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably."

The plaintiff claimed that since the defendant had not intimated to him as to which of the supplies of goods the payments made by him from time to time should be adjusted, he, as creditor, has enforced his right given in the above sections of adjusting the payments to the value of the goods supplied in order of time, irrespective of whether such claims are barred or not. The decisions cited before me by the learned counsel for the defendant *Atmaram Vinayak* v. *Lalji Lakhamsi*[1], and *Firm Gulabrai* v. *Firm Ilahi Bux*[2], lay down the view that in cases of supply of goods by a tradesman to a buyer, where goods are supplied from time to time and payments are made from time to time, the relevant Article of the Limitation Act is Article 52 and that each delivery of goods gives rise to an independent cause of action to recover the price thereof under Article 52 and that the claim in respect of deliveries which took place more than three years before the filing of the suit was barred by limitation. But these decisions do not deal with the question of the right of the plaintiff to appropriate the payments to the outstandings under successive deliveries of goods in order of time, irrespective of the question whether the claim for the value of such deliveries is barred by limitation or not. Reference is made to the decision of the Allahabad High Court in *Puttu Lal* v. *Jagannath*[3], which I find has been referred to and followed in *Firm Gulabrai* v. *Firm Ilahi Bux*[2], which lays down that where payments are made by the customer from time to time without specifying the items of goods to which they are to be credited, the supplier is entitlted to credit them to the earlier of the items sold, and will, for the purposes of limitation be taken to have done so and he is not entitled to credit them to the entire balance due on the dealings in the sense of saving limitation for each and every item. I am of the opinion that the principle thus enunciated is the appropriate one to be applied to the case on hand.

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1. I.L.R. (1940) Bom. 127.
2. A.I.R. 1945 All. 185.
3. A.I.R. 1935 All. 53.

The further question is, how this principle has to be applied to an account of the present kind. The amounts credited from time to time will go to wipe off the debits against the goods supplied from time to time until we reach a particular delivery of goods on a particular date which remains unadjusted either in whole or in part by the above procedure. If the date corresponding to the delivery which remains thus unadjusted in whole or in part, is beyond three years from the date of the suit, the claim in respect of that amount will remain barred under Article 52 of the Limitation Act. But if the date corresponding to that delivery and the dates of subsequent deliveries which remain unadjusted, fall within the three-year period of limitation, the claim for the corresponding amounts will be in time. Applying the aforesaid principle to the plaintiff's statement of account (which the learned District Munsif has found to be correct and acceptable), I find that the payments on the credit column are sufficient to wipe off all outstandings on account of the deliveries made prior to 4th December, 1954. Therefore, there is no question of the value of any of the deliveries made in this case being barred by time. The suit claim is in effect for the balance due after the plaintiff has exercised his right of appropriating the payments made from time to time against deliveries made from time to time in the order of time of the deliveries, according to the right given to the plaintiff to make such appropriation under sections 60 and 61 of the Indian Contract Act. The suit claim is laid for the balance remaining outstanding and I hold that it is in time. The suit is decreed with costs and this Revision Petition is allowed with costs.

P.R.N. ——— *Petition allowed ; Suit decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT:—MR. JUSTICE RAMACHANDRA IYER.

The Management of the Radhakrishna Mills Ltd., Coimbatore .. *Petitioner**

v.

The Presiding Officer, Labour Court, Coimbatore and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947)—Disciplinary action by employer—Alleged commission of offence by employee—Finding of criminal Court—Binding nature of.

Where an employer takes disciplinary action against an employee on the ground of his being guilty of a criminal offence, (*e.g.*, assaulting an officer), it is the duty of the employer to accept and treat as conclusive the findings and orders of a criminal Court trying that offence. It may be that when a prosecution for the alleged commission of the offence is only pending before a criminal Court, the employer is not bound to wait for the decision of the Court before taking action against the employee. Though in cases of a grave nature it would be advisable for an employer to await the decision of at least the trial Court in cases of a simple nature the employer can proceed with his own domestic enquiry and come to his own decision as regards the disciplinary action to be taken even though a criminal case was pending before the Court. But where once the Court has acquitted the person concerned of the offence charged it is the duty of the managerment to accept the same and failure to do so would clearly show that the employer did not act *bona fide* in the matter and an Industrial Tribunal will be justified in interfering with the decision of the employer terminating the services of the employee on the ground of disciplinary action.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.D. No. 8 of 1958 on the file of the Labour Court, Coimbatore, and quash the award, dated 31st March, 1958 and made therein and published in the *Fort St. George Gazette*, dated 30th April, 1958.

M. R. Narayanaswami, for Petitioner.

T. Ramakrishna, for the Additional Government Pleader, for 1st Respondent.

S. Mohankumaramangalam and *K. V. Sankaran*, for 2nd Respondent.

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*W.P. No. 487 of 1958. 14th July, 1960.
(23rd Asadha, 1882—Saka).

The Court made the following

ORDER.—By G.O. Ms. No. 687, Department of Industries, Labour and Co-operation, dated 17th February, 1958, the Government of Madras referred for adjudication by the Labour Court, Coimbatore, an industrial dispute between the workers and management of the Radhakrishna Mills Ltd., in regard to the question whether the dismissal of one Subbian was justified, and to what relief he was entitled.

The facts that led to the reference were these. At about 8 A.M. on 14th August, 1955, Venkatapathy, the Assistant Welfare Officer of the Radhakrishna Mills Ltd., was waylaid, belaboured, and a number of injuries were inflicted on him by lethal weapons. The injured man was immediately taken to the hospital, where he gave a dying declaration. In the dying declaration he mentioned that Subbian was one of the persons who had assaulted him. Venkatapathy, however, got well, though it is stated that some time afterwards he was murdered by some other person. Subbian was arrested on 14th August, 1955. In due course, the police charged him under section 324 read with section 148, Indian Penal Code, and the case was taken on file as C.C. No. 280 of 1955, by the Additional First Class Magistrate, Coimbatore. The Magistrate found him guilty of the offence charged, and sentenced him to three months rigorous imprisonment. That was on 31st October, 1955. There was an appeal against the conviction to the Sessions Judge, Coimbatore, in C.A. No. 14 of 1956. The learned Sessions Judge, by his judgment, dated 25th February, 1956, held that the charges against Subbian were not proved, and acquitted him.

In the meanwhile, that is on 19th September, 1955, the management issued a notice to Subbian, charging him with the misconduct above said, and directing him to show cause why disciplinary action should not be taken against him. Subbian was also suspended pending enquiry. The enquiry followed. On the 26th of January, 1955, the management came to the conclusion that Subbian was guilty of the offence of assaulting an Officer of the mill, and that he was no longer fit to continue in service. No action, however, was taken by the management in pursuance of the finding, as an industrial dispute, I.D. No. 13 of 1952, was then pending before the Industrial Tribunal. Under section 33 of the Industrial Disputes Act then in force, it was not open to the management by themselves to take any disciplinary action against the worker during the pendency of the proceedings before a Tribunal. The management, therefore, stated that they would apply to the Industrial Tribunal for permission to affect the dismissal of the worker. On the 10th of February, 1956, the management applied to the Industrial Tribunal for permission to dismiss Subbian. That application did not come up for disposal before the Tribunal during the pendency of the Industrial Dispute. An award was passed in I.D. No. 13 of 1952 on the 25th of July, 1957. No orders however, were passed on the application under section 33 filed by the management. The result was that the ban imposed by section 33 was removed by the the termination of the industrial dispute in I.D. No. 13 of 1952 in July, 1957. In September, 1957, the management issued an order, dismissing Subbian from service. An industrial dispute arose as a result of such dismissal, and the same was referred to the Labour Court, Coimbatore, for adjudication, as stated above.

The Labour Court considered afresh the question whether Subbian was guilty of the offences charged, and came to the conclusion that he was not guilty of the same. The Court also held that the management had acted *mala fide*, and victimised Subbian in awarding the punishment. But, having regard to the strained relationship between the parties, the Court held that it was not a case for reinstatement of the worker, and permitted the management to discharge the worker by paying of his gratuity, the other discharge benefits to which he was entitled by reason of the services he had put in, and the back wages during the period of suspension. The validity of this award is questioned in the petition on behalf of the management. The worker does not complain against the refusal of the Labour Court to direct his reinstatement.

Mr. Narayanaswami, the learned counsel for the management, contended that the Labour Court was in error in adjudicating upon the question whether factually Subbian was guilty of the offences charged against him. According to the learned counsel, the Additional First Class Magistrate, Coimbatore, had found the worker guilty of the offence as early as December, 1955, and when the Management made its own enquiry and came to a conclusion which was consistent with that arrived at by the Additional First Class Magistrate in C.C. No. 280 of 1955, it could not be said that the management acted *mala fide* for even erred. Reliance was placed, in support of this contention, on the decision in *Balipara Tea Estate* v. *Its Workmen*[1], where the Suprme Court held that an Industrial Tribunal, while adjudicating on an industrial dispute relating to dismissal of a workmman for misconduct, would have no power to decide for itself whether the charge framed against the workman had been established to its satisfaction, and that the Court had only to be satisfied that the management was justified in coming to the conclusion (in a *bona fide* and proper domestic en-enquiry) that the charge against the workman was well founded. At page 249, Sinha, J. (as he then was) observed :—

> "It has been contended on behalf of the appellant, and in our opinion, rightly, that the Tribunal has misdirected itself in so far as it has judged the case against the workman concerned afresh on its merits as if it were a trial for a criminal offence for the falsification of accounts and misappropriation of funds and that in so doing, the Tribunal was not only sitting as a Court of appeal on the order of dismissal passed by the management, even though it did not find any *mala fides* or want of good faith or any irregularity in the proceedings taken by the management against the workman concerned, but it had also laid down a wrong line of approach to the case. The Tribunal misdirected itself in so far as it insisted upon conclusive proof of guilt to be adduced by the management in the inquiry before it. It is well-settled that a Tribunal has to find only whether there was justification for the management to dismiss an employee and whether a case of misconduct had been made out at the inquiry held by it."

There can be no doubt that the contention of the learned counsel is well-founded, and that the Labour Court had no jurisdiction in the instant case to decide itself whether Subbian was or was not guilty of the offences charged and on the basis of such a finding set aside the dismissal directed by the employer. But this does not, however, dispose of the matter. In the judgment, of the Supreme Court referred to above it was observed that if there had been a finding by the Tribunal that the mangement had been actuated by any sinister motives, or had indulged in unfair labour practice, or that the workman had been victimised for any activities of his in connection with the trade union, the Tribunal might have had reasons to be critical of the inquiry held by the management. This is what the Laour Court found in the present case. The Court expressly found that the management was actuated by improper motives when it came to the conclusion in the enquiry conducted by it that Subbian was guilty of the offences charged and in awarding the punishment therefor. The Labour Court further held that Subbian was singled out by virtue of the position he occupied among the labourers for victimisation. This conclusion is fortified by the circumstances to which I shall presently refer. As stated already, the management did not pass any orders for discharge on 26th January, 1956, when it concluded the enquiry. It may be that it could not pass such order of discharge on account of pendency of I.D. No. 13 of 1952. On 25th February, 1956, the Sessions Judge, on an elaborate consideration of the evidence, had acquitted Subbian of the offences charged. It was nearly one year and six months after the acquittal by the Sessions Judge that the management resurrected the disciplinary proceedings initiated against Subbian, and passed the order of dismissal. It does not appear that the management ever paid any regard to the finding arrived at by the Sessions Court. It is needless to say that the action of the management in dismissing Subbian even after his acquittal by the criminal Court was anything but *mala fide*.

In *Jerone D'Silva* v. *Regional Transport Authority*[2], a Bench of this Court held that a quasi-judicial Tribunal could not ignore the findings and orders of competent criminal Courts in respect of an offence when the Tribunal proceeded to take any action on the basis of the commission of that offence, and that, as primarily the criminal Courts of

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1. (1959) 2 L.L.J. 245.   2. (1952) 1 M.L.J. 35.

the land were entrusted with the enquiry into offences, it was desirable that the findings and orders of the criminal Courts should be treated as conclusive in proceedings before quasi-judicial Tribunals. In my opinion, that rule would apply to domestic Tribunals, like the present one where the employer was taking disciplinary action against his employee. The learned counsel for the petitioner contended that the decision of the Supreme Court in *The Delhi Cloth & General Mills Ltd.* v. *Kushal Bhan*[1], was to the contrary effect. I do not agree. That was a case, where criminal proceedings were pending against an employee. In the meanwhile, the employer initiated disciplinary proceedings against the former. The employee did not produce any defence, as, in his opinion, that was likely to prejudice him in the decision of the criminal case. He did not even answer the questions put to him during the course of the enquiry by the employer. The latter completed the enquiry, and directed the dismissal of the employee, on the ground that the misconduct alleged against him had been proved. An application was filed under section 33 (2) of the Industrial Disputes Act by the employer to the Tribunal for approval of the action taken against the employee. By the time the matter came up before the Tribunal the employee was acquitted by the criminal Court. It was contended that the action taken by the employer was vitiated, in that the employer had not waited till the trial in the criminal Court was over, and that principles of natural justice required that the employer should at least wait for the decision of the criminal Court before taking disciplinary action. The Supreme Court negatived the contentions and observed :

> " It is true that very often employers stay enquiries pending the decision of the criminal trial Courts and that is fair ; but we cannot say that principles of natural justice require that an employer must wait for the decision at least of the criminal trial Court before taking action against an employee .... We may, however, add that if the case is of a grave nature or involves questions of fact or law, which are not simple, it would be advisable for the employer to await the decision of the trial Court, so that the defence of the employee in the criminal case may not be prejudiced. The present, however, is a case of a very simple nature and so the employer cannot be blamed for the course adopted by him."

In my opinion, there is nothing in the decision of the Supreme Court which, in any way, militates against the decision in *Jerone D' Silva* v. *Regional Transport Authority*[2]. The only question before the Supreme Court was whether the employer could proceed with domestic enquiry, while the criminal proceedings were pending. No question arose in that case as to the binding nature of the judgment of a competent Court in an enquiry which was completed after such judgment. In the present case, by the time the employer completed the enquiry by inflicting on the employee the punishment, the Sessions Judge of Coimbatore had acquitted the employee of the offences charged. That decision would be binding on the employer. Even otherwise, failure to accept that decision or at least to consider it would show that the employer did not act *bona fide* in the matter. I am, therefore, of opinion that the Labour Court did less justice to the worker in denying him reinstatement and awarding him only the compensation.

Rule *nisi* is discharged. The writ petition fails, and is dismissed with costs. Advocate's fee Rs. 100.

R.M. *Petition dismissed.*

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1. Since reported in (1960) S.C.J. 711 : (1960) M.L.J. (Cr.) 461.

2. (1952) 1 M.L.J. 35.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

P. K. Varadaraja Goundar .. *Petitioner**

v.

P. A. Narasimhalu Reddiar .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 476 or 476-A—Orders under—If open to revision under section 115, Civil Procedure Code (V of 1908)—Assistant City Civil Judge, Madras—If subordinate to Principal City Civil Judge under sections 476-B and 476-A, Criminal Procedure Code (V of 1898).

As an order made under section 476 or 476-A of the Criminal Procedure Code has been expressly made appealable under section 476-B of the Code to the Court to which the Court making the order is subordinate no revision could be filed against such an order under section 115 of the Civil Procedure Code.

An Assistant City Civil Judge, Madras, should be deemed to be subordinate to the Principal City Civil Judge within the meaning of section 476-B of the Civil Procedure Code.

Petition under section 115 of Act V of 1908 sought to be presented to the High Court to revise the Order of the First Assistant Judge of the City Civil Court of Madras, dated 10th March, 1959 and made in I.A. No. 1127 of 1957, in O.S. No. 1302 of 1955.

The petition was submitted by the office for orders with the following

Office note.—This S.R. is sought to be presented as a Civil Revision Petition under section 115 Civil Procedure Code, against the order, dated 10th March, 1959, in I.A. No. 1127 of 1957, in O.S. No. 1302 of 1955, on the file of the First Assistant Judge, City Civil Court, Madras. That application was under section 476 of the Criminal Procedure Code seeking sanction of a complaint to the Court of any Presidency Magistrate in Madras, so that the respondent therein may be tried for the offences under sections 193 and 477 (*a*) of the Indian Penal Code. The respondent is alleged to have tampered with certain documents. The lower Court dismissed the application, and against the order in the said application, refusing to accord the sanction for prosecution, the present S.R. is filed in the form of Civil Revision Petition.

An objection was raised regarding the maintainability of the Civil Revision Petition, as, under section 476-B of the Criminal Procedure Code, an appeal only lies to the District Court, against the order rejecting an application to launch a prosecution. The advocate contends that his remedy is only under section 115, Civil Procedure Code and cites as authority, *Kumaravel Nadar* v. *Shanmuga Nadar*, (1940) 1 M.L.J. 719 : I.L.R. (1940) Mad. 762 (F.B.). It is submitted that the authority cited does not appear to support the contention of the advocate. On the other hand it supports the objection taken against the maintainability of the Civil Revision Petition at the First Instance without exhausting the remedy by way of an appeal to the District Court (in this case Principal City Civil Court, Madras).

Section 476-B of the Criminal Procedure Code expressly confers a right of appeal against the order on an application under section 476 or 476-A. The appeal lies to the Court to which that Court passing the order is subordinate (vide *M. S. Sheriff* v. *State of Madras*, (1954) S.C.J. 458 : (1954) 1 M.L.J. 699 : A.I.R. 1954 S.C. 397). No Second Appeal lies to the High Court from an order of the appellate Court under section 476-B. But there may be a revision. In *M. S. A. P. L. Palaniappa Chetti* v. *S. L. S. Chettiappa Chetti*, (1926) 99 I. C. 957, it has been held by a Division Bench of the Madras High Court, that against an order passed on an application for launching a criminal prosecution, an appeal will lie to the District Court even where the value of the suit in the lower Court is over Rs. 5,000. It is clear from the decision, that irrespective of the value of the suits, the aggrieved party will have to exhaust his remedy by way of an appeal to the District Court, before he comes to the High Court under section 115, Civil Procedure Code. Therefore it is submitted that no revision appears to lie in cases in which an appeal lies and it is not possible for the petitioner to file the Revision Petition to the High Court without preferring an appeal to the District Court (Principal City Civil Court in this case).

In the case cited by the advocate, *Kumaravel Nadar* v. *Shanmugha Nadar*, (1940) 1 M.L.J. 719 : I.L.R. (1940) Mad. 762 (F.B.), an appeal was first preferred to the District Court, and then a Revision Petition to the High Court and the question that was considered was whether the Revision should be dealt with on the Criminal Side under sections 435 and 439 of the Criminal Procedure Code, or in the Civil Side. The Court took the view that the matter should be dealt with on the Civil Side following the decision in *King Emperor* v. *Karri Venkanna Patrudu*, (1916) 31 M.L.J. 440. Hence the case cited does not appear to be an authority for filing the Revision Petition in the High Court, before exhausting the remedy in the Principal City Civil Court. The same question was considered in S.R. No. 32806 of 1957 and it was decided that Civil Revision Petition did not lie to the High Court

*S.R. No. 28398 of 1959. 11th March, 1960.
(21st Phalguna, 1881-Saka).

and the papers were directed to be returned to the petitioner for preferring a Civil Miscellaneous Appeal in the Principal City Civil Court, if so advised.

The principal laid down in *M. S. A. P. L. Palaniappa Chetti* v. *S. L. S. Chettiappa Chetti*, (1926) 99 I.C. 957 and the order in S.R. No. 32806 cited above, directly covers the subject in issue. As this is not conceded by the advocate who wants this matter to be posted before Court, it is submitted for orders.

N. Vachinathan for Petitioner.

The Court made the following

ORDER.—In S.R. No. 32806 of 1957, Ramaswami, J., has held that (1) as a remedy by way of appeal lies against the order complained of no revision would lie; (2) that the Assistant Judge, City Civil Court should be deemed to be subordinate to the Principal City Civil Judge's Court within the meaning of section 476-B read with section 195 (3), Criminal Procedure Code.

It follows that an appeal against the order complained of would lie to the Principal Judge. The Revision Petition cannot be entertained.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

S. Gopalakrishna ... *Appellant**

v.

C. V. Krishna Iyer and another .. *Respondents.*

Hindu Law—Alienation by guardian of minor's property—Necessity and benefit—Partial necessity—Standard of care—Relevant factors—Onus of proof—When becomes relevant.

Under Hindu Law the guardian's alienation of the property of the ward could be justified as one for (i) necessity, (ii) partly for necessity and partly for benefit and (iii) benefit simpliciter and such benefit need not necessarily be of a defensive character. The burden of proving that any one or more of the aforesaid justifying elements existed is on the alienee.

In the case of an alienation for the benefit of the minor, pure and simple, it cannot be said that the guardian had no alternative, for she could have retained the property. A power to sell for the benefit of the ward implies a discretion, a discretion not merely to decide as to the form of the alienation, *e.g.*, mortgage, lease or sale but whether the alienation is at all to be made. For example if the minor has an unproductive property and the guardian sells it with a view to purchase a productive one it cannot be said that the only course open to the guardian was to sell the property. But yet the alienation would be binding. The test in such cases is not that there should be no alternative but that whether the act was one for the benefit of the minor in the known circumstances.

The view expressed contra in *Tulsiram Sitaram* v. *Narayana Waman*, A.I.R. 1950 Nag. 69 and *Nathu Bhiwaji* v. *Ganapat Bablaji*, A.I.R. 1958 Bom. 25, dissented from.

The standard of prudence is not a subjective one, *e.g.*, what the guardian would do if the property were his. The guardian occupies a fiduciary position.

His decision to alienate should be objective, *viz.*, whether in the circumstances it was necessary or for the benefit of the minor that the property should be sold or otherwise alienated. The standard of care would be more akin to that of a trustee than that of an owner.

The necessity for such an alienation cannot be decided by merely taking into account the arithmetical proportion between that portion of the amount which was for necessary purpose and that which was not. The proper approach would be to see whether the sale itself was one which was justified by necessity or benefit. The propriety of the investment of the balance of the purchase money should be judged in the light of the necessity for the sale and not by viewing it as an independent transaction.

Onus of proof becomes important only when there is no evidence on a particular point or where evidence let in on both sides is evenly balanced or equally untrustworthy or is of such a nature that the Court feels that it could not come to a definite conclusion thereon.

The alienation in the instant case was held to be binding on the ground of necessity.

Case-law discussed.

Appeal against the decree of the Fourth Assistant Judge of the City Civil Court, Madras, in Original Suit No. 1702 of 1955.

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*C.C.C. Appeal No. 21 of 1957. 3rd November, 1960. (12th Kartika, 1882-Saka).

V. P. Raman, for Appellant.

S. Balasingam Satya Nadar and *N. C. Rangaswami*, for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This appeal arises out of a suit instituted by the appellant for a declaration of his title to and recovery of possession of house No. 37, Saravana Perumal Mudali Street, Purasawalkam, Madras. The house was originally owned by two brothers, Sarangapani Pillai and Janakiram Pillai who constituted members of a joint Hindu family. The appellant is the son of Sarangapani Pillai. On 18th May, 1934, the latter on his behalf as well as that of his minor son, the appellant and along with Janakirama Pillai executed a simple mortgage of the house in favour of one C.V. Subramania Iyer (D.W. 1) for a sum of Rs. 1,000 stated to be borrowed for the marriage expenses of Janakirama Pillai and for effecting repairs to the house. Subsequent thereto, the same creditor appears to have advanced further sums on promissory notes, which need not, however, be referred to in detail as they were subsequently consolidated and two mortgages bearing dates 2nd September, 1937 and 21st January, 1938 (Exhibits B-5 and B-8), were executed over the same property for Rs. 500 and Rs. 200 in lieu thereof. By the year 1940 both Janakirama Pillai and Sarangapani Pillai had died. The latter was survived by his widow, the second respondent and the appellant his son who was then a minor. On 27th June, 1944, the second respondent acting as the guardian of the appellant, executed a deed of sale (Exhibit B-10) of the mortgaged property in favour of the first respondent for a sum of Rs. 5,500, Rs. 2,000 being reserved with the purchaser for discharging the three mortgages mentioned above. It was agreed that the balance of purchase money, *viz.*, Rs. 3,500 was to be retained by the purchaser for the benefit of the appellant to be invested either by the purchaser or the guardian in proper securities, and that till then, the purchaser was to pay interest thereon at the rate of 6 per cent. per annum up to 31st December, 1944, and at 3 per cent. per annum thereafter. A charge over the property sold was also provided for the unpaid purchase money. The contemplated investment never fructified presumably because neither the second respondent nor the purchaser was able to find a suitable one. The interest on the amount is stated to have been regularly drawn by the second respondent. The sum of Rs. 3,500 was in the hands of the purchaser. The appellant attained the age of majority in 1952; shortly thereafter, he repudiated the alienation made by his mother, and instituted the suit, out of which this appeal arises, for the reliefs referred to earlier.

The suit was contested by the first respondent, the purchaser; the second respondent who sold the property was *ex parte*. The learned City Civil Judge held that the alienation was made for proved necessity and also for the benefit of the appellant, and, as such, binding on him. The suit was dismissed.

The substantial question that arises in the appeal is whether the act of the guardian in selling the property could be justified.

The extent of the power of the guardian of a minor to alienate the property of the latter was laid down in the leading case of *Hanooman Prasad* v. *Mussamat Baboyee*[1] thus:

> " The power of the manager of an infant heir to charge an estate not his own is under the Hindu Law a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance, is the thing to be regarded."

Doubts arose as to whether the necessity and benefit referred to by their Lordships of the Privy Council as justifying a guardian's alienation formed really one head or whether they were distinct heads.

In *Vembu Iyer* v. *Srinivasa Iyengar*[2], Sundara Aiyar, J., dealing with the case of an alienation by a natural guardian held that the words need and benefit imported two distinct ideas. Necessity according to the learned Judge implied the warding off an

1. 6 M.I.A. 393 at 423.   2. (1912) 23 M.L.J. 638.

evil or the doing of something that could not be avoided or of something which was one's legal duty to do *e.g.*, to avoid the sale of the minor's property for a debt binding on him would be warding off an evil. The other head of justification of the alienation is expressed by the learned Judge thus :

"But over and above all these acts that are necessary there may be acts which are positively beneficial to the minor and an alienation which would conduce positively to the benefit of the minor would be upheld apart from any necessity unless of course it is accompanied by other evils."

That such an alienation could be justified under any one of te two distinct heads of need and benefit was the consistent view taken by this Court in several cases dealing with analogous cases of alienations by qualified owners. In *Sellappa* v. *Suppan*[1], Venkatasubba Rao, J., while recognising the fact that in some cases need and benefit would be so interwoven as to make demarcation difficult held that 'benefit' would be as much a distinct ground of justification of the alienation as necessity. Yahya Ali, J., while upholding an alienation on the mere ground of benefit in *Tiruvengada Mudaliar, In re*[2], referred to a number of unreported decisions of this Court. Then there was a further question as to the nature of the benefit, *viz.*, whether the benfit contemplated should be of a defensive character. In *Krishnamurthy Iyer* v. *Nataraja Iyer*[3], Wadsworth, J., repelled an argument confining the meaning of the word benefit by laying down a hard and fast rule. The import of the expression was held to be elastic dependent on the circumstances of each case. In A.S. No. 671 of 1948 a Bench of this Court in which one of us (Rajagopalan, J.), was a member, after considering the several decisions observed :

"At no stage did any of the learned Judges attempt the task of preparing an exhaustive list of cases where the sale or alienation could be justified on the ground of benefit. Such a task is obviously impossible. The question whether in any given case there has been a benefit or not is really a question of fact as was pointed out by Wadsworth, J., in *Krishnamurthy Iyer* v. *Nararaja Iyer.*[3]"

Thus guardian's alienation of the property of the ward (as also the manager's alienation of family property and a Hindu widow's alienation of property in which she has a limited interest) could be justified as one for (1) necessity, (2) partly for necessity and partly for benefit and (3) benefit *simpliciter*. The burden of proving that any one or more of the aforesaid justifying elements existed is on the alienee.

Now what are the circumstances under which the second respondent sold the property under Exhibit B-10?

The family of the minor appears to have owned a printing press in addition to the suit property. It is said that the printing press had been sold some time in the year 1930, long before the appellant was born. When Sarangapani Pillai died, only the house remained as family property ; in that property his widow would have a limited right in half a share thereof under the provisions of the Hindu Women's Right to Property Act, 1937. The property itself was subject to three mortgages Exhibits B-1, B-5 and B-8 created by Sarangapani Pillai for a sum of Rs. 2,000 bearing interest at 9 per cent. per annum and more. It is argued that Exhibit B-1 not being for an antecedent debt incurred by the appellant's father would not constitute a valid charge. But the recital in the mortgage shows that it was for a necessary purpose. Assuming, however, that there was no necessity, the amount due under it could be enforced as a money claim against the appellant. Exhibits B-5 and B-8 would be binding even as mortgages. The mortgages conferred a power of private sale under section 60 of the Transfer of Property Act on the mortgagee. The only source of income for the appellant and his mother was the rental income from the mortgaged property. The evidence of D.Ws. 1 and 2 shows that the property yielded an income of Rs. 23 to 27 per month. There is no acceptable evidence *contra*. The appellant who was a minor on the date of sale could not have known anything personally. His mother the second respondent who is living with him and who without doubt is largely interested in the appellants' success, has not chosen to give evidence contradicting the evidence on the side of the purchaser. Further, there is evidence on the side of the purchaser to show that the house was in a dilapidated

1. I.L.R. (1937) Mad. 906: (1937) 1 M.L.J. 422.
2. (1948) 2 M.L.J. 47.
3. (1948) 1 M.L.J. 430.

condition. That the evidence as to income from the property on the date of Exhibit B-10 must obviously be nearer the truth is shown by Exhibit B-12, the extract from the Assessment Register of the Corporation of Madras, which gives the annual valuation as Rs. 273. The learned Advocate for the appellant tried to demonstrate that even with that income there must have been a surplus available with the second respondent. Let us see how far learned counsel is correct. Taking the rent at the higher of the two figures, *viz.*, Rs. 27 per month, the annual gross income would be Rs. 324. Out of this, municipal taxes payable was Rs. 48. Interest payable on the three mortgages would be Rs. 163. There would only be a balance of Rs. 113 per year out of which necessary repairs had to be effected for the house. There is no evidence that the second respondent was earning. With this meagre income it would have been hardly possible for the second respondent to maintain herself and her son and to make any payment to reduce the mortgage liability.

It is the case for the alienee as spoken to by D.W. 1, whose evidence was accepted by the learned trial Judge, that the mortgagee Narayanaswami Iyer, the real owner of the mortgages was pressing the second respondent for money. This evidence is strongly criticised by the learned advocate for the appellant on the ground that Narayanaswami Iyer himself has not been examined. The learned counsel went even so far as to suggest that the alienee should have examined on his side the second respondent. We cannot however agree. D.W. 1 speaks to the demand by Narayanaswami once when the mortgage was in his name as benamidar and again after he had assigned the same in favour of the latter. The evidence besides being uncontradicted is probable having regard to the fact that the first of the mortgages was nearly seven years old at the time.

It is true that the onus of proof is one on the purchaser but one cannot with reason expect him to examine on his side the appellant's mother who is a party to the suit and who would in all probability support only her son.

Assuming, even that the story of the demand is not true, the position of the appellant is not improved thereby. That the debts under Exhibits B-1, B-5 and B-8 existed can admit of no doubt. They would afford sufficient basis for necessity particularly in the known circumstances of the case, without even a formal demand by the creditor.

The learned trial Judge held that the price paid under Exhibit B-10 was proper. The rental income and the municipal valuation do support that conclusion. It is not suggested that the second respondent was actuated by any improper motives either to sell the property when there was no need or to sell it at a low value. Her father was alive and was living with her in or near the house. Possibly with a view to provide an explanation for the alienation the appellant charged in the plaint that his mother was misguided and tricked into executing the sale deed and that his grandfather was inimically disposed towards him. There is no evidence in regard to the former: that in regard to the latter cannot be accepted. But the contention of the learned advocate for the appellant is not that there is any explanation on the appellant's part as to why his own mother should sell the property but that it must be held that the evidence let in by the alienee is untrustworthy and even otherwise would be insufficient to discharge the burden of proof that lay on him. We have already indicated that the witnesses on the side of the alienee speak to all material facts and that evidence is uncontradicted and probable. That evidence if accepted would justify the sale. Where evidence has been let on the material point, the question then is purely one of assessment of the evidence. Onus becomes important only when there is no evidence on a particular point, or where evidence let in on both sides is evenly balanced or equally untrustworthy or is of such a nature that the Court feels that it could not come to a definite conclusion thereon. In such a case the matter can be decided on the basis of burden of proof. Where as in this case there is evidence, the case has to be decided on the footing whether it is such as could be accepted or acted upon and if acted upon would be sufficient to prove the existence of the relevant factors to justify the guardian's alienation,

It was then contended that even if one were to accept the evidence on the side of the alienee; there was necessity only for a portion, and a minor portion of the price for which the property was sold, and that the guardian could not be said to have acted on account of necessity when she invested the unpaid purchase money with the purchaser. If a guardian merely sells a property for investing the amount on a mortgage or with the vendee it cannot be said on that basis alone that the sale is one which is justifiable. The propriety of the investment of the balance of purchase money should be judged in the light of the necessity for the sale and not by viewing it as an independent transaction. In the pressed case the guardian had to sell the property to liquidate the claims thereon. The necessity for such a transaction cannot be decided by merely taking into account the arithmetical proportion between that portion of the amount which was for a necessary purpose and that which was not. The proper approach will be to see whether the sale itself is one which was justified by necessity or benefit. It is obvious in the circumstances that the pressure of the creditor could not have been met otherwise than by alienating the property wholly. That was the only property which the appellant had and no question of alienation of part of the house can at all arise. The sale being proper, the investment of the surplus purchase money is only incidental.

It is however contended that the guardian could have mortgaged the properties for paying off the creditor and that a sale was therefore not justified. For one thing the execution of a fresh mortgage would at best be from Scylla to Charybdis ; the position of the minor would improve in no way ; if the interest in the mortgage were to he paid to the new creditor, very little would be left for the minor's maintenance; if not paid the mortgage would swallow the entire property in course of time. Secondly, once it is found that an alienation was necessary, what form that should take, whether it should be a sale or mortgage was one entirely for the guardian to decide.

In *Nagammal* v. *Varada Kandan*[1], a Bench of this Court held that the validity of a sale of the ward's properties by a guardian with a view to discharge debts binding on the former, should be judged by circumstances obtaining on the date of the transaction and not on events which subsequently happened, events which could not have been thought of at that time and that it was not necessary that creditors were making demands before it could be found there was pressure on the estate. The learned Chief Justice observed in the course of his judgment :

> " In dealing with the property of a ward considerable latitude should be allowed for the exercise of the guardian's discretion though if the act was of a speculative character it cannot be supported by Court. "

Learned counsel for the appellant however contended that there was no such discretion in the guardian and that it was the duty of the alienee to show that the guardian had no option but to sell. In support of this contention reliance was placed on two decisions of Mudholkar, J., (as he then was) *viz.*, *Tulsiram Sitaram* v. *Narayana Waman*[2], and *Nathu Bhiwaji* v. *Ganpath Bablaji*[3], where it was held that an alienee from a natural guardian had to show positively that the course which the latter took was the only one open to her in the circumstances. We must however express our respectful disagreement with that view. A guardian, as we have shown earlier, can sell the ward's property for necessity or benefit and such benefit need not necessarily be of a defensive nature. In the case of an alienation for the benefit of the minor, pure and simple, it cannot be said that the guardian had no alternative, for she could have retained the property. A power to sell for the benefit of the ward implies a discretion, discretion not merely to decide as to the form of alienation, *e.g.*, mortgage, lease or sale, but whether the alienation is at all to be made. For example, if the minor has an unproductive property and the guardian sells it with a view to purchase a productive one it cannot be said that only course open to the

1. (1950) 1 M.L.J. 505.
2. A.I.R. 1950 Nag. 69
3. A.I.R. 1958 Bom. 25.

guardian was to sell the property. But yet the alienation would be binding. The test in such cases is not that there should be no alternative, but whether the act was one for the benefit of the minor in the known circumstances. In *Vembu Iyer* v. *Srinivasa Iyengar*[1], Sundara Iyer, J., observed at page 643 :

> "The question in each case would be whether the discretion vested in the guardian has been exercised properly. He would be taken to have done so if he acted with due prudence and caution.. ..At the same time the Court has certainly to judge of the act of a guardian as it would appear to a prudent man at the time the act was done. It will not set aside his acts on the ground that years after the act has been done it appears to the Court that the guardian might have acted better...... ..the right view to lay down appears to me to be to consider, whether in the circumstance that existed at the time of the alienation, the act would be regarded as a prudent one by men of ordinary prudence in dealing with the property of the ward."

Sadasiva Iyer, J., observed :

> "The only safe and convenient rule is that if the guardian of a Hindu minor alienates the minor's property because he considers it after weighing all the then existing circumstances to be in the best interests of the minor to make that alienation, the minor is clearly bound by that act of alienation."

It is however obvious that the standard of prudence is not a subjective one, *i.e.*, what the guardian would do if the property were his. The guardian occupies a fiduciary position: his decision to alienate should be objective, *viz.*, whether in the circumstances it is either necessary or for the benefit of the minor that the property should be sold or otherwise alienated. The standard of care required would be more akin to that of a trustee than that of a owner. The proved circumstances of this case show that the alienation under Exhibit B-10 would stand even a more rigid test. The alienation was inevitable: if matters were delayed the mortgagees might have brought to sale the property either privately or through the Court with the result that very little would have been left for the minor to live upon. If under those circumstances the guardian thought it was wiser to sell the property and save thereby a sum of Rs. 3,500 for the minor on the security of the same property in the absence of a better investment, it cannot be said that sale was speculative. It was one in the interests of the minor and would bind him.

It is now represented that the alienee had deposited the unpaid balance of purchase money in the lower Court and the same has been drawn by the appellant. We dismiss the appeal but in the circumstances without costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Sri Dhandapani Power-Loom Factory, Erode, by its Proprietor Sri S. V. M. S. Marudappa Chettiar .. *Petitioner**

v.

The Commercial Tax Officer, Coimbatore and another .. *Respondents.*

Madras General Sales Tax Act (II of 1939), *section* 3 (1) (b) *as amended by Acts XX of* 1954 *and III of* 1956—*Scope and effect—Additional tax on power loom cloth—Liability.*

Under the scheme of sales tax levied prior to the Amending Act III of 1956 power loom cloth was not brought within the scope of the additional tax. When section 2 (*b*) of Act XX of 1954 enacted that mill cloth would be liable to additional tax, it did not include power loom cloth. Considered in the context of Act III of 1956, it is clear that prior to the amendment power loom cloth, as distingusihed from mill cloth, did not attract the additional tax imposed by Madras Act XX of 1954.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the Commercial Tax Officer, Coimbatore South, in his Ref. G. 6149 of 1957, dated 29th May, 1958 and quash the same.

1. (1912) 23 M.L.J. 638.

*W.P. No. 809 of 1958.

24th November, 1960.
(3rd Agrahayana, 1882—Saka).

M. K. Nambiar and *K. K. Venugopal*, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*), for Respondent.

The Court made the following

ORDER.—The petitioner owns a factory at Erode wherein cloth is manufactured with the aid of nine power looms. Originally cloth manufactured on power looms and sold by a dealer was liable to a sales tax at the general rate fixed in section 3 (1) (*b*) of the Madras General Sales Tax Act, 1939. Act XX of 1954, which came into effect from 23rd August, 1954, imposed an additional tax of Re. 0-1-3 on every rupee of the turnover on certain varieties of cloth, namely " cloth, whether of silk, artificial silk, wool, flax, or any other material not being cotton, made in mills, in which the count of warp yarn employed (excluding the border) is 17s or finer (whether single or folded). It will be noticed that the additional tax levied under the provisions of the Amending Act XX of 1954 was in respect of mill products where the warp yarn employed was above 17s or finer. Cloths manufactured by power-looms are not specifically mentioned in the section. *Prima facie* they appear to have been excluded from the operation of the section. This Act was later amended by Act XL of 1954 which substituted the following in the place of the one above extracted :

> " Mill cloth (whether of silk, artificial silk, wool, flax, or any other material), which is not made wholly of cotton and in which the count of warp yarn employed (excluding the border) is 17s or finer (whether single or folded) ".

The amended section came into effect from 23rd August, 1954 itself. By Act III of 1956, the State Legislature further amended the aforesaid provision. In the place of the provision which I have extracted, above, it brought to tax the following goods :

> " Cloth (other than cloth woven on handlooms, whether of silk, artificial silk, wool, flax, or any other material) which is not made wholly of cotton."

A comparison of the three provisions which I have set out above shows that in the latest of the enactments, the qualification of the cloth being a mill cloth had been removed. It would follow that any cloth other than those exempted by the provision would attract the tax. Power-loom products would therefore be included by virtue of Act III of 1956 even if it were not included under the previous provisions. Section 1 (2) of Act III of 1956 states that it should be deemed to have come into force on 23rd August, 1954. The result will be that additional tax would be leviable in respect of sales of cloth manufactured on power-looms as and from that date. It is obvious that if the dealers in power-loom cloth were not subject to additional tax under Act XX of 1954 or Act XL of 1954, the retrospective operation of Act III of 1956 would act harshly on such of them that did not collect tax from their customers thinking that their turn over was not liable to tax under the then existing law. In order to relieve this hardship, the Government passed G.O. Ms. No. 275 Rev., dated 19th January, 1957, whereby they waived the collection of the additional sales tax leviable in section 3 (2) of the Madras General Sales Tax Act for the period from 23rd August, 1954 to 27th March, 1956. The relevant provision of the G.O. so far as it applies to the present case is that contained in clause (*b*) thereof.

> " (*b*) Cloth (other than handloom cloth woven on handlooms) whether silk, artificial silk, wool, flax or any other material, which is not made wholly of cotton, if the dealer adduces proof that the additional sales tax had not actually been collected on the ground that according to the manufacturers' invoices, the sale of the cloth was not liable to the additional sales tax ".

For the year 1954-55 the Deputy Commercial Tax Officer assessed the petitioner to sales tax. The assessment was made on 31st May, 1956. By that time Act III of 1956 had come into force, the President's assent having been given on 24th March, 1956. The enactment being retrospective in its operation the power-loom goods sold in 1954-55 would also come within its ambit. That the Deputy Commercial Tax Officer made the assessment on the basis of Act III of 1956 is clear from the order of assessment itself. He made a specific reference to the relevant words.

contained in Act III of 1956. The petitioner was duly assessed in respect of the turn over for the relevant year and the additional tax payable was Rs. 2,653,-0-0. The petitioner unsuccessfully appealed to the Commercial Tax Officer against the order of assessment and a further appeal therefrom to the appellate Tribunal proved equally futile. The order of the Tribunal upholding the assessment was made on 19th February, 1957.

As I stated, the Government had passed a G.O. giving relief to the dealers who satisfied certain conditions from the operation of the retrospective provisions of the enactment even a month earlier. The petitioner presumably was not aware of the G.O. when his appeal was disposed of. On coming to know of it later, he applied to the Tribunal for review of its order. The Tribunal held that as the relief under the G.O. was granted by an administrative direction, it would not be open to the petitioner to claim it as of right before it. In that view it rejected his application. The petitioner appears to have filed earlier a petition to the Commercial Tax Officer claiming relief under the G.O. The Commercial Tax Officer refused to entertain the petition on the ground that as the assessment had already become final, no question of relief could at all arise. There is an obvious fallacy in the view of the Commercial Tax Officer. It is because the assessment had become final the question of relief under the G.O. arose. He was therefore not right in rejecting the petitioner's claim on the ground that the assessment had become final. Not taking failure easily, the petitioner filed an application to the Board of Revenue seeking relief by way of refund of Rs 2,653 out of the tax paid on the basis of the assessment. The Board of Revenue forwarded the application to the Commercial Tax Officer for disposal. The Commercial Tax Officer has rejected the application and in so doing stated :

> " In the case of the applicant this concession is not applicable as manufacturers cannot be heard to say that they did not know the count of warp of the cloth produced by them. Further it was made clear in the Press Note No. 74 dated, 5th November, 1954, that power-loom cloth of the description falling under items (*i*) and (*ii*) of section 3 (2) of the Act is liable to additional tax. Therefore, the applicants are not entitled to the concession provided in G.O. No. 275, Rev., dated 19th January, 1957 ".

The reason given by the Commercial Tax Officer is thus two-fold. (1) That the yarn employed by the petitioner in the manufacture of cloth being of a count higher than 17s, he was, at no time, entitled to a reduced taxation. Act XX of 1954 would apply to the sales thereof. (2) that Act XX of 1954 included within its ambit power-loom manufactured cloth was made clear by the Press Note issued by the Government.

It is contended for the petitioner that the Commercial Tax Officer was labouring under a misapprehension in regard to the Government Order. The learned counsel contends that under Act XX of 1954 two categories of goods were not brought to additional tax, (1) goods manufactured by power-loom and (2) Mill goods whose warp count was less than 17s. Act III of 1956 brought to tax both the above categories for the first time. Relief under the G.O. was granted to both of them. The Commercial Tax Officer in rejecting the claim for refund on the ground that the goods manufactured and sold were of a higher count than 17s committed an error ; in that he ignored the fact that the power loom products were not at all liable to tax under Act XX of 1954. As the G.O. gave him relief in regard to such goods his claim for refund could not be rejected on the ground that the cloth manufactured was above the count of 17s. I am of opinion that the argument is well founded. Implicit in the order of the Commercial Tax Officer is the view that there is no distinction between Mill and power loom products He held that the power loom products would be covered by Act XX of 1954 itself ; and unless the petitioner were able to show that the yarn employed by him was less than the count of 17s. he would not be entitled to exemption. Reliance was placed by the Officer for the view he took on the Press Note issued by the Government. I cannot see how the Officer could take note of the Press Note in construing a statutory provision like the one contained in Act XX of 1954. A statute has to be construed on its terms. A construction placed by the executive of the Government on a statute cannot obviously

bind a judicial or a quasi-judicial tribunal. This is particularly so in a taxing enactment. No person would be liable to tax unless he is brought within the terms of the taxing statute. The question whether the power-loom yarn would come within Act XX of 1954 will have to be decided on the terms of the statute and not on the basis of the Press Note issued by the Government.

Section 2 (*b*) of Act XX of 1954 only refers to cloth, etc., made in mills. In the affidavit filed in support, of the petition, it is stated that a power-loom is not a mill and the cloth produced on power-looms would not be liable to the additional tax. No counter affidavit has been filed controverting this statement that a power loom is not a mill. The learned Additional Government Pleader, contended that mill goods would include power-loom goods, as the essential element in both of them would be employment of machinery. I cannot agree. Mill cloth is a familiar variety of cloth and everybody knows what a Mill is. In popular language, a power-loom cloth is never associated with a Mill cloth. I am therefore of the opinion that when section 2 (*b*) of Act XX of 1954 enacted that Mill cloth would be liable to additional tax, it did not include power-loom cloth. The learned counsel for the petitioner referred to the *Statement of Objects and Reasons* for the enactment of Act III of 1956 to show that the legislature itself was alive to the distinction between the two. A section in an enactment cannot be construed in the light of the *Statement of Objects and Reasons*. But it is a familiar principle of interperetation that in order to ascertain the true scope of a statute, it will be open to the Court to look at the state of law as it existed before and the mischief which was intended to be remedied by the subsequent statute. Therefore for the purpose of ascertaining the scope of Act III of 1956, and the necessity for the legislation or the mischief it intended to rectify, the Court could look into the *Statement of Objects and Reasons*. Adverting to the previous law it states :

> " It has been pointed out that all kinds of cloth mentioned in section 3 (2) of the Act can be made in power-looms run in places other than mills, and that power-loom cloth made in a mill cannot be distinguished from that made in a place other than a mill."

What is implicit in this passage is that a power-loom cloth is distinct and differently understood from the Mill cloth. I am of opinion that the object of the Legislature while enacting Act III of 1956 would indicate that the enactment was necessary to bring into the taxation scheme the power-loom cloth which till then escaped taxation. That would support the view come to earlier, namely, that the word 'mill' used in Act XX of 1954 did not include "a power-loom".

The learned Additional Government Pleader then contended that this Court would have no jurisdiction to issue a writ of *certiorari*, as what the Commercial Tax Officer did was merely to decline the granting of a refund in respect of which the petitioner had no statutory right. A similar argument was advanced on behalf of the Government in W.P. Nos. 832 to 834 of 1958 and a Bench of which I was a member rejected that contention. When the Board of Revenue directed the Commercial Tax Officer to dispose of the application of the petitioner for relief under the terms of the G.O., the Officer should be held to have been entrusted with a public duty and if he, by an erroneous view, declined to perform that duty it would be open to this Court to correct it under Article 226 of the Constitution. The learned Additional Government Pleader advanced a further contention namely that the Government Order was only an administrative direction, and on the analogy of the cases decided under the Motor Vehicles Act, he contended that a disregard or a wrong construction of such administrative direction would not be justiciable and that therefore no relief could be given to the petitioner under Article 226 of the Constitution. There is, however, a distinction between the case under the Motor Vehicles Act and the present case : the principle of those decisions will not apply to the present case. Under the Motor Vehicles Act the Tribunal is vested with statutory authority: in performing its quasi-judicial duties, it could rely upon certain administrative directions issued by the appropriate authority. A disregard of its administrative direction by the quasi-judicial authority under the statute was held not to attract

the writ jurisdiction of this Court. Here the Commercial Tax Officer is not exercising any independent or statutory jurisdiction of his own. He, as a subordinate of the Government, was directed to do a public duty and if he failed to do that duty on a misapprehension of the scope of the very direction given to him it should be open to this Court to issue an appropriate writ.

The rule *nisi* is, therefore, made absolute. The result will be that the Commercial Tax Officer will have to dispose of the petitioner's claim for refund afresh. The petitioner will be entitled to costs. Advocate's fees Rs. 100.

R.M. ——— *Rule absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VEERASWAMI.

A. Anthonimuthu Samban .. *Petitioner**

v.

Sri Sethuranga Vallabanathaswamy Devasthanam, Poovanoor, by its Executive Officer, P. Raja Manicka Mudaliar, Poovanoor .. *Respondent.*

Madras Cultivating Tenants (Payment of Fair Rent) Act (XXIV of 1956), *section* 14 (2)—*Scope—Time limit for the exercise of the option to relinquish excess over one* veli *to claim benefit of Act.*

If the tenant has the option to relinquish the land in excess of one veli (6⅔ acres) of wet land even subsequent to the agricultural year ending in 1957, the words in the section 14 (2) " relinquish at the end of the agricultural year ending in 1957 the tenancy ", etc., would be meaningless. The intention of section 14 (2) is that the tenants should exercise the option to relinquish at the end of the agricultural year ending in 1957, but not subsequent thereto.

Petition under section 11 (*b*) of Act XXIV of 1956 and 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif (Rent Tribunal), Mannargudi, dated 22nd November, 1958 and passed in R.A. No. 29 of 1958 preferred against the Order of the Rent Court, Thanjavur, in F.R.P. No. 164 of 1958.

K. V. Sankaran and *Palaniswami*, for Petitioner.

T. M. Chinnaiya Pillai and *T. S. Palanisivagurunathan*, for Respondent.

The Court delivered the following

JUDGMENT.—This Revision Petition is directed against the Order of the learned District Munsif, Mannargudi, in R.A. No. 29 of 1959. The tenant is the petitioner.

The petitioner applied to the Rent Court, Thanjavur, in F.R.P. No. 164 of 1958 for fixing the fair rent under section 9 of Madras Act XXIV of 1956 in respect of 6 acres and 75 cents comprised in R.S. Nos. 14, 15 and 16/1 in Royapuram Village, and 82 cents in R.S. No. 196/3 in Poovanur Village. It may be mentioned that out of these extents of land, the petitioner purported to surrender 92 cents of land, evidently with a view to qualify himself for the benefits of the Act. It may also be mentioned that the same petitioner had on a previous occasion in F.R.P. No. 181 of 1957 applied for fixation of fair rent. In that petition, the presiding officer of the Rent Court fixed the fair rent for the year 1956-57 and held that the petitioner was not entitled for the benefits of the Act for the future years. The petition for fixation of fair rent out of which the present petition arises was resisted by the respondent landlord on the ground that the petitioner having not relinquished the 92 cents at the end of the agricultural year ending in 1957, he was not entitled to surrender that extent in the subsequent year and claim the benefits of the Act.

The Rent Court did not accept that contention and fixed the fair rent. On appeal, the learned District Munsif, on a consideration of the scope of section 14 (2), held that the petitioner having failed to avail himself of the option to

* C.R.P. No. 689 of 1959. 4th March, 1960. (14th Phalguna, 1881, Saka).

relinquish the necessary extent of land in order to qualify himself to the benefits of the Act, was not entitled to surrender any portion of the land subsequent to the end of the agricultural year ending in 1957 and claim the benefits of the Act.

In this revision, Mr. Sankaran, learned counsel for the petitioner urges that the learned District Munsif was wrong in the view he took of the scope of section 14 (2) and that under that section, the tenant would be entitled to relinquish the portion of land in excess of one *veli* even subsequent to the agricultural year ending in 1957. The question is whether this contention is well-founded.

The Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956, is an Act to provide for the payment of fair rent by cultivating tenants under certain areas in the State of Madras. Clause (*b*) of section 2 defines a cultivating tenant in the following terms :

"'Cultivating tenant' means a person who contributes his own physical labour or that of the members of his family in the cultivation of any land belonging to another, under a tenancy agreement, express or implied, and includes any such person who continues in possession of the land after determination of the tenancy agreement or the heirs of such person, but shall not include a mere intermediary or his heirs."

Section 14 (1) provides that the provisions of the Act are not applicable to any cultivating tenant who owns, or who cultivates either as tenant or owner or as both, an extent of land in excess of one *veli* (6⅔ acres) of wet land.

Sub-section (2) of section 14 reads :—

"Any cultivating tenant who owns, or who cultivates either as tenant or as owner or as both, an extent of land exceeding that specified in sub-sction (1) but not exceeding 10 acres of wet land may, by notice in writing addressed to the landowner, relinquish at the end of the agricultural year ending in 1957 the tenancy, in respect of such portion of the land aforesaid, as may be necessary to entitle him to all the benefits of a cultivating tenant under this Act. Such cultivating tenant shall be entitled to all the benefits of this Act till the end of the agricultural year ending in 1957 and shall thereafter be entitled to all the rights of a cultivating tenant under this Act only on such relinquishment."

Obviously, but for this sub-section, tenants owning or cultivating either as tenants or owners or as both, an extent of land in excess of one *veli*, would not be entitled to the benefits of the Act. But this sub-section provides that in the case of tenants cultivating an extent of land not exceeding 10 acres of wet land, they may have the option of relinquishing at the end of the agricultural year ending in 1957 the extent of land in excess of one *veli* so that they may qualify themselves for the benefits of the Act. If the tenant has the option to relinquish the land in excess of one *veli* even subsequent to the agricultural year ending in 1957, the words in the section "relinquish at the end of the agricultural year ending in 1957 the tenancy", etc., would be meaningless. It seems to me that the intention of section 14 (2) is that tenants who are in possession of an extent of land in excess of one *veli* should exercise the option to relinquish in terms of sub-section (2), that is to say at the end of the agricultural year ending in 1957. If they fail to do so, they will not, in my opinion, be entitled to the benefits of the Act. Sub-section (2) of section 14 does not in terms give the tenant an option to relinquish any portion in excess of one *veli* at any time he likes.

In that view of section 14 (2), I consider that the petitioner was not entitled under that provision to relinquish the 92 cents of land which was in excess of one *veli* after the end of the agricultural year ending in 1957 and claim the benefits of the Act.

The revision petition fails and is dismissed with costs.

K.L.B. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM AND MR. JUSTICE RAMASWAMI.

Krishna Pillai, *In re* .. *Appellant**.

Evidence Act (I of 1872), section 27—Scope—Information received from the accused—How much may be proved—' Custody '—Expression to be construed in wide terms—Section 27—It offends Article 14 of the Constitution.

Section 27 of the Evidence Act does not create an unjustifiable discrimination between accused persons in custody and accused persons out of custody and in that way does not offend Article 14 of the Constitution.

If the two clauses occurring in section 27 of the Act, " persons accused of any offence " and " in the custody of a police officer" separated by a comma, are read distributively as referring respectively to persons referred to in sections 25 and 26 there can be no question of the admissibility being restricted only to the confession of a person in the custody of a police officer. Thus viewed the law embodied in section 27 cannot be stated to make a discrimination in favour of persons who are not in police custody and against persons who are in police custody.

The term ' custody ' in section 27 should be interpreted in wide terms and should not be restricted only to a custody after formal arrest.

Case-law discussed.

Appeal against the Judgment of the Court of Session of the Kanyakumari Division at Nagercoil in Case No. 1 of the Calendar for 1959.

R. Namasivayam, amicus curiae.

The Public Prosecutor (*P. S. Kailasam*), for State.

The Judgment of the Court was delivered by:

Ramaswami, J.—This appeal is preferred against the conviction and sentence by the learned Sessions Judge of Kanyakumari in Sessions Case No. 1 of 1959.

The facts of this case are within a brief compass. It is common ground that there have been bitter ill-feelings between the accused Krishna Pillai and the deceased Velu Nadar over the leasing and enjoyment of palmyrah trees standing on the southern plot of Chudukattuvilai and therefore we need not reset the details of this ill-feeling set out by the learned Sessions Judge in paragraphs 3 and 4 of his judgment.

On 17th November, 1958, at about 5 P.M., according to P.W. 1, son of the deceased, himself and the deceased as usual left their house for tapping cocoanut trees. Then at about 8 P.M. when P.W. 1 was climbing trees in the garden adjoining the Chudukattuvilai, known as Arappuravilakam, the deceased was climbing the trees in the southern half of Chudukattuvilai. Then P.W. 1 heard an exchange of hot words between the deceased and the accused. How the altercation arose was in this wise.

The deceased was on the top of the tree and the accused questioned him as to who was on the top of the tree and the deceased announced his identity. Then the accused interrogated him as to with whose permission he was climbing the trees. The deceased replied that he need not ask for anybody's permission as he (deceased) was pattomdar. The accused then stated that if he wanted to exercise his rights as pattomdar, he must pay the pattom to him (accused). The deceased stated that he had paid portion of the pattom due for that year and has also paid the advance and therefore he would pay the pattom only from next year onwards. The accused persisted that unless he was paid, the deceased could not climb the trees in that garden. In the course of this altercation P.W. 1 heard the deceased cry that the accused had stabbed him. P.Ws. 3, 4, 7 and 8, who were in the vicinity, hearing this galatta came there. Meanwhile P.W. 1 got down from the tree on hearing the hot exchange of words. When P.W. 1 was 150 feet away from the scene he heard the alarm of his father that the accused had stabbed him. P.W. 1 then

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* Cr. A. No. 168 of 1959. 20th January, 1960. (30th Pausa, 1881, Saka).

saw the accused running with the dagger M.O. 5 in his hand towards Melavilai. On P.W. 1 obstructing the accused and asking him why he stabbed his father, the accused brandished the dagger saying that P.W. 1 would also meet with the same fate as his father. Therefore, P.W. 1 got frightened and went behind a palmyrah tree. The accused ran towards his wife's house *i.e.*, P.W. 5. This was witnessed by P.Ws. 3 and 4. P.W. 8 noticed only the accused running towards his wife's house. P.W. 7 who was climbing the trees in the adjoining Kattuvilai came there on hearing the cries and saw the injured man being lifted by his son (P.W. 1) and held close to his chest. P.W. 6, the wife of the deceased, and her daughters (not examined) came to the scene. Then the injured man was taken to his house and before he could be sent to the hospital, he died. Information of this occurrence had been given at the Arumana out-post and the Tiruvattar Police Station. The Sub-Inspector of the Tiruvattam Police Station investigated the case and sent the dead body for *post-mortem* examination. P.W. 2 conducted the autopsy and found a stab injury near the neck which, in his opinion, was necessarily fatal and could be caused by a weapon like M.O. 5 at the time and in the manner mentioned by the prosecution. The accused was looked for but he was absconding. He was arrested by P.W. 10 at Tiruvandrum at 7-30 P.M. on 21st November, 1958 and on the information given by him M.O. 5 was recovered on 24th November, 1958, from the top of a beam in the shop of D.W. 3 Ramakrishnan and the seizure was duly recorded under a mahazar Exhibit P-6.

The accused stated that his wife and her children were in possession of the properties in pursuance of a partition deed, even from the date of partition. In spite of the deceased having agreed, in the presence of his father-in-law, to give sweet toddy on alternate days (called Akkani), according to the Varappanai arrangement, he did not do so. On the date of occurrence P.W. 5's son (through her first husband) informed the accused, at the place where he was rolling beedies, that the deceased had not given their share of sweet toddy. After ascertaining from him that the deceased had climbed the trees that morning also and gone away, he stated that he would look into it when he returned home from work. On his way home he had to cross the Chudukattuvilai. At that time the deceased was climbing the tree allotted to D.W. 2. When he got down from that tree, the accused asked him why he had not given the sweet toddy. The deceased threw chunam and asked him what business he (accused) had there. The accused stepped aside with the stick (மிதிப்புத் தடி) marked as M.O. 1. The deceased beat him on his leg below the knee. The accused held M.O. 1, but after snatching it, the deceased attempted to beat the accused on his head with it. Apprehending that he, the accused might lose his life, he took the pen-knife (not M.O. 5) from his waist and stabbed the deceased. P.W. 1, came running then, shouting that the accused should be killed, without knowing that the deceased had been stabbed by the accused. The accused became afraid and ran away. P.Ws. 3, 4 and 8 are the relations of the deceased and therefore they are deposing falsely.

On the evidence on record, there cannot be the slightest doubt that the prosecution has brought home the offence to the accused beyond reasonable doubt. The motive for the commission of the offence was the grievance felt by the accused that the deceased was persisting in climbing trees without paying the pattom to him. P.W. 1 had heard the altercation between the deceased and the accused narrated above and in the course of which the accused had stabbed the deceased with M.O. 5. The cry of the deceased that he had been stabbed by the accused, had also been heard by P.Ws. 3 and 4. P.W. 3, on going near the place of stabbing, had also seen the accused brandishing a dagger and threatening to stab P.W. 1 also if he obstructed him, and whereupon P.W. 1 went behind a palmyrah tree, which, as already stated, is spoken to by P.W. 1. P.W. 4 also speaks to his seeing the accused threatening P.W. 1 and P.W. 1. hiding himself behind a palmyrah tree and the accused running away from the place where the deceased was lying speechless with injuries. P.W. 6, the wife of the deceased, on hearing the cries of P.W. 1 from Chudukattuvilai, went there with her daughters and learnt from P.W. 1 then and there that the accused

had stabbed the deceased. P.W. 7 who was climbing trees in Kattuvilai, south of Chudukattuvilai, came on hearing the cries of the deceased that he was stabbed by the accused and saw P.Ws. 1, 3 and 4 there and P.W. 6 and her daughters coming there. P.W. 8, who was tapping trees in Sundavilai, near Chudukattuvilai, corroborates P.W. 1 about the altercation between the deceased and the accused and subsequently hearing the cry of the deceased and that he had been stabbed by the accused and his seeing the accused run towards the west and the injured man being removed to his house. He speaks to the other witnesses P.Ws. 1, 3 and 7 being present there. The accused had immediately absconded and could be arrested at Trivandrum and later, on the information given by him, the weapon of offence M.O. 5 had been recovered.

The two pleas of defence raised on behalf of the accused in the lower Court and which were rightly rejected by the learned Sessions Judge, were grave and sudden provocation and self-defence. In this case the plea of grave and sudden provocation will not apply, because it was the accused who picked up quarrel with the deceased, as spoken to by P.W. 1 and secondly, the argumentativeness of the deceased setting up his own point of view would certainly not constitute grave and sudden provocation. In fact, the First Proviso to *Exception* 1 of section 300, Indian Penal Code lays down that " the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person." Turning to the plea of self-defence the version of the accused that the deceased beat him on the leg below the knee with the stick (மிதிப்புத்தடி) marked as M.O. 1, and that on that account he took a pen-knife from his waist and stabbed the deceased which brought about his death, is not even probabilised by the evidence. It is nothing more than an uncorroborated and untested statement of the accused from the dock. In fact it was not even referred to by him in the committing Court where the accused merely denied knowledge of the occurrence. On his being arrested, the accused was sent to the Doctor P.W. 2 as he (accused) complained of pain, apparently to put forward a plea of self-defence. But P.W. 2 was not able to see any external injury. The wife of the accused, who turned hostile obligingly stated that she gave fomentation for the injury. This is found to be an after-thought mentioned in the Sessions Court for the first time. Therefore, the learned Sessions Judge rightly held

" In the circumstances, I am unable to hold that the accused was exercising his right of private defence, either of person or property at the time he stabbed the deceased."

The learned advocate for the accused Mr. Namasivayam puts forward the contention based on the recent decision of the Allahabad High Court in *Upadhyaya* v. *State*[1], of the trial being vitiated by the reception of evidence under section 27 of the Indian Evidence Act and which he urges is void by reason of Article 14 of the Constitution of India.

The principle on which section 27 of the Indian Evidence Act is based may be briefly set out as follows : The broad ground for not admitting confessions made under inducement, or to a police officer, or by persons whilst in custody, is the danger of admitting false confession. But the necessity for the exclusion disappears in a case provided for by section 27, when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. It is this guarantee, afforded by the discovery of the property, for the correctness of the accused's statement, which is the ground of the admission of the exception to the general rule. The fact discovered shows that so much of confession as immediately relates to it is true and voluntary : *R.* v. *Babul Lal*[2], *R.* v. *Nana,*[3] *Pullukurti Kotayya*[4], *Ram Kishan* v. *State of Bombay*[5], Taylor's Evidence Act, sections 902, 903.

" But not only are confessions excluded when obtained by means of improper inducements, but also the acts of the prisoner done under the influence of such inducements unless confirmed.

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1. (1959) A.L.J. 651.
2. (1884) I.L.R. 6 All. 509.
3. (1898) I.L.R. 14 Bom. 260 (F.B.).
4. (1947) 1 M.L.J. 219.
5. A.I.R. 1955 S.C. 104.

by the finding of the property; for, the same influence which might produce a groundless confession, might produce groundless conduct."

(*See also* 3 Russell on Crimes 485 Stephen Digest, Article 22, Phipson Evidence, 9th edition 272; Roscoe Criminal Evidence, 16th edition 61).

Section 150 of Act XXV of 1861, as amended by Act VIII of 1869, was re-embodied in the 27th section of the Evidence Act with slight alterations of language. The only alteration on which any stress can be laid is the omission of the word 'or'. Section 150 ran: "accused of any offence or in the custody of a police officer". The term accused means one who is charged with a crime *Queen Empress* v. *Muksuddi Lal*[1], *Sheddin* v. *King Emperor*[2]. The term "custody" means to the lexicographer "care, keeping, charge" (M. L. J. *Law Lexicon*, page 270).

In regard to the interpretation placed thereon there are two schools of legal thought. One school considers, and this is emphasised by the majority decision in *Upadhyaya* v. *State*[3], that the operation of the proviso is restricted to information from an accused person in custody of the Police, and does not apply to information from an accused person not in the custody of the Police: *R.* v. *Babul Lal*[4]. It would appear, therefore that in order to bring a case of discovery within the scope of section 27, it is necessary that the party making the statement should be both accused and in custody at such time and that (*a*) a confession obtained by inducement under the circumstances mentioned in section 24; or (*b*) a confession made to a Police Officer, will not be affected by the operation of the 27th section when the person confessing is at the time (*a*), neither accused nor in custody, (*b*) in custody, but not accused, (*c*) accused but not in custody notwithstanding any discovery in consequence thereof, (*d*) a confession made to any person other than a police officer by a person who was at the time in the latter's custody, but not accused is inadmissible, even though it may lead to discovery, unless indeed it was made in the immediate presence of a Magistrate. But the arrest and custody need not be in respect of the offence under investigation (*See* In re *Malladi Ramiah*[5], *Jalla* v. *Emperor*[6], *Chetu* v. *Emperor*[7], *R.* v. *Babul Lal*[4], *Deonandan* v. *Emperor*[8].

The second school of thought, is represented by Chief Justice Monir, in his Principles and Digest of the Law of Evidence, 4th edition, volume 1, page 183, who expresses a doubt, about the correctness of this interpretation. He sees no reason why a statement of an accused person not in the custody of a police officer, contained in a confession made to a police officer, should not be receivable. He referred to the observation of Rankin, C.J., in *Durlay Namasudra* v. *Emperor*[9], that the section is paradoxical and thought that the legislature might have used the expression "person accused of any offence in the custody of a police officer" as a compendious mode of describing the persons whose confessions are excluded under sections 24, 25 and 26 and that the object of the section 27 was to declare that parts of the confessions which are excluded under any of these three sections became admissible if they are confirmed by subsequent facts. Then he proceeded to observe that since sections 24, 25 and 26 are themselves an exception to section 27, section 27 cannot possibly mean the statement of an accused person confirmed by subsequent facts cannot be proved unless he was in custody at the time of making it. If this interpretation of the section by Monir is correct, there is no classification of accused persons into two classes (1) of those in custody of a police officer and (2) of those not in custody of a police officer and no question arises of infringement of Article 14 of the Constitution.

It can be noted that there is a comma between the words "person accused of any offence" and the words "in the custody of a Police Officer". These two sets

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1. (1898) 21 All. 107.
2. 6 O.C. 262.
3. (1959) A.L.J. 651.
4. (1884) I.L.R. 6 All. 509.
5. A.I.R. 1956 Andh. 56.
6. A.I.R. 1931 Lah. 278.
7. A.I.R. 1948 Lah. 69.
8. A.I.R. 1951 Pat. 491.
9. (1932) I.L.R. 59 Cal. 1040 at 1045.

of words respectively may be taken to refer to persons accused of any offence in section 25, and a person in the custody of a police officer in section 26. In other words, the two clauses "person accused of any offence" and "in custody of a police officer" may be read distributively as referring respectively to the persons referred to in sections 25 and 26. If section 27 is read is this manner, there can be no question of the admissibility being restricted only to the confession of a person in the custody of a police officer. Thus viewed, the law embodied in section 27 cannot be stated to make a discrimination in favour of persons who are not in police custody and against persons who are in police custody.

But we shall proceed to discuss the point raised on the foot of the former interpretation that the plain language of section 27 is that the person giving information must be an accused and that he must be in the custody of a police officer. But what is "custody of a police officer?"

The term 'custody' used in section 27 has been the subject-matter of several decided cases and the trend of modern decisions is that it is not confined to formal arrest. They have been collected in the following two extracts from (i) Woodroffe and Ameer Ali's Law of Evidence in India, 10th Edition, edited by Malick, C.J., (1957), Volume I, page 407 and (ii) in A.I.R. Commentaries on the Indian Evidence Act, Volume II, section 27, Note 12, as follows :—

(i) When a person states that he has done certain acts which amount to an offence, he accuses himself of committing the offence ; and if he makes the statement to a police officer, as such, he submits to the custody of the officer within the meaning of section 46 (1), Criminal Procedure Code and is then in the custody of a police officer within the meaning of section 27, Evidence Act (*Santokhi Beldar* v. *Emperor*[1], *Legal Remembrancer* v. *Lalit Mohan Singh Roy*[2], *Bharosa* v. *Emperor*[3].

For the purposes of section 27, Evidence Act, the word 'custody' does not necessarily mean formal arrest, detention or confinement ; but submission to custody by word or action under section 46 (1), Criminal Procedure Code, may be taken to amount to custody ; *Jalla* v. *Emperor*[4], *Maung Lay* v. *Emperor*[5], *Legal Remembrancer* v. *Lalit Mohan Singh Roy*[2]. The word 'custody' in section 26 or 27, Evidence Act, does not mean formal custody, but includes such state of affairs in which the accused can be said to have come into the hands of a police officer, or can be said to have been under some sort of surveillance or restriction and cannot break away from the company of the Police officer and get away. *Mt. Maharani* v. *Emperor*[6], *Chhotey Lal* v. *State of U. P.*[7], relying on *Mt. Maharani* v. *Emperor*[6], *Wirsa Singh* v. *The State*[8], In re *Chundur Pallayya*[9].

(ii) The word 'custody' does not only mean custody after formal arrest but also includes such state of affairs in which the accused can be said to have come into the hands of a police officer or can be said to have been under some sort of surveillance or restriction ; *Mst. Maharani* v. *Emperor*[6], (Ragubir Dayal and Wanchoo, JJ.) ; (*Chotey Lall* v. *State of U.P.*[7], Bide and Din Mohamed, JJ.). *Allah Ditta* v. *Emperor*[10] (Goldstream and Din Mohammed, JJ.) (*Jamania* v. *Emperor*[11]) ; *Aishen Bibi* v. *Emperor*[12] ; and *Sudan Chandra* v. *Emperor*.[13]

Person suspected of being in possession of cocaine—Police Officer interviewing for a long time and walking with him to place pointed out—Though person was arrested only after discovery of cocaine he was in custody when he made the statement : *Hakim Kuda* v. *Emperor*[14] *Nawab Din* v. *Emperor*[15]. Detention of the accused as a suspect at the time of his giving information is sufficient to make the information admissible under section 27: *Gurdial Singh* v. *Emperor*.[16]

The word 'custody' for the purposes of section 27 would also include submission to custody by word or action under section 46 (1), Criminal Procedure

1. A.I.R. 1933 Pat. 149.
2. (1921) I.L.R. 49 Cal. 167.
3. A.I.R. 1941 Nag. 86 : 42 Crl. L.J. 390.
4. A.I.R. 1931 Lah. 278.
5. A.I.R. 1924 Rang. 173.
6. A.I.R. 1948 All. 7.
7. A.I.R. 1954 All. 687.
8. A.I.R. 1955 N.U.C. Pepsu 457.
9. 56 L.W. 77 : 1943 M.W.N. 11 : A.I.R. 1943 Mad. 315.
10. 38 Crl. L.J. 1082: A.I.R. 1937 Lah. 620.
11. 37 Crl. L.J. 1047: A.I.R. 1936 Nag. 200.
12. 36 Crl. L.J. 14 : A.I.R. 1934 Lah. 150.
13. 34 Crl. L.J. 675 : A.I.R. 1933 Cal. 148.
14. 41 Crl. L.J. 591.
15. A.I.R. 1933 Lah. 516.
16. A.I.R. 1932 Lah. 609.

Code, *Jalla* v. *Emperor*[1], *Santokshi Beldar* v. *Emperor*[2], *Bashora* v. *Emperor*[3] *Legal Remembrances* v. *Lalit Mohan.*[4]

As soon as an accused or suspected person comes into the hands of a police officer he is, in the absence of clear and unmistakable evidence to the contrary, no longer at liberty and is therefore in custody within the meaning of sections 26 and 27, *Maunglay* v. *Emperor*[5]. Where at the time the accused made a statement the Police had arrived on the spot, the custody of the police should be held to have commenced: *Choda Atchenah*, In re[6].

Two decisions may be specifically referred to. In *M. J. Jamunia Partap Lahor* v. *Emperor*[7], Grille and Gruer, JJ., observed that even if the accused in the case had not been formally arrested at the time when she gave the information, she was for all practical purposes in police custody, and that section 27, therefore applied. In *Ram Babu Jadav and others* v. *Emperor*[8], the accused was in hospital, in judicial custody, and the police officer examined him with the permission of Court. The Patna High Court observed that section 27 would well be applied to a case of that kind, because actual police custody was then prevailing.

Subsequent to the decisions referred to above we have further decisions. In *Akmat Ali* v. *State of Tripura*[9], it was held that the 'custody' contemplated by section 26 does not necessarily mean a formal arrest and what is necessary is that at the time of making the confession or giving information, the accused should be in the hands of a police officer, *i.e.*, not free to depart at his own free will. In In re *Mansingh Parma Teli*[10], it was held that for the purpose of section 27, the word 'custody' does not necessarily mean detention or confinement and that submission to custody by any action or by arrest is also custody within the meaning of that section. In a Bench decision of this Court, In re *Ramachandran*[11], to which one of us was a party, it was held after a review of the relevant decisions :

"...........We see no reason at all why the expression relating to police custody occurring in section 27 of the Indian Evidence Act, should be rigidly interpreted. After all, what the spirit of the language employed appears to imply is that, where a person submits himself to the custody of a police officer, with the consciousness that temporarily at least he is in such custody, or under such control, whether formally authorised in some manner or otherwise, the information given by him to such Officer, leading to the discovery of a relevant fact, may be proved within the scope of the section. To limit the meaning of the expression further, by imposing conditions as to the time of arrest, the existence or absence of a formal magisterial order authorising police custody or interrogation, etc., does not seem to be justified either by the context, or by any inherent feature of the scheme of sections 25 and 26, to which section 27 clearly constitutes a proviso or exception. Please see the decision of the Supreme Court in *Ramkishan* v. *Bombay State*[12]."

Therefore, the term 'custody' used in section 27 has to be interpreted within wide limits. In practice it would be found that in almost all the criminal cases in which information given to the Police Officer is sought to be introduced under the provisions of section 27, it would have been the information given by persons in custody within the wide limits of the interpretation set out above. Therefore, the category of persons referred to by the majority Judges in the Allahabad decision referred to above, *viz.*, the category of persons not in police custody giving information and which information is sought to be introduced under section 27, will be practically non-existent and render the discussion about the application of Article 14 of the Constitution clearly academical.

The majority decision in *Upadhyaya* v. *State*[13], seems to hold that '*A*' may be hanged on the basis of the statement made by him under section 27 of the Evidence Act, while in police custody, whereas '*B*' a co-accused who made a similar state-

1. A.I.R. 1931 Lah. 278.
2. A.I.R. 1933 Pat. 149.
3. A.I.R. 1941 Nag. 86.
4. A.I.R. 1922 Cal. 342.
5. A.I.R. 1924 Rang. 173.
6. (1867) 3 M.H.C.R. 318.
7. A.I.R. 1936 Nag. 200.
8. A.I.R. 1938 Pat. 60.
9. 1957 Crl. L.J. 1457
10. 1959 Crl. L.J. 850.
11. R. T. No. 65 of 1959 (Since reported in (1960) 1 M.L.J. 112 : (1960) M.L.J. (Crl.) 127.
12. (1955) 1 M.L.J. (S.C.) 66 : (1955) S.C.J. 129: (1955) 1 S.C.R. 903: A.I.R. 1955 S.C. 104.
13. (1959) A.L.J. 651.

ment will be allowed to escape because he was not in police custody, when he made the statement. *It is difficult to accept this view, for, all that section 27 does is only* to render certain evidence admissible ; it is but a link in the chain of the prosecution case. It does not thereby seal the fate of the accused against whom it is admitted. What is made admissible is but a part of information relating to the existence of *corpus delicti* or an incriminating article in a certain place ; it is this part that relates distinctly to the fact discovered . Now, this part of information in its very nature therefore is only an admission of a relevant fact and not of a fact in issue. Unless the offence consists wholly or partly of keeping an article in a certain place or knowing that an article is placed in a certain place, the mere statement that an article is kept by the accused or is known to him to be in a particular place, will not amount to a confession of a fact in issue. In practice however one does not come across but rarely a case in which the aid of section 27 may have to be invoked in order to prove a fact in issue.

In practice after the decision in *Pulikuri Kottayya* v. *King Emperor*[1], the extended use of section 27 has been severely curtailed and in fact it is even felt that the section has been emasculated. The Law Commission of India in their 14th Report, Volume II at page 748 has gone to the extent of suggesting a relaxation, *viz.*, that as an experimental measure in Presidency Towns or places of like importance where investigations are conducted by superior police officers of the status of Deputy Superintendent of Police and above, confessions made to them should be admissible in evidence and sections 25 and 26 of the Evidence Act should be amended accordingly and that in such cases there should be no scope for the application of section 27 and which they suggest should be suitably amended. It is a moot point, having regard to our fairly considerable experience, whether this suggested relaxation will be in the best interests of the administration of justice . In other words, the information got under section 27 is nothing more than a pointer to the investigating officers that they are proceeding on the right lines and secondly, so far as Courts are concerned, it affords in practice corroboration for the other substantive evidence in the case. To give one illustration, in the case of a theft, stolen properties soon after the commission of the theft might be recovered on the information given by the accused. But before that information becomes useful evidence on which a conviction can be rested making use of the presumption in *Illustration* (*a*) to section 114 of the Evidence Act, the other requirements have got to be fulfilled. Firstly, the identity of the properties stolen and recovered has got to be established; secondly, the possession brought home by the recovery on the information given by the accused has got to be established as exclusive possession, thirdly, if the accused gives a reasonable and plausible explanation for the legitimate possession of the articles recovered, that would be a good ground for his acquittal. It is well-settled principle of criminal jurisprudence based on the Anglo-Saxon system of criminal law that the accused is not bound to prove beyond reasonable doubt the defence set up by him and his task has been approximated to that of a defendant in a civil suit. Then Courts have also been enjoined before acting upon the information of the accused leading to discovery of the articles in a case of this nature to guard themselves against four possibilities, *viz.*, (*a*) the complainant might have been persuaded by the police to state in the first information report that property which in fact was not stolen had been stolen and to hand over such property to the police to be used in fabricating recoveries from the accused persons ; (*b*) the police might have obtained property similar to the stolen property from the complainant or some one else and used it for the purpose of fabricating the recoveries. In considering this hypothesis, regard must necessarily, be had, to the nature and value of the property recovered ; (*c*) the police might have suppressed some of the stolen property recovered from an accused person and utilised it in inventing a recovery from another accused

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1. (1947) 1 M.L.J. 219 : L.R. 74 I.A. 67 : (P.C.).
I.L.R. (1948) Mad. 1 : A.I.R. 1947 P.C. 67

person; and (*d*) the property might have been recovered from a third party and used by the police in one of the impugned recoveries: *Uma Krishnan* v. *State of Ajmer*[1] We are mentioning these details to show how circumscribed is the use of the information given by the accused leading to discoveries and recoveries as the basis for resting a conviction.

The next question to which we shall turn our attention is whether section 27 of the Evidence Act is hit by Article 14 of the Constitution of India.

Article 14 may be related to the Preamble to the Constitution directly. The Preamble declares as one of the objects of the Constitution the securing to all the citizens equality of status and of opportunity. This Article is the first of a series which embodies the ideal of equality expressed in the Preamble. This Article expresses the general rule while the succeeding Articles 15, 16, 17 and 18 enact particular applications of the rule. This Article may be treated as the residuary provision on the subject. Article 15 is aimed at the abolition of disabilities and inequalities founded upon differences of religion, race, caste, sex and place of birth. The Article must be taken with Article 17 which formally abolishes untouchability and forbids its practice in any form. Article 16 guarantees equality of opportunity in matters of public employment. Article 18 is aimed against the coming into existence of a class of 'title-holders'. The Article embodies a concept which is familiar to practically all modern systems of jurisprudence. But reference may be made here to the English conception of the rule of law and to the Fourteenth Amendment of the Constitution of the United States of America as forming the main inspiration behind the Article.

The principle of the rule of law or the supremacy of law is one which Dicey[2] claimed as the speciality of the English Law. For understanding the conception better it will be useful to refer to Dicey's analysis of the concept. According to him the supremacy or the rule of law which is a characteristic of the English Constitution generally includes under one expression at least three distinct, though kindred conceptions. These are:

(i) No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of Government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint.

(ii) In England, not only no man is above the law, but (what is a different thing) every man, whatever be his rank and condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

(iii) The general principles of the Constitution (*e.g.*, the right to personal liberty or the right of public meeting) are in England the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.

Section 1 of the Fourteenth Amendment of the Constitution of the United States of America states:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law *nor deny to any person within its jurisdiction the equal protection of the laws*".

We have now to construe the phrases "equality before the law" and "equal protection of the laws" guaranteed by Article 14 of the Constitution.

"Equality before the law" is an expression borrowed from the English Common Law, while the expression "equal protection of the laws" can be traced to the Fourteenth Amendment of the American Constitution. While the phrase "equality before the law" finds a place in almost all written constitutions of the world, the

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1. 1956 Crl. L.J. 1134

2. *Dicey*: Introduction to the Study of the Law of the Constitution 1939 edition, pages 202 to 203.

phrase " equal protection of the laws " does not occur in so many words in the said constitutions. Both these expressions have, however, been used in the Universal Declaration of Human Rights, and find a place in Article 14 of the Indian Constitution.

Both these expressions aim at establishing what is called " equality of status " in the Preamble of the Indian Constitution. But they do not convey the same meaning. While " equality before the law " is a somewhat negative concept implying the absence of any special privilege in favour of any individual and the equal subjection of all classes to the ordinary law, " equal protection of the law " is a more positive concept implying equality of treatment in equal circumstances. There is, however, one dominant idea common to both the expressions, that is, equal justice. In substance, however, the two expressions mean one and the same things.

Equality does not mean absolute equality of men, which is a physical impossibility. Nor does it mean that things which are different shall be treated as though they were the same. What it does mean is the denial of any special privilege by reason of birth, creed or the like, and also equal subjection of all individuals and classes to the ordinary law of the land. " One of the most fundamental social interests is that law should be uniform and impartial " said Cordozo,[1] There must be nothing in the action of the State that savours of prejudice or favour or even arbitrary whim or fitfulness. It means that every man's civil liberty is the same with that of the others—that all men are equal before the law in rights, privileges and legal capacities. Professor Jennings in his "*Law and the Constitution*" (3rd Edition, page 49) says :

> " Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and be prosecuted for the same kind of action should be the same for all ctizens of full age and understanding without distinction of race, religion, wealth, social status, or political influence. It merely means that one man should not merely be used as instrument for satisfying the needs of another and that the good things of life like wealth, comfort, power, and influence should not be monopolised by the small minority who constitute the privileged class whether on the basis of birth, religion or on any other basis. The right to equality has nothing to do with the law of status ".

In short, equality before law means, that as between two persons similarly circumstanced the law shall not discriminate in favour of one against another, and the State shall not make a law to the detriment of one person with a view to favour another. It means that the same law shall govern persons similarly circumstanced. It involves the concept of a rule or principle which applies universally over a given field. It means that among equals the law should be equal and should be equally administered and that the like should be treated alike. The marks of justice according to law in the modern sense are generality and equality. It implies that all rights of the same kind are equal as between different individuals.

The expression " equal protection of the laws " means the right to equal treatment in similar circumstances, both in the privileges conferred and in the liabilities imposed by the laws. The rule was designed to prevent any person or class from being singled out as a special subject of hostile or discriminatory legislation. The principle is to secure every person against intentional and arbitrary discrimination whether occasioned by express terms of the Statute or by its improper execution through directly constituted agents. It prohibits the legislature to select a person, natural or artificial, and impose upon him or it, burdens and liabilities which are not cast upon others similarly situated.

The equal protection clause is however not susceptible of exact delimitation. No definite rule, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. It may generally be said that the equal protection clause means that the rights of all persons under similar circumstances must rest upon the same rule, and applies to the exercise of all the powers of the State which can affect the individual or his property. So long

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1. *The Growth of the Law*, page 37.

as the law applies to all alike, the requirements of equal protection are met. The equal protection of laws is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of the Government. It has been said that " the equal protection of the law is a pledge of the protection of equal laws."

It does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection, but it does not require that the classification be not arbitrary, but based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation. Besides, lack of equal protection is to be found in the existence of an invidious discrimination, not in the mere possibility that there will be like or similar cases which will be treated more leniently. The Legislature is entitled to hit the evil that exists and is not bound to take account of new and hypothetical inequalities that may come into existence as time passes or as conditions change. Inequalities of minor importance do not render a law invalid on the ground of infringing equal protection. In other words, in order to support the constitutional validity of its regulation, the Legislature is not bound to extend it to all cases which it might possibly reach It may proceed cautiously, step by step, and if an evil is a specially experienced in particular branch of business, it is not necessary that the prohibition should be couched in all embracing terms. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. In short, mere production of inequality is not enough to hold that equal protection has been denied. For, every selection of persons for regulation, produces inequality, in some degree The inequality produced in order to encounter the challenge of the Constitution, must be actually and palpably unreasonable and arbitrary. There must in short be intentional or purposeful discrimination between particular persons or classes.

In other words, the Court will not adjudicate upon the validity of the legislation solely because the counsel for the complainant ingenuously united with arguments of inseparability, the suggestion that in unusual hypothetical situations the Statute may encroach upon the constitutional rights. We do not sit as a super-legislature or a censor. To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require rough accommodations, illogical, it may be, and unscientific. Delusive exactness is a source of fallacy throughout the law and a classification having some reasonable basis cannot be struck down merely because it has not met with mathematical nicety or because in practice it results in some inequality. Courts should be very cautious in condemning what Legislatures have approved. It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed to presume in favour of its validity, until its violation of the Constitution is proved beyond all reasonable doubts by the person who impeaches the law.

These principles will be found expounded in the following leading treatises of American Constitutional Law.

Willis : *Constitutional Law of the United States*, Chapter XX, page 572 and following ; Rottschaeffer : *American Constitutional Law* (Hornbook Series), Chapter XIV. page 439 and following; Willoughbey : *On the Constitution of the United States*, Second Edition, Volume 3, Chapter CIV, page 1919 and following; Justice William Douglas of Supreme Court of U.S.A.—*From Marshall to Mukherjea* (Studies in American and Indian Constitutional Law), Chapter XI, page 308 and following ; Cooley : *Constitutional Limitations*, 8th Edition, Volume II, pages 816 and 817.

The following decisions arising under Article 14 of the Constitution of India and the concepts " equality before the law and equal protection of laws " in the United States of America may be studied with profit :

Hayes v. *Missouri*[1]; *Yick Wo* v. *Hopkins*[2]; *Lindsey* v. *Natural Carboni Gas Co.*[3]; *Central Lumber Co* v. *South Dekota*[4]; *Matropolis Theatre* v. *Chidago*[5]; *Keokee Coke Co* v. *Taylor*[6]; *Barbier* v. *Conolly*[7]; *Trux* v. *Corrigan*[8]; *Power Co* v. *Saunders*[9]; *Tigner* v. *Taxas*[10]; *Morey* v. *Doud*[11].

Indian Decisions :—*Chiranjit Lal* v. *Union of India*[12]; *State of Bombay* v. *Balsara*[13]; *State of Bengal* v. *Anwar Ali Sarkar*[14]; *Rawat* v. *State of Saurasthra*[15]; *Ameer Unnissa* v. *Bokboob*[16]; *Sakhwant Ali* v. *State of Orissa*[17]; *Budhan Chowdhry* v. *State of Bihar*[18]; In re *Kerala Educational Bill*[19]; *Ram Kishan Dalmia* v. *Tendolkar*[20], and *Moti Das* v. *S. P. Sahi*[21].

Before examining whether in the light of the principles set out above, section 27 of the Evidence Act can be said to be repugnant to Article 14 of the Constitution, we have to point out that there is a Bench decisions of the Allahabad High Court in *Brijesh Kumar* v. *State*[22], which held that section 27 of the Evidence Act does not contravene Article 14 of the Constitution. The Full Bench of the Allahabad High Court did not approve the reasoning of this Bench decision.

The pertinent questions that arise for consideration are those posited by Desai, J., at page 659 of *Upadhyaya* v. *State*[23], as follows :—

"Is there in the law contained in section 27, an element of intentional or purposeful discrimination ? Has the law been enacted in a spirit of prejudice and favouritism ? Is there a clear and hostile discrimination between accused in custody and accused not in custody? Is there a clearly and actually arbitrary and unreasonable discrimination? Is the discrimination the result of caprice or so unreasonable and extravagant as to be a mere arbitrary mandate? Is there any intentional violation of the essential principle of practical uniformity?

The answer to these questions is a categorical negative and one cannot find any element of hostility towards accused persons in custody on the part of the Legislature. There is no element of purposeful or intentional discrimination between accused in custody and accused not in custody. The section is not found to display a spirit of prejudice and favouritism as between the accused in custody and the accused not in custody. There is no abuse of the power of classification which undoubtedly vests in it. There is no apparent denial of equality before the law in the provisions of section 27 of the Evidence Act. The section is based upon the wholesome principle of law based on the Anglo-American system of criminal jurisprudence. The Law Commission of India in their 14th Report, Volume II at page 746 points out the contrast between the Indian and English Police forces, and observe that the rules laid down in the Indian Evidence Act are based upon the recognition of the imperfections of the police system in this country. High signs of fairness and justice which alone would enable confessions made to police officers admissible in evidence have not come to permeate the entire ranks of the Police. Therefore, the Commission found, to make a confession made to such officials admissible in evidence, would be fraught with dangerous consequences. Therefore, section 27 of the Evidence Act which has been held to be a proviso to sections 25 and 26, Indian Evidence Act, has been enacted, because, when the information given by the accused is confirmed by consequent facts discovered, there is a *prima facie* guarantee of truth to enable such information to be acted upon. On account of its confirmation by subsequent facts, it is received in evidence. Thus section 27 has been enacted to

1. 113 U.S. 27.
2. 118 U.S. 356.
3. 220 U.S. 61.
4. 226 U.S. 157 : 57 L. Ed. 164.
5. 228 U.S. 61 at 69.
6. 234 U.S. 224.
7. 113 U.S. 27 : 28 L. Ed. 923.
8. 257 U.S. 312.
9. 274 U.S. 490.
10. 310 U.S. 141.
11. 353 U.S. 457.
12. (1951) S.C.J. 29: 1950 S.C.R. 869.
13. (1951) 2 M.L.J. 141 : (1951) S.C.J. 478 : A.I.R. 1951 S.C. 318 (S.C.).
14. (1952) S.C.J. 55 : 1952 S.C.R. 284.
15. (1952) S.C.J. 168 : 1952 S.C.R. 435.
16. (1953) S.C.J. 61 : 1953 S.C.R. 404.
17. 1955 S.C.R. 1004 : (1955) S.C.J. 262.
18. 1955 S.C.R. 1045 : (1955) S.C.J. 163.
19. A.I.R. 1958 S.C. 956 : (1959) S.C.J. 321.
20. A.I.R. 1958 S.C. 538 (1959) S.C.J. 147: (1959) 1 M.L.J. (S.C.) 67 : (1959) 1 An. W.R. (S.C.) 67.
21. (1959) S.C.J. 1144 : A.I.R. 1959 S.C. 942.
22. A.I.R. 1958 All. 514.
23. 1959 A.L.J. 651.

advance the cause of justice and therefore it cannot be struck down on the mere ground that accused persons who are not in custody and whom, as we have already pointed out in so far as the practical working of section 27 of the Evidence Act is concerned would be like the proverbial snakes in Iceland, would be more advantageously placed. It would be a case of unwarranted interference and striking down a useful piece of legislation the grounds being nothing more than that section 27 has not been made with mathematical nicety or delusive exactness or has resulted in some inequality or an unusual hypothetical situation has not been covered or a meticulous adjustment has not been made, in order to ensure a delusive exactness. On the other hand this statute has stood the test of time and no one has ever thought of manufacturing a grievance that the section is not couched in all embracing terms and that the doctrinaire requirement has not been fulfilled. To strike down the very useful provision under section 27 of the Evidence Act on the ground of this doctrinaire requirement would very well be a case of cutting off the nose to spite the face. In fact to quote Bentham,[1] if all the criminals of every class in India had assembled and framed a system after their own wishes, is not this section 27 the very first which they would have abolished for their security? Innocence claims the right of speaking, as guilt invokes the privilege of silence. To invoke Article 14 of the Constitution in such circumstances would be like the proverbial Father of the Evil citing the Scriptures, and the Constitution of India instead of enshrining our cherished Fundamental Rights, could very well become in the language of Wigmore, "hiding place of crime".

The net result of this analysis is that section 27, Indian Evidence Act, as already held by one of us (Somasundaram, J., in Criminal Revision Case in 614 of 1959, *Alagiri Naidu and another* v. *The State* (Judgment dated 10th December, 1959) does not create an unjustifiable discrimination between accused persons in custody and accused persons out of custody and in that way does not offend Article 14 of the Constitution of India.

The conviction and sentence by the learned Sessions Judge are confirmed and this appeal is dismissed.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

The Management of C. Veluswamy Nadar Transport, Udumalpet, Coimbatore District .. *Petitioner**

v.

The Secretary, Coimbatore District Motor Workers' Union Branch, Udumalpet, representing the Workers employed in C. Veluswamy Nadar Transport, Udumalpet and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947)—Dismissal of employee by management for misconduct—Reinstatement—When can be ordered by Labour Court—Management leading evidence before Industrial Tribunal as to workers misconduct—If precludes them from contending that their conclusion must be accepted by the Tribunal.

Where there had been an enquiry by the management and there was no suggestion that the conclusion reached as a result of the enquiry was perverse or was vitiated by improper motive the Labour Court has no jurisdiction to enter into the merits of the dismissal of the employee. The fact that the management led evidence before the Labour Court on the merits of their contention regarding misconduct of the worker does not preclude them from saying that the conclusion reached by them as a result of their enquiry should be accepted by the Tribunal.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.D.No. 95 of 1957 before the Labour Court, Coimbatore and quash the order dated 19th February,

1. Cited by Professor Glanville Williams. *The proof of guilt* (Hanly Lectures), page 51.

* W.P. No. 321 of 1958. 11th December, 1959. (20th Agrahayana, 1881 Saka.)

1958, made therein and published at page 10, Part I of the Gazette, dated 19th March, 1958, directing the reinstatement of the second respondent.

C. S. Padmanabhan for *M/s. King and Partridge*, for Petitioner.

S. Mohan Kumaramangalam, *K. V. Sankaran* and the Additional Government Pleader (*M. M. Ismail*), on behalf of Respondents.

The Court made the following

ORDER :—The legality of an award of the Labour Court, Coimbatore, in an Industrial Dispute which was referred to it is the subject-matter of this Writ Petition which has been filed by the management.

The Petitioner, management in question is one which was conducting a transport undertaking. Gopal the second respondent in this Petition was employed as a driver of a lorry in this undertaking. While he was in charge of a lorry the vehicle met with a serious accident on 20th September, 1957, by reason of which the lorry became a total loss. The person who was actually driving the vehicle at the time of the accident was a cleaner by name Dayanandan who had no licence to drive. The Management immediately after the accident issued notice to both the driver and the cleaner to show cause why they should not be dismissed from service for misconduct. Gopal the driver replied on 23rd September, 1957, pleading that he was not responsible for the accident blaming it on Dayanandan alone and attributed victimisation as the motive for the issue of notice. The management held an enquiry on 26th September, 1957, when they examined Gopal as well as Dayanandan. The evidence of Dayanandan was that he had been instructed or directed by Gopal the driver to drive the lorry and bring a load and that the key of the vehicle was given to him by the driver for the purpose. He confessed that he was himself not a licensed driver and that his driving the vehicle amounted to an offence. The management found as a result of this enquiry that it was established that it was the driver Gopal who put the vehicle under the control of the cleaner Dayanandan, and that it was on his instructions that the vehicle was driven by the cleaner. On these findings the management took action against both the driver as well as the cleaner and both of them were dismissed from service. This Petition is concerned only with the driver Gopal since there was no controversy as regards the propriety of the punishment imposed on the cleaner, Dayanandan. The Secretary, of the District Motor Worker's Union sponsored the cause of the driver and raised an industrial dispute which was referred by the Government for adjudication. The terms of reference to the Industrial Court were :—

> " Whether the dismissal of Sri N. Gopal, driver is justified and to what relief he is entitled and to compute in terms of money the relief, if any, to which the worker is entitled if it can be so computed."

The Tribunal by its award has held that the services of the driver were unjustifiably terminated and on this finding had directed the reinstatement with back wages and allowances of Gopal. It is the legality of this award that is challenged in this Writ Petition. The ground on which the Tribunal held that the management was not justified in dismissing the driver was based upon the enquiry which it conducted in relation to the driver's misconduct. Before the Labour Court both Gopal as well as Dayanandan were examined. Besides one Ibrahim was examined as the workers' second witness. Gopal stated in his evidence what he had always been asserting that he did not authorise the cleaner, Dayanandan, to drive the lorry. Dayanandan in his evidence stated the same facts that he deposed before the management, namely, that it was the driver who permitted him and it was only on his instructions that he drove the lorry. Gopal, however, produced a letter before the Labour Court which had not been produced at any earlier stage and which has been marked as Exhibit W-1. This was a letter passed by Dayanandan to Gopal on the same day as the accident in which he had stated that Gopal had not instructed him to take the lorry but that he had done so of his own accord. When this letter was put to him in the course of cross-examination Dayanandan stated that he gave it to Gopal because the latter wanted such a letter in order to escape proceedings being taken against him by the employer. The Labour Court was inclined to

believe that that letter respresented the truth, that Dayanandan's evidence given before the Labour Court was untrue and that it was not really on the instructions of Gopal that tne vehicle was taken by Dayanandan. On this finding the Tribunal held that the discharge was unjustified and therefore granted relief to the driver, Gopal which the Union prayed for.

The functions of an Industrial Tribunal in deciding a dispute as to whether an employer has properly terminated the services of an employee have been laid down by the Supreme Court in *Indian Iron & Steel Co.* v. *Their Workers*[1], and the passage relevant in the present context is at page 270:

" Undoubtedly the management of a concern has power to direct its own internal administration and discipline ; but the power is not unlimited and when a dispute arises, industrial tribunals have been given the power to see whether the termination of service of a workman is justified and to give appropriate relief. In cases of dismissal on misconduct the Tribunal does not, however, act as a Court of appeal and substitute its own judgment for that of the management. It will interfere (i) when there is a want of good faith, (ii) when there is victimisation or unfair labour practice, (iii) when the management has been guilty of a basic error or violation of a principle of natural justice and (iv) when on the materials the finding is completely baseless or perverse ".

If these tests were applied it appears to me that the order of the Labour Court cannot be sustained. The dismissal of the driver was preceded by an enquiry conducted by the management. The driver was directed to show cause why his services should not be terminated and the charge against him was specified with particularity. The enquiry was held on 26th September, 1957, in the presence of the worker. The worker had no doubt denied knowledge of the cleaner's driving the vehicle but he had however, to admit that the key of the lorry was left in the lorry itself in his presence. The cleaner was examined and he stated that he was instructed to make one trip and bring the load and that the driver gave him the key of the Lorry on account of which he drove the vehicle. There was no cross-examination of this witness by Gopal. If this represented the enquiry it appears to me indisputable that it satisfied every test of a proper enquiry and if the management in the circumstances held that the evidence of Dayanandan, the cleaner should be accepted I do not see any impropriety in the order of dismissal which followed. The Tribunal was not as the learned Judges of the Supreme Court pointed out a Court of appeal from the decision of the domestic forum. Learned counsel for the respondent Mr. Mohan Kumaramangalam however, urged two points. The first was that the management had not raised this point about the jurisdiction of the Labour Court before it and were therefore precluded from objecting to a finding now reached regarding the impropriety of the dismissal of the driver. I feel unable to uphold this objection. The jurisdiction of the tribunal is dependent on the proper construction of the Industrial Disputes Act and the relevant law of the land. That has been laid down authoritatively by the Supreme Court and this is as much the duty of the Tribunal to govern itself by proper rule of law and keep itself within the limits of the jurisdiction as it is the duty of the litigants to apprise it of the real state of the law. Nor is it correct to say that no objection was raised as to the jurisdiction of the Tribunal. In the counter statement filed by the management before the Labour Court, in paragraphs 13 to 15 the management had set out the details of the enquiry which they conducted with a view to show that the enquiry was proper and that its results were fair and just. The legal objection based on the finding at this enquiry was formulated in paragaph 18 thus :—

" It is, therefore, submitted that the claim is not tenable either in law or on the facts ".

The fact that the management led evidence on the merits of their contention regarding misconduct of the worker does not in my judgment preclude them from saying that the conclusion reached by them as a result of their enquiry should be accepted by the tribunal. In passing I might mention that though the worker had attributed *mala fides* to the management there is no finding regarding it by the Tribunal and I must therefore, proceed on the basis that their action in terminating the services of

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1. (1958) S.C.J. 285 : (1958) M.L.J. (Crl.) 266 : (1958) 1 L.L.J. 260.

the driver was *bona fide*. Learned counsel for the respondent further submitted that the management did not follow up the plea raised by them in paragraph 18 of their counter-statement in the course of their arguments and raise an issue regarding it but that on the other hand they led evidence to justify the misconduct of the worker before the Tribunal and that as they had taken the chance of a decision in their favour they could not now object to the jurisdiction in the Tribunal basing themselves on the decision of the Supreme Court. This submission is in my opinion, also not tenable. On the decision of the Supreme Court the termination of employment by the management after enquiry even if justified on the merits, might be impugned on the ground of *mala fides* and consequently it was necessary for them to adduce evidence and it was the worker and not the management that adduced evidence to show that on the merits he was not guilty of the misconduct charged. This cannot certainly be blamed on the management and if the Tribunal wrongly held that it was entitled to travel beyond the findings reached by the management at the enquiry held, the petitioners cannot suffer. In this connection I have only to mention that it was the case of the worker that there was no enquiry at all by the management. The Tribunal found that this was untrue and has recorded a specific finding regarding it. The record of the enquiry was before the Tribunal and if the contention that there was no enquiry is negatived, it would certainly follow that the document filed before the Tribunal purporting to be the record of enquiry represented what actually took place. The next point urged was that as the Tribunal had not found as a fact that this enquiry was a proper enquiry I should even if the award should be set aside remit it for further consideration by the Labour Court for determining whether the enquiry was proper. In view however, of the case put forward on behalf of the worker that there was no enquiry at all, the Tribunal was not called on to record any specific finding on this point. The record, however, of the enquiry conducted by the management on 26th September, 1957, is before me and the learned counsel for the respondent was unable to suggest why it should not be held to be a proper enquiry if it represented what actually took place at the time. It was open to the management to accept the evidence of the cleaner and if they did so I do not see how it could be characterized as perverse, so as to fall within the purview of the decision of the Supreme Court already cited.

I hold that the award of the Labour Court was beyond its jurisdiction in that it entered into the merits of the dismissal when on its finding there had been an enquiry by the management and there was no suggestion that the conclusion reached as a result of the enquiry was perverse or was vitiated by improper motive. The Writ Petition is accordingly allowed and the rule *nisi* made absolute. The award of the Labour Court is set aside. There will be no order as to costs.

K.L.B. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUNHAMED KUTTI.

Mettur Industries, Ltd., Mettur Dam, by its Manager .. *Petitioner**

v.

Velayutha Mudaliar and another .. *Respondents.*

Employees Provident Fund Act (XIX of 1952), *section* 10 *and Civil Procedure Code (V of* 1908), *section* 60(k) *—Scope of immunity from attachment in execution of provident fund amounts—Amount payable only after six months of retirement—Immunity from attachment during such period.*

So long as an amount in the custody of a garnishee does not cease to have the character o provident fund, either by payment of the same to the employee or removing it from his credit in the accounts, the immunity against attachment in execution will continue by virtue of section 10 of the Employees Provident Fund Act, 1952 and the provisions of section 60 (*k*) of the Civil Procedure Code. Where under the scheme of provident fund the amount is payable only six months after the date of employee's resignation the amount is immune from attachment during that period as it retains its character as provident fund.

* C.R.P. Nos. 2103 and 2104 of 1959. 16th December, 1960. (25th Agrahayana, 1882—Saka).

Petitions under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif of Sankari at Salem dated 28th February, 1959 and made respectively in R.E.A. No. 2706 of 1958 and R.E.A. No. 2637 of 1958 in O.S. No. 871 of 1957.

C. S. Padmanabhan instructed by *M/s. King and Partridge*, Attorneys for the Petitioner.

K. Kumaraswami Pillai, for First Respondent.

The Court made the following

ORDER.—These two Civil Revision Petitions raise a common point which I shall make clear by reference to the facts of the case.

Veluyudha Mudaliar, the first respondent herein, filed a suit, O.S. No. 871 of 1957 on the file of the District Munsif's Court, Salem, for recovery of a certain amount due from Palani Goundan, the second respondent herein, and attached before judgment a sum of Rs. 515 in the hands of the revision petitioner, the Mettur Industries Ltd., hereinafter called the garnishees. This Rs. 515 included a provident fund amount of Rs. 322. Notice of interim attachment was served on the garnishees on 21st December, 1957. They did not object to the attachment and the attachment was confirmed on 31st January, 1958. The suit was subsequently decreed. When the garnishees were called upon to deposit the attached amount into Court, they intimated the Court by Exhibit A-1 dated 4th July, 1958 that provident fund amount being exempt from attachment, they were unable to deposit the amount. By its letter Exhibit A-2 dated 16th August, 1958 the Court however directed the garnishees to deposit the amount whereupon they deposited the amount, it is said, under protest and by I.A. No. 2637 of 1958 applied to the Court for issue of a cheque for Rs. 322. They averred that the said amount was a portion of the provident fund which they were entitled to withhold and that the decree-holder is entitled only to payment of the balance of the attached amount, namely, Rs. 193. While this application was pending, the decree-holder also applied by E.A. No. 2706 of 1958 for a cheque for entire Rs. 515 impleading the garnishees also as a respondent. The learned District Munsif heard both the applications together and by a common order, dated 23rd February, 1959, dismissed the garnishees' application and allowed the First Respondent's application. It is the correctness of this order that is challeged in these petitions.

The common point urged for the garnishees is that the order directing the issue of cheque to the First Respondent so far as it relates to the provident fund amount is without jurisdiction as the order of attachment and the subsequent proceedings pursuant to it are void in law.

Section 60 (*k*) of the Civil Procedure Code provides immunity from attachment of the provident fund amount. There is prohibition against attachment of provident fund amount standing to the credit of an employee in the Employees' Provident Funds Act, 1952 (Act XIX of 1952)—*vide* section 10. This position is conceded for the First Respondent decree-holder; so that the order of attachment of the provident fund amount was illegal.

It is however urged for the First Respondent that the Second Respondent had resigned his job on 19th December, 1957, that is, two days before notice of attachment was served upon the garnishees, that the amount became payable to the Second Respondent on his resignation, that thereafter it ceased to be provident fund amount and therefore the prohibition contemplated under section 60 (*k*) of the Civil Procedure Code and section 10 of the Employees' Provident Funds Act does not apply. This contention found favour with the learned District Munsif. He also repelled the argument based upon provision in the scheme framed by the garnishees by which the provident fund could be paid only after the expiry of six months from the date of the employee's discharge and held that this provision could be construed only as deferring payment of the amount and not as conferring any immunity from attachment.

It would appear that prior to the deposit of the amount in Court the garnishees paid the provident fund amount to the Second Respondent. This conduct on the part of the garnishees was construed by the learned District Munsif as supporting the decree-holder's contention that the garnishee's attempt was only to defeat his claim. In the context of the point for consideration in these petitions, I do not think that the above conduct of the garnishees is very relevant.

The settled position is that, so long as the amount does not cease to have the character of provident fund either by payment of the same to the employee or by removing it from his credit in his provident fund ledger, the immunity against attachment continues. In the present case, under the provident fund scheme framed by the garnishees and subscribed by the Second Respondent, the amount was payable to him only after the expiry of six months from the date of his resignation, namely, 19th December, 1957. The attachment was effected during this period and it can hardly be contended that the attachment at a time when the amount still retained the character of the provident fund was valid. If the initial attachment was illegal or in other words prohibited by law, the subsequent orders passed by the Court can also have no legal effect. Obviously, the decree-holder cannot take advantage of the illegal order confirming the attachment, so that it should follow that the order directing issue of cheque for the entire sum of Rs. 515 including the provident fund amount is unsustainable in law.

It is, nevertheless pointed out, for the First Respondent that the garnishees had no *locus standi* to apply for cheque under Rules 163 and 165 of the Civil Rules of Practice as these rules contemplate issue of cheques consequent upon orders of Court and that the garnishees have no such order in their favour. If the attachment as regards the provident fund amount was without juridiction and void, the garnishees who deposited the amount were entitled to take back that amount. They deposited the amount as directed by Court and under protest and were not volunteers. The only mode in which they could take back that amount is by applying to the Court for issue of a cheque for the amount. In the circumstances of this case therefore I am unable to find much force in this argument. I am satisfied that the order of attachment of the provident fund amount was illegal. The First Respondent was not entitled to enforce or get any benefit under the said illegal attachment.

In the result, these Civil Revision Petitions are allowed, the order dismissing E. A . No. 2637 of 1958 is set aside, and an order is passed in the said application directing issue of a cheque for Rs. 322 in favour of the garnishees. E.A. No. 2706 of 1958 being an application for the issue of a cheque for an amount larger than what could be legally claimed by the First Respondent, the order therein should be deemed to operate only to the extent of Rs. 193. It would be open to the garnishees to apply for restitution against the First Respondent to the extent of Rs. 322, if the amount in deposit has already been withdrawn by him. In the circumstances of this case, I make no order as to costs in these Civil Revision Petitions.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR AND MR. JUSTICE JAGADISAN.

N. S. K. R. Karuppan Chettiar and another .. *Appellants**

v.

AR. VR. S. Somasundaram Chettiar and others .. *Respondents.*

Banker and Customer—Nature of relationship between—Liability of banker to pay his customer—Extent of—Banking business—What is—Ordinary money-lending bsusiness of Nagarathar community—If banking business.

Though the relation of Banker and Customer in respect of a contract of loan or deposit is that of a debtor and creditor, in actions by the customer against the banker for recovery of the debt the common

* Appeal No. 305 of 1956. 1st April, 1960. (12th Chaitra, 1882—Saka).

law doctrine of the debtor being obliged to seek the creditor and pay the debt could have no application. The liability of the bank to pay the amount will arise only at the branch where the account of the party is kept and there is no obligation on a bank to pay in one country a debt due to a customer on account in another country.

The essence of the relationship of banker and customer is the affording of the facility to the customer to draw funds from the bank by issuing of cheques. In the absence of such a facility the term ' banker ', though loosely applied to money-lenders, cannot be applied to ordinary money-lending business carried on by Nattukottai Chettiars in India or in foreign parts. Hence the rules of common law regarding the liablility of a bank to pay the amount only at the branch where it is deposited cannot be applied to transactions with such money-lenders. Where money is deposited in Indian currency with a money-lender, who is a permanent resident of India, it is implicit that the borrower agrees to repay the money back in India and in Indian currency. The investment of the amount in a foreign firm is merely incidental to the use of the loan. A debt arising out of a contract is deemed to be situated in the place where it is properly recoverable ; that is normally the country where the debtor is resident.

Appeal against the decree of the Court of the Subordinate Judge of Pudukottai in O.S. No. 6 of 1955.

K. S. Ramamurthi and *K. Sarvabhuman*, for Appellants.

R. Ramamurti Ayyar, A. Venkatarama Ayyar and *T. Ramalingam*, for Respondents.

The Judgment of the Court was delivered by

Jagadisan, J.—This is an appeal against the Judgment and Decree in O.S. No.6 of 1955 on the file of the Sub-Court of Pudukottai, granting a decree in favour of the plaintiffs for recovery of the sum of Rs. 8,566-7-9 with interest and costs. Defendants I and 2 are the appellants.

Plaintiffs 1 and 2 are the sons of one Sinnakaruppan Chettiar, and the third plaintiff is the grandson of Sinnakaruppan by his son Veerappa. Veerappa died during the lifetime of Sinnakaruppan. They are members of a Hindu undivided family belonging to the Nagarathar Community, and residing at Kilasivalpatti, Ramanathapuram district. Their family vilasam is AR. VR. S. The six defendants in the suit are partners of a firm styled PL. RM. ST. carrying on money-lending business at Dabein in Burma. Sinnakaruppan Chettiar drew a hundi for Rs. 5,748-8-0 on the A. VR. RM. firm, Rangoon and sent the hundi to the PL. RM. ST. firm, Dabein with instructions to cash the hundi and credit the proceeds to his Kilasivalpatti AR. VR. S. account. This was in August, 1925. The amount so deposited was to carry interest at Rangoon Nadappu rate. The Hundi was cashed by the PL. RM.ST. firm and the net proceeds, after deducting cost of stamp and commission, of Rs. 5,902-6-0 were credited to the Plaintiff's family account. A deposit letter dated 31st December, 1925 (Exhibit A-1) signed by the agent of the PL.RM. ST. firm was sent to the plaintiffs. Sinnakaruppan died in or about December, 1925. On 30th June, 1927, the plaintiffs drew a hundi for Rs. 500 on the PL. SP. firm, Thongua and sent it to the PL. RM. ST. firm Dabein with instruction to cash the hundi and credit the proceeds to their account with the firm. The hundi was cashed on or about 8th August, 1927 and the proceeds of Rs. 503-11-0 were credited as per directions of the plaintiffs. This was also a deposit carrying interest at the Rangoon two months *Thavanai* rate. *Vaddi chittais* and *Kanakku nagals* (account copies) were sent periodically by the defendants-firm to the plaintiffs (Exhibits A-2 to A-33).

The plaintiffs made a demand for the payment of the two deposit amounts, by issuing a notice through their counsel dated 19th January, 1955 (Exhibit B-1). Defendants 2 to 6 sent a reply through their counsel, Exhibit A-34 dated 21st January, 1955. They pointed out the difficulties in getting remittances from Burma and stated that arrangements should be made for receiving the money at Dabein by sending the deposit letter to that place. The first defendant also sent a reply Exhibit A-36 dated 7th February, 1955, but by that time the plaintiffs had instituted the suit on 4th February, 1955.

The suit was laid for recovery of the amounts due under the two deposits after giving credit to several payments made by the defendants. Defendants 1 to 5 are permanent residents within the territorial jurisdiction of the Sub-Court of Puddukottai.

The 6th defendant was not such a resident and leave to sue him was obtained. The substantial defence to the suit was that the suit was not maintainable in law for the recovery of the amounts at Pudukottai as the deposits were made with a foreign firm at Burma doing business as bankers.

At the trial defendants 3 to 6 submitted to a decree and got the benefits of Madras Act I of 1955. Defendants 1 and 2 contested the suit but failed. The learned Subordinate Judge passed a decree against them for the full amount as prayed for by the plaintiffs.

The only point urged in the appeal on behalf of the appellant (defendants 1 and 2) is that the suit is not maintainable. The learned counsel for the appellants contended that the PL. RM. ST. firm at Dabein was a banking firm, that the suit amounts were deposits made at a particular place of business of the said banking firm and that having regard to the well-settled law governing a banker's liability to repay his customer all debts, whether in the shape of current account or deposit for a term or payable on demand only at the particular branch the plaintiffs can obtain payment only at Dabein and nowhere else. The learned counsel submitted that Exhibit B-1 the suit notice was not a proper demand as the demand was to pay at Pudukottai and that the plaintiffs had no cause of action to sue as defendants 1 and 2 were always ready and willing to pay at Dabein.

Though the relation of banker and customer in respect of a contract of loan or deposit is that of a debtor and creditor, in actions by the customer against the banker for recovery of the debt, the common law doctrine of the debtor being obliged to seek the creditor has no application. It is a term of such contract that the bank is not liable to pay the customer the amount due until he demands payment from the bank at the branch at which the account is kept. There is no obligation on a bank to pay in one country a debt due to a customer on account in another country. " The contract between a banker and customer contains special terms and cannot in its entirety be expressed in the phrasing of an ordinary indebitatus count ". To hold otherwise would in the language of Atkin, L.J., in *Joachimson* v. *Swiss Bank Corporation*[1], "subvert banking business." The Supreme Court of India in the decision reported in *The Delhi Cloth and General Mills Co., Ltd.* v. *Harnam Singh and others*[2], summarised the law thus :

" In banking transactions the following rules are now settled : (1) the olbigation of a bank to pay the cheques of a customer rests primarily on the branch at which he keeps his account and the bank can rightly refuse to cash a cheque at any other branch : *Rex* v. *Lovtt*[3], *Bank of Travancore* v. *Dhrit Ram*[4] and *New York Life Insurance Company* v. *Public Trustee*[5]. (2) a customer must make a demand for payment at the branch where his current account is kept before he has a cause of action against the bank: *Joachimson* v. *Swiss Bank Corporation*[1], quoted with approval by Lord Reid in *Arab Bank Ltd.* v. *Barclays Bank*[6]. The Rule is the same whether the account is a current account or whether it is a case of deposit. The last two cases refer to a current account ; the Privy Council case (*Bank of Travancore* v. *Dhrit Ram*[4], was a case of deposit. Either way, there must be a demand by the customer at the branch where the current account is kept, or where the deposit is made and kept, before the bank need pay, and for these reasons the English Courts hold that the situs of the debt is at the place where the current account is kept and where the demand must be made."

There can thus be no doubt that if the defendant-firm were to be held to be bankers as the term is understood in English law and if there are no special circumstances attendant on the terms of the suit deposits express or implied, the failure on the part of the plaintiffs to make a demand for payment at Dabein in Burma may have the result of non-suiting the plaintiffs. The first question that has, therefore, to be considered is whether the defendant-firm can at all be called bankers or the business of the firm called banking in their well accepted sense in English law.

In England commercial usage and the course of banking practice have embodied particular and definite kinds of transactions within the concept of the terms, banker

1. L.R. (1921) 3 K.B. 110 at 130.
2. (1955) 2 M.L.J. (S.C.) 141 : (1955) S.C.J. 645: (1955) 2 S.C.R. 402, 422 (S.C.).
3. L.R. (1912) A.C. 212 at 219.
4. (1942) 2 M.L.J. 256: L.R. 69 I.A. 1, 8, 9.
5. L.R. (1924) 2 Ch. 101, 119 at 117.
6. L.R. (1954) A.C. 495, 531.

and banking. In Halsbury's *Laws of England*, Vol. II, 3rd edition, at page 150, paragraph 277 the said terms are defined as follows :—

"A 'banker' is an individual, partnership or corporation, whose sole or predominating business is banking, that is the receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid in by a customer."

In the Foot-note (*f*) occurring at page 15 it is stated as follows :—

"A savings bank formed and registered under the repealed Joint Stock Companies Act, 1856, from which money could not be withdrawn except upon a stated period of notice and on which cheque, could not be drawn in an ordinary form, was not a banking company: Re. *District Savings Bank, Ltd.* Ex. Parte *Coe*[1]."

In Sheldon's *Law of Banking*, 6th edition, at page 183 the following description of banking business is given :

"............a person cannot claim to be carrying on the business of banking unless he receives money or instruments, representing money on current account, honours cheques drawn thereon, and collects the proceeds of cheques which his customers place into his hands for collection. The banker performs many other functions, as we shall see presently, but this function of receiving money from his customers and *repaying it by honouring their cheques as and when required*, is the one function above all other functions which distinguishes a banking business from any other kinds of business. Dr Hert in his *Law of Banking*, 4th edition, page 1, defines a banker or bank as 'a person or company carrying on the business, of receiving moneys, and collecting drafts, for customers subject to the obligation of honouring to the extent of the amounts available on their current accounts'."

Reference may also be made for a similar definition to *The Law of Banking* by Sir John Paget, 5th edition, page 5 :

"It is a fair deduction that no person or body corporate or otherwise can be a banker who does not (i) take deposit account ; (ii) take current account ; (iii) issue and pay cheques and (iv) collect chques, crossed and uncrossed for his customers."

The essence of the relationship of banker and customer is the affording of the facility to the customer to draw funds from the bank by issuing cheques. This is the primary characteristic of a banking business. Without it the business is not banking as known and understood in the English law. If such business can yet be called banking, it can only be of an indigenous or particular variety not susceptible of the application of the rules of English Law in the matter.

Judged by this standard, as it should be, the principles of Englsh Law cannot be applied to the money-lending business carried on by the Nagarathars or Nattukottai Chettiars in India or in foreign parts. It is true that in common parlance they describe themselves as bankers. But such a description cannot *per se* make them bankers within the concept of that term in the English Law. In *Ramaswami Chettiar* v. *Jeevarathnammal*[2], a Division Bench of this Court observed:

"It cannot be said that these Nattukottai Chettiars who are carrying on business in money-lending are bankers in the strict sense of the term in order to attract the observations of their Lordships in *The Delhi Cloth and General Mills Co., Ltd.* v. *Harnam Singh and others*[3]."

On the principles set forth above we have no hesitation in agreeing with this observation of the Division Bench. There is no evidence in this case that the defendants allowed their customers to draw upon the current or deposit accounts by the issue of cheques. Therefore the plaintiffs cannot be held to be disentitled to maintain the suit in the Subordinate Judge's Court at Pudukottai without a prior demand for the payment of the money at Dabein in Burma. A similar contention in respect of a negotiable instrument payable at Rangoon was overruled by a Division Bench in *Arunachalam Chettiar* v. *Murugappa Chetiar*[4].

Even assuming that the defendants can be said to constitute a firm of bankers, there is no disability on the part of the plaintiffs to maintain the present suit. The mere fact that the deposits were made by the plaintiffs in a foreign firm is not enough to hold that the plaintiffs are compelled to seek their remedy only at the place where

1. (1861) 3 D.E.C.F. & J. 335.
2. 1956) 2 M.L.J. 508.
3. (1955) 2 M.L.J. (S.C.) 141 : (1954) S.C.J. 645 : (1955) 2 S.C.R. 402 (S.C.).
4. (1956) 2 M.L.J. 372.

the foreign firm is situate. As explained by the Judicial Committee in *Bank of Travancore Ltd.* v. *Dhrit Ram*[1] :

"The law which governs a contract depends on the intention of the parties, express or implied. There is no intention expressed in these documents and the Courts are left to infer the intention by reference to considerations where the contract was made and how and where it was to be performed."

In the present case all the contracting parties, the plaintiffs and defendants are permanent residents of India. The amounts deposited were in terms of Indian currency. It is true that at the time when the deposits were made Burma was a part of India. When one Nattukottai Chettiar lends money to another member of his community who invests it in a foreign firm it is implicit in that transaction that the borrower agrees to pay the money back in India and in Indian currency. The investment in a foreign firm is merely an incidental use of the loan. The essential part of the transaction is the lending of the money in India by drawing a hundi upon a foreign firm. If it is implicit at the very inception of the contract that the repayment of the loan was to be only in India and in Indian currency the fact that subsequently Burma ceased to be a part of India and came to have a currency of its own cannot really affect that liability. By reason of the subsequent happening it will not be open to the defendant-firm to insist upon paying in Burmese currency at Dabein in respect of a loan obtained by him in Indian currency. The Court can take judicial notice of the fact that the rupee in Burma to-day is of a different value from the rupee in India. For example the Canadian dollar is different from the dollar of the U.S.A. The sterling in the United Kingdom is different from the sterling in New Zealand or in Australia. The following observation describes the position aptly:

"Money has a different value in different parts of the world even although it may be expressed in the same currency, and I cannot conceive it possible that a man who has, we will say, 1,000*l* sterling to his credit at a bank in New Zealand on coming to London would have the legal right to demand payment of 1,000*l* at an office of the same bank in London.........." (*Clare Co.* v. *Dresdner Bank*[2]).

We are of opinion that in the circumstances under which the suit deposits came to be made by the plaintiffs with the defendants-firm it must be taken to be an implied term of the contract that the repayment of the debt was to be in India in Indian currency. A point which was stressed by the learned counsel for the appellants to substantiate the contention that the deposits were repayable only at Dabein was that in making part payments towards the depsits the defendants firm debited the plaintiffs with remittance charges and discount (*vattam*) for the transmission of the money from Dabein to Kilasivalpatti. It was contended that if the plaintiffs were entitled to have the repayment at Kilasivalpatti they would not have allowed the defendants to charge them for the remittances made. But this circumstance is not in any way inconsistent with the plaintiffs' right as claimed because it may be that there is an usage governing these transactions in and by which the firm or person accepting a deposit is enabled to charge the creditor with the charges of remittance.

At the trial evidence was let in on the side of the plaintiffs to prove that Chockalingam Chettiar, the deceased father of the first defendant, came to the house of Sinnakaruppan Chettiar, the father of plaintiffs 1 and 2 at Kilasivalpatti in Ramnad district and requested the latter to deposit the money with Dabein firm and promised to pay the same on demand in India. This evidence remains uncontroverted. Though as the learned Subordinate Judge points out there was no explicit plea on the part of the plaintiffs that it was an express term of the contract that the money was repayable in India, the omission is not important in the view we are taking of the matter.

The defendant-firm is not an incorporated company or body. The learned counsel appearing for the appellants referred to us several sections of the Indian Partnership Act and contended that a firm of partnership is as good as an incorporated company. We are unable to perceive the relevance of the reference to the

1. (1942) 2 M.L.J. 256 : L.R. 69 I.A. 1 (P.C.). 2. L.R. (1915) 2 K.B. 576.

provisions of the Indian Partnership Act; nor can we appreciate the soundness of the contention that a firm and an incorporated body are alike. On the other hand, the law makes a vital distinction between a firm and incorporated body. It is unnecessary to pursue this point further.

All the decisions governing the rights and liabilites of a banker and customer especially in regard to the place where the banker can be made liable for the re-payment of the debt, relate to banks which are all incorporated bodies. We do not think that this is really a matter of accident. There is a distinction between an individual banker or a firm of banking business and a bank which is an incorporated body. Dealing with the situs of debts Cheshire in his text book on *Private International Law* at page 449 observes thus:

"Thus the residence of the debtor has been selected as the determining factor because it is there that proceedings for recovery will normally be taken, and the modern rule is that a debt is situated in the place where it is properly recoverable. This test clearly admits of a multiple situation, since recovery may be had in any Court to whose jurisdiction the debtor is subject. If, to take a simple case, he resides in France but is served with notice of a writ under Order 11, the debt according to English Law is situated both in England and in France. The difficulty is greater if the debtor is a corporation having offices and branches all over the world. In this case the Courts, realising that, the appropriate forum for recovery must be determined by some further test, have selected the place where, according to the contract under which the debt has arisen, payment would normally be exigible. Thus the situation of a debt due from a bank to a customer is at the branch where the account is kept, and a debt arising under a policy of insurance or under a sterling bill issued by a foreign Government is situated in the place where it is payable."

Halsbury's *Laws of England*, Volume 7, 3rd edition, page 44, paragraph 87 runs thus:

"A debt arising out of a contract is deemed to be situated in the place in which it is properly recoverable by action, that is, in general, the country in which the debtor is resident. There may be more than one forum for the recovery of a debt; in such cases the situs of the debt is the place where payment would be required in the normal course of commercial usage, for example, in the case of a debt due from a bank to a customer, at the branch where the account is kept, in the case of a debt due under a policy of insurance, at the place where the policy moneys are made payable by the policy, and similarly with a debt due under a sterling bill issued by a foreign Government. If, however, the debtor is not resident in England, the mere fact that the debt can be recovered by action in England from the debtor out of the jurisdiction does not make the debt locally situate in England."

Whatever may be the rule of law governing banking institution, which is an incorporated body, in respect of its obligations to repay the deposit amounts only at the place or at the branch where the money is deposited, it is not necessary to extend the said principle readily and without any further examination of the subject to all kinds of banking institutions whether incorporated or not, whether they are strictly banking institutions within the English law or not. It is enough for us to say that so far as the present case is concerned, the rigid and technical rules of English law governing banks cannot have any application.

The decision of the learned Subordinate Judge is correct. The appeal fails and is dismissed with costs of respondents 1 to 3.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTANARAYANAN.

E.V.K. Sampath and another .. *Petitioners**.

Criminal Procedure Code (V of 1898), section 198-B—If offends Article 14 of the Constitution of India (1950).

Section 198-B of the Code of Criminal Procedure does not violate Article 14 of the Constitution of India.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Orders of the Court of Sessions of the Madras Division, dated 3rd October, 1960, in Cr.M.P. Nos. 48 and 49 of 1960 in C.C. No. 9 of 1960.

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* Crl. R.C. No. 1228 and 1243 of 1960. 21st December, 1960.
(Crl. R. P. Nos. 1197 and 1212 of 1960.) (30th Agrahayana, 1882—Saka).

V. P. Raman, for Petitioner in Crl.R.C. No. 1228 of 1960.

R. K. Gokulakrishnan and *S. Jayakumar*, for Petitioner in Crl. R.C. No. 1243 of 1960.

The Attorney-General (*M. C. Setalwad*).

The Advocate-General (*V. K. Thiruvenkatachari*) and *V. V. Radhakrishnan*, for the Public Prosecutor, for the State.

The Court made the following

ORDER —I desire, at the outset, to state briefly the background of facts with reference to which these Revision Proceedings have arisen. At the same time, I wish to be very clear that I am making no observations upon the merits of the prosecution of these Revision Petitioners (accused 1 and 2) ; since the matter is not merely *sub judice*, but will continue to be such till the disposal of the case by the learned Sessions Judge of Madras Division. Briefly stated, the facts are that these Revision Petitioners (Sri E. V. K. Sampath and Sri A. V. P. Asaithambi) are being prosecuted in respect of an alleged offence under section 500, Indian Penal Code, of defamation of the Council of Ministers of the Madras Government, which prosecution has been instituted by the Public Prosecutor, upon sanction specifically accorded under section 198-B, Criminal Procedure Code. It is necessary to refer to the actual facts, for the purpose of elucidating one principle which underlies the enactment of section 198-B, Criminal Procedure Code ; but I am not stating the facts for any other purpose, and no comment whatever on the merits is implied. According to the terms of the complaint, accused 1, a Member of Parliament, made a public speech in which he alleged, with reference to a prosecution for the counterfeiting of hundred-rupee currency notes, which is now pending trial, that an unnamed individual close to a Minister of the Madras Government, was involved, and that the said Minister was making attempts to prevent the arrest of the culprit. According to the reported speech, the speaker further stated that Ministers were attempting to suppress the offence by exercising their power, and that if the said Ministers did, by means of a conspiracy, suppress the truth, it would nevertheless be exposed. Accused 2 (Revision Petitioner in Crl.R.C. No. 1243 of 1960) is the declared Printer and Publisher of the Tamil Daily *Thani Arasu*, and he published this report or article in his issue, dated 2nd July, 1960. The averment in the complaint is that, thereby, the Council of Ministers has been defamed.

While this case was pending trial before the learned Sessions Judge, in accordance with the provisions of section 198-B, Criminal Procedure Code, the accused filed a petition into Court in which several grounds were taken regarding the maintainability of the proceedings. It was claimed, *inter alia*, that the complaint was by a Council of Ministers, and hence not maintainable. The complaint ought to have been signed both by the party aggrieved and by the Public Prosecutor, and not by the latter alone. Sub-sections (6) to (9) of section 198-B, Criminal Procedure Code, render it clear that the victim should also join in making the complaint, before a Court could take cognizance of it. A separate plea was taken, with regard to accused 1, that he was not liable, as spoken words were definitely excluded from the purview of section 198-B (1), Criminal Procedure Code. Accused 2 claimed that he was not liable, since he only reported the speech made by a Member of Parliament, accused 1. There was one plea in addition, with which we are now concerned, to the effect that the provisions of section 198-B, Criminal Procedure Code, offended Article 14 of the Constitution. The learned Sessions Judge dealt with these objections in a preliminary order, and overruled them. It is in this context that the Criminal Revision Proceedings have been filed.

The learned Advocate-General specifically declares, and I am placing it on record now, that though these objections were dismissed *in limine* by the learned Sessions Judge, the accused are free to agitate them as grounds against their conviction at the further stages of the trial also. The arguments advanced before me have hence been confined to one ground, which is alone presented for the adjudication of

this Court, that the provisions of section 198-B, Criminal Procedure Code, are *ultra vires* of Article 14 of the Constitution, and hence that the complaint itself is liable to be quashed. Upon the other grounds, therefore, it is not necessary for me to express any opinion whatever But I wish merely to state that, after it was held by Bavdekar, J., in *C. B. L. Bhatnagar* v. *The State*[1], and by Raman Nair, J., in *R. Sankar* v. *The State*[2], that a complaint, made under section 198-B, Criminal Procedure Code, must also satisfy the provisions of section 198, that is, the complaint will have to be made both by the person aggrieved and the Public Prosecutor, the Supreme Court has now held in *P. C. Joshi and another* v. *The State of Uttar Pradesh*[3], that this view does not correctly interpret sub-section (13) of section 198-B, and that the complaint need not also be signed by the person or persons aggrieved. I may also merely note, without expressing any further comment thereon, the argument of the learned Advocate-General with the regard to the plea that accused 2 (Revision Petitioner in Crl.R.C. No. 1243 of 1960) was not liable, because he merely reported the speech of a Member of Parliament, accused 1. The learned Advocate-General has here pressed before me the principle expressed in "*Truth*" (*N. Z. Ltd.*) v. *Philip North Holloway*[4], in the following words, quoting Gatley on Republication and Repetition:

"Every republication of a libel is a new libel, and each publisher is answerable for his act, to the same extent as if the calumny originated with him."

I shall now pass on to a consideration of the single ground with which I am concerned in these proceedings, the alleged conflict between the terms of section 198-B, Criminal Procedure Code, and Article 14 of the Constitution.

This matter came up for decision before a single Judge of the Allahabad High Court in *Muneshwaranand Tyagi* v. *State of U. P.*[5]. The learned Judge (V. C. Oak, J.,) held that the terms of section 198-B, Criminal Procedure Code, involved no violation of Article 14 of the Constitution. He pointed out that the persons dealt with in section 198-B, Criminal Procedure Code, were engaged in the discharge of public functions, that trials for defamation often dragged on in Courts for several months, that the principle was therefore recognized and enacted that special protection has to be given to such defamed public servants and that that classification in section 198-B, Criminal Procedure Code, was reasonable, and it did not rest on any such grounds, as caste, religion or sex. Further, the learned Judge pointed out that the procedure prescribed seemed actually to be in favour of the accused, as compared with the procedure applicable to an accused in an ordinary case of defamation. This precedent has, undoubtedly, persuasive force, and I could cite the authority and adopt it. But issues not dealt with in this judgment have now been elaborated before me; I consider it, therefore, desirable and expedient that the matter should be examined at some greater length.

It is important, at the outset, to set forth in as precise and clear a manner as possible, the arguments of the learned counsel for the Revision Petitioner (Sri V. P. Raman), seeking to impugn the provisions of section 198-B, Criminal Procedure Code, as violative of Article 14. A somewhat extensive case-law has also been cited during arguments, consisting almost exclusively of decisions of the Supreme Court. But this case-law can be divided into two broad categories. Firstly, we have the leading decisions expounding the principles of reasonable classification, and the manner in which Article 14 should be interpreted and applied. Secondly, we have a number of decisions, relating to procedures in particular, sometimes striking down those procedures as violative of Article 14, and, in other cases, of upholding the procedures or provisions of law. I may first refer to *Kedar Nath* v. *State of West Bengal*[6], *Budhan Choudhry* v. *State of Bihar*[7], and *Ram Krishna Dalmia* v. *Justice Tendolkar*[8]. All

1. A.I.R. 1958 Bom. 196.
2. (1959) M.L.J. (Crl.) 930 : I.L.R. (1959) Ker. 195.
3. Crl. Appeal No. 130 of 1960, not so far reported.
4. (1960) 1 W.L.R. 997 (P.C.).
5. A.I.R. 1959 All. 21.
6. (1953) S.C.J. 580 : 1954 S.C.R. 30 : A.I.R. 1953 S.C. 404.
7. (1955) S.C.J. 163 : (1955) 1 S.C.R. 1045 : A.I.R. 1955 S.C. 191.
8. (1959) 1 M.L.J. (S.C.). 67 : (1959) 1 An. W.R. (S.C.) 67 : (1959) S.C.J. 147 : A.I.R. 1958 S.C. 538.

these decisions emphasise that, firstly, the classification must be based on intelligible differentia which distinguishes persons or things that are grouped together, from others left out of the group, and, secondly, that the differentia must have a rational relation to the object sought to be achieved by the statute in question. Once this is conceded or established, the classification might be founded on different bases, namely, geographical, or according to objects or occupations. What is necessary is that there must be a nexus between the basis of classification, and the object of the Act under consideration. If these criteria are satisfied, there is always a presumption in favour of the constitutionality of the Amendment. It is also presumed that the Legislature understands and correctly appreciates the needs of its own people. But it is not in dispute that Article 14 condemns discrimination not only by means of a substantive law, but even by means of a law of procedure, such as section 198-B, Criminal Procedure Code, essentially is. See *Budhan Choudhry* v. *State of Bihar*[1], and *Lachmandas* v. *State of Bombay*[2].

It is against this background of principles laid down by authority that Sri V. P. Raman seeks to impugn the provisions of section 198-B, Criminal Procedure Code, in particular. His argument is that it is not a reasonable classification to set apart those who defame the President or the Vice-President, the Governor or Rajpramukh of a State, or a Minister, or any other public servant, even in respect of his conduct in the discharge of his public functions, from defamers of persons in general under the Criminal Law. For, the Criminal Law itself recognises no such basis of distinction, as defamation of dignatories; this is against the principle of equality before the law, which is guaranteed by Article 14. The discrimination would have some justification, if the substantive law (section 500, Indian Penal Code) contained any hint of such a differentiation, or gave any room for it. But, admittedly, it does not. Sri Raman further argues that this unjustifiable discrimination has led to an actual differentiation in procedure, which is unfavourable to the accused. For instance, if the offence were to be made triable by the Court of Session, there would be committal proceedings as an essential part of the procedure. This has been done away with. Conceivably, the rights of appeal might also be affected, in case the Sessions Judge happens to impose a non-appealable sentence. In an ordinary case of defamation, a Magistrate of the First Class would deal with the case, and an appeal would lie to the Sessions Judge. The provisions relating to prior sanction are also impugned as discriminatory in their effect, since, in all other cases, the proceedings must commence with a private complaint, and a sworn statement made in person by the aggrieved party. Sri Ramn does not deny the argument, when the question was mooted, that, if the procedure were to be held, on the whole, in favour of the accused rather than against, he would have no case. For, it is not in dispute that it is a hostile discrimination which must be made the basis of an objection based on Article 14. I might here refer to certain observations in *Matajog Dobey* v. *H. C. Bhari*[3], in which the Supreme Court held that section 197 Criminal Procedure Code, was not *ultra vires* of Article 14, as the discrimination was based on a rational classification.

It appears to me that the purposes of the classification behind section 198-B, Criminal Procedure Code, is fairly evident. It is not merely to protect high dignatories, such as the President, the Governor or Rajpramukh of a State, from defamation in respect of their conduct in the discharge of their public functions, though that is certainly a part of the purpose. It is not merely to protect public servants from being involved in trials for defamations which may be very protracted, and may entail considerable expenditure. The real point of the classification is to deal with these offences upon a different plane altogether, in the larger interests of the public. I shall elaborate this point a little later, particularly in the light of certain observations of the Supreme Court in *P. C. Joshi and another* v. *The State of U. P.*[4]

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1. (1955) S.C.J. 163 : (1955) 1 S.C.R. 1045 : A.I.R. 1955 S.C. 191.
2. (1952) S.C.J. 339 : 1952 S.C.R. 710 : A.I.R. 1952 S.C. 235.
3. (1956) 1 M.L.J. (S.C.) 79 : (1956) S.C.J. 10 : A.I.R. 1956 S.C. 44.
4. Crl. Appeal No. 130 of 1960, not so far reported.

which do appear to me to illuminate the deeper implications of the enactment (section 198-B, Criminal Procedure Code), if I may say so with great respect. For the time being, I shall assume that this is a reasonable classification, and that the purpose of it has been achieved by the special safeguards and procedures enacted under the section. The question is whether, on this assumption, there is anything discriminatory against this class of accused in the procedures, which needs to be struck down as violative of Article 14.

A scrutiny of the case-law on this aspect shows that procedural enactments have been so struck down, not because of the mere letter, form or variation, but only where substantial prejudice, has, thereby, been occasioned to the accused. The case-law uniformly accepts the application of this principle. It is also well-settled that no citizen has a vested interest in a procedure, as such. For instance, in *State of West Bengal* v. *Anwar Ali*[1], the enacted law was struck down, because the procedure involved substantial loss of advantage to the accused. On the contrary, in *Kathi Raning* v. *State of Saurashtra*[2], the Court held that it would be going too far to state that in no case and under no circumstances could a Legislature lay down a special procedure for trial of a particular class of offences. Again, recourse to a simplified or less cumbrous procedure could not itself be impugned as such. See also *Qasim Razvi* v. *State of Hyderabad*[3], *Habeeb Mohamed* v. *State of Hyderabad*[4], *Lachmandas* v. *State of Bombay*[5], and *Askar Ali Nazar Ali* v. *State of Bombay*[6], in *Hanumantha Rao* v. *State of Andhra Pradesh*[7], the Supreme Court upheld the enactment of sections 207 and 207-A, Criminal Procedure Code, though the two provisions laid down material procedural differences, according as the case had been investigated by a competent Police Officer, or was upon a private complaint. Looking at the matter now before me, in the light of these decisions, it is very difficult to see how any procedural discrimination could be alleged. The trial by a Sessions Judge instead of by a First Class Magistrate, is not merely a question of no prejudice to the accused, but is actually a safeguard in his favour, or seems to have been designed as such. Since a Magistrate would ordinarily take cognizance straightaway on the private complaint, the elimination of committal proceedings is no disadvantage. As regards the sanction, it could even be argued, as the learned Advocate-General actually did argue, that this practically substitutes the committal proceedings, and involves a kind of initial scrutiny at a responsible level, before the prosecution of the accused is decided upon. The omission of trial by jury is now of purely academic significance, since the system does not prevail even in the City of Madras. In brief, there is absolutely nothing in the procedure which is disadvantageous to these accused, compared to an accused in an ordinary case of defamation. There is much in the procedure which appears to be a kind of special safeguard for accused in this class of cases, including the provision as to limitation in section 198-B (4), and the provisions as to compensation under sub-sections (6) to (11) of section 198-B. The ground of procedural discrimination, whether in respect of the initial sanction or in respect of the special forum and the procedure prescribed, must therefore entirely fail. But I do not desire merely to leave the matter there. I shall now proceed further into the question of the purpose behind the classification, and the extent to which it is sought to be fulfilled by the enactment of section 198-B, Criminal Procedure Code.

It is here that certain observations of the Supreme Court in *P. C. Joshi and another* v. *The State of U. P.*[8], appear to me to be highly significant, particularly in relation to the alleged facts of the present case. Their Lordships observed :

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1. (1952) S.C.J. 55 : (1952) S.C.R. 284 : A.I.R. 1952 S.C. 75.
2. (1952) S.C.J. 168 : (1952) S.C.R. 435 : A.I.R. 1952 S.C. 123.
3. (1953) S.C.J. 151 : (1953) S.C.R. 589 : A.I.R. 1953 S.C. 156.
4. (1953) S.C.J. 361 : (1953) S.C.R. 661 : A.I.R. 1953 S.C. 287.
5. A.I.R. 1952 S.C. 235.
6. (1957) 1 M.L.J. (Crl.) 391 : (1957) S.C.J. 421 : A.I.R. 1957 S.C. 503 (S.C.).
7. (1958) 1 M.L.J. (S.C.) 56 : (1958) 1 An. W.R. (S.C.) 56 : (1958) S.C.J. 129 : A.I.R. 1957 S.C. 927 (S.C.).
8. Crl. Appeal No. 130 of 1960, not so for reported.

"In the vindication of the character or conduct of a private individual who is defamed, the State is primarily not concerned ; the party aggrieved may, if he is so minded, take proceedings for obtaining relief. But in the investigation of defamatory charges against Ministers and public servants in the discharge of their public functions, the State is as vitally concerned as the individual defamed. The Legislature has therefore authorised the State to take upon itself the power in appropriate cases to prosecute the offenders. But lest this procedure be abused, provision has been made for the examination of the person defamed and awarding against him compensation if it be found that the complaint was false and frivolous or vexatious ".

In other words, there is an altogether different complexion also to the matter, beyond the question of the protection of the public servant concerned. Since the public servant may shirk judicial scrutiny, may be unwilling, for many reasons, to initiate criminal proceedings, since the statutory *Exceptions* to the offence of defamation to include such criteria as justification by truth and publication in the public interest, the matter has been lifted to a different plane and an initiative vested in the authorities competent to sanction the prosecution. This suggests that the discrimination is, essentially, in the larger interests of the public and of justice, and not merely for protection of the person or persons defamed. This is reflected in the procedural safeguards, which are largely in favour of the accused. Hence, I am of the view that the provisions of section 198-B, Criminal Procedure Code, are not violative of Article 14 of the Constitution.

Particularly with reference to the alleged facts of the instant case, or allegations of any similar character, it is clearly in the public interest that the searchlight of judicial scrutiny should be focussed upon the imputation, or the circumstances under which it was made, whether the consequences be pleasant or unpleasant for any of the parties concerned. Because a great principle is involved, and not merely the vindication of any public servant, of however high a rank, the classification appears to me to be not merely reasonable, but just and equitable ; the purpose sought to be achieved is also integrally related to it: I dismiss the Revision Proceedings, and, in doing so, would reiterate that I am deciding the ground argued before me alone, and that I must not be taken as having expressed any view, in however indirect a manner, upon the merits of the case, or the other grounds of objections which are still at large.

R.M. —————— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMAKRISHNAN.

Nallayee .. *Appellant.**

Criminal Procedure Code (V of 1898), *section* 271 (2)—*Conviction based on plea of guilty—Propriety.*

Under section 271 (2) of the Criminal Procedure Code, the Court is no doubt empowered to record the plea of an accused and convict him if the accused pleads guilty. But the conviction need not necessarily follow the plea of guilty. The Court has discretion to accept the plea or proceed to take evidence notwithstanding the plea. Courts will be exercising a wise discretion in not accepting the plea of an accused and proceeding with the recording of evidence. But the Court should explain to the accused as fully as possible the technical ingredients of the offence and fully satisfy itself that the accused has understood them before the plea of guilty is accepted and conviction based thereon.

Appeal against the Judgment of the Principal Assistant Sessions Judge of the Court of Session of the Salem Division at Salem in Case No 83 of the Calendar for 1959.

V. V. Radhakrishnan, for the Public Prosecutor, for State.

Appellant not represented.

The Court delivered the following

JUDGMENT.—In this case the accused, one Nallayee was committed to take her trial for an offence under section 307, Indian Penal Code, (attempt to com-

* Crl. Appeal No. 624 of 1959.

31st January, 1961.
(11th Magha, 1882, Saka).

mit murder) before the Court of Sessions, Salem Division, and she was tried accordingly by the Principal Assistant Sessions Judge, Salem. The typed copy of the charge framed by the Assistant Sessions Judge against her mentions the ingredients of the offence, and therefore, it should be considered as a proper charge. The learned Assistant Sessions Judge has noted in the judgment that, when the charge framed against the accused was read over and explained to her in Tamil, she pleaded guilty. The Judge then held that the plea was voluntary. He accepted the plea, found her guilty as charged on her own admission, convicted and sentenced her to undergo rigorous imprisonment for seven years.

The accused has filed this appeal from jail. She did not make appearance through an Advocate within the time allowed to her. In her memorandum of appeal, she says that her husband had two wives, that her husband was addicted to drink, that she did not know as to who inflicted a cut on him during a quarrel that took place while he was drunk, that he gave false evidence against her (presumably in the committal Court) on the advice of his other wife that the Sub-Inspector insisted that she should plead guilty in the Court below, stating that if she did so, she would be acquitted, and that, in those circumstances, she admitted the offence out of sheer ignorance and want of knowledge,

This appeal has been taken on file. Notice was issued to the Public Prosecutor, on the suggestion of the Judge who took the case on file, Ramachandra Iyer, J., regarding the necessity for issuing directions in regard to the trial of serious crime-whether the plea of guilty should be allowed to be recorded and the accused convicted and sentenced without knowing even the circumstances, under which the offence was committed. Adequacy of the sentence was also mentioned by Ramachandra Iyer, J., as a possible ground for being canvassed in the appeal

Section 271 (2), Criminal Procedure Code states that, if the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon. In other words, the conviction need not necessarily follow the plea of guilty. The Court has discretion to accept the plea or proceed to take evidence notwithstanding the plea. Prior decisions have held that the Court will be exercising a wise discretion in not accepting the plea of the accused, and in proceeding with the recording of evidence, in a case where the natural consequence (of such acceptance) would be a sentence of death. It has been the general practice for the Sessions Courts not to accept the plea of guilty in capital cases. But the question that arises in this particular case where the charge is not a capital charge, is somewhat different. The offence of murder is a technical one, in the sense that every killing is not r urder. The necessary intention or knowledge has to be proved to have existed before the offence of killing can be designated as an offence of murder. While the ingredients for the offence of murder mentioned in the section of the Indian Penal Code are stated more or less in formal terms, it will require somewhat more detailed explanation than what would be given in a mechanical reading of the charge, before it could be held that the accused understood all the implications of the offence when he pleaded guilty. In this respect, the ingredients of an offence of attempt to murder closely follow the ingredients of the offence of murder. It is not possible to lay down any rule that in a case of serious offences like attempt to murder (whose ingredients are set down in some what technical language in the Code) it will not be a safe practice to accept the plea of guilty for the purpose of sustaining conviction. But in such cases, the necessity can be pointed out, for the Court to explain to the accused as fully as possible the technical ingredients of the offence and fully satisfy itself that the accused has understood them before the plea of guilty is accepted and a conviction is based thereon. Where, after such detailed explanation the accused still has chosen to admit the offence and plead guilty, there may not be any legal ground to hold the conviction based on such plea to be illegal or unjustified. While the conviction on a plea of guilty may considerably abridge the trial, that should not be a reason for the Court to refrain from taking evidence, if it feels any doubt that the accused did not understand the full implication of the offence mentioned in the charge, before pleading guilty.

In the present case, however, the accused has not contended that she was not in a position to know the implications of the charge against her. Her contention was that she was persuaded to plead guilty by the Sub-Inspector of Police who told her, that, if she so pleaded she would be acquitted. I do not find any basis, on which I can accept this statement, as true.

In view of the statement of the Court below, that it had fully read over and explained the charge to the accused and was satisfied that her plea was voluntary, this Court, acting under section 412, Criminal Procedure Code, can only consider the extent or legality of the sentence. The appellant, as the first wife of her husband, had a great deal to put up with her husband's second wife, and under those circumstances, she seems to have inflicted the injuries on her husband which were, no doubt, on a vulnerable part of the body. After hearing the learned Public Prosecutor, I am, of opinion that it will suffice, to meet the ends of justice, if the sentence on the accused is reduced to a period of four years rigorous imprisonment. With the above modification, the appeal is dismissed.

K.M. *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN AND MR. JUSTICE KAILASAM.

M. S. Ramachandra Sastrigal .. *Petitioner**

v.

Kuppuswami Vanniar .. *Respondent.*

Madras Cultivating Tenants' Protection Act (XXV of 1955), *section* 6-*A—Applicability—Transfer of suit from civil Court—When could arise.*

In order to attract the provisions of section 6-A of the Madras Cultivating Tenants' Protection Act three conditions must be fulfilled. First the defendant must be a cultivating tenant ; secondly he must be entitled to the benefits of the Act and thirdly he must, on transfer of the proceedings from the civil Court to the Revenue Divisional Officer, be in a position to obtain one or other of the statutory reliefs provided in his favour under the Act. Without a concurrence of these three conditions no transfer of a suit could be ordered by a civil Court under the provisions of section 6-A of the Act. No such transfer could be ordered on any *prima facie* finding. Before a civil Court decides not to try a suit on the ground that the defendant is a cultivating tenant entitled to the benefit of the Act, it must reach a definite conclusion and must record a comprehensive finding that it has no jurisdiction to deal with the matter.

A suit for injunction *simpliciter* before a civil Court cannot automatically become converted into a petition for restoration to possession by the tenant under the Act when once it is transferred to the Revenue Divisional Officer on a tentative finding by the civil Court that the defendant is a cultivating tenant. The period of limitation prescribed under section 4 (3) of the Act creates a vested right in the landlord and there could in such circumstances be no question of any automatic conversion of one relief into something else which the party entitled has not sought for. In a suit for injunction in a civil Court to restrain the defendant from interfering with the plaintiff's possession and enjoyment of the lands, the defendant could not claim any relief or benefit under the Act, even if he is a cultivating tenant, merely by changing the forum of adjudication from a civil Court to the Revenue Court. A Revenue Court under the Act cannot grant any remedy by way of injunction.

Syed Sahib v. *Angamuthu Mooppan*, (1958) 1 M.L.J. 232 ; *Subbaratnam Iyer* v. *Pattavarthi Mooppan*, (1958) 2 M.L.J. 184, differed.

Ramaswami Pappiah v. *Ellappa Gounder*, (1960) 2 M.L.J. 26 (N.R.C.), referred.

(Case-law reviewed and discussed).

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Tiruvarur, dated 7th December, 1956, and made in I.A. No. 1162 of 1956 in O.S. No. 135 of 1956.

R. Viswanathan, for Petitioner.

K. Raman, for Respondent.

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* C.R.P. No. 61 of 1957. 15th November, 1960. (24th Kartika, 1882, Saka).

The Judgment of the Court was delivered by

Jagadisan, J.—O.S. No. 135 of 1956 on the file of the District Munsif's Court, Tiruvarur, is a suit in which the plaintiff prays for a permanent injunction restraining the defendant from interfering with his possession and enjoyment of the suit lands, of an extent of 3 acres, 65 cents, in the village of Mudikondan, Nannilam Taluk, Tanjore District. In the fasli year 1955-1956 the plaintiff let the lands to the defendant for cultivation on *waram* basis for that year. After the harvest of the lands in 1956 according to the plaintiff he took possession of the lands in February, 1956, intending to cultivate the lands himself personally in future. Alleging that the defendant interfered with his possession and enjoyment of the suit lands, after having voluntarily surrendered the lands, the plaintiff instituted the suit referred to above for a permanent injunction. The plaintiff filed I.A. No. 559 of 1956 for a temporary injunction restraining the defendant from interfering with his possession of the suit lands during the pendency of the suit. The defendant contested the application but the learned District Munsif of Tiruvarur by his order, dated 5th July, 1956, granted the temporary injunction as prayed for by the plaintiff. At the time when the suit was instituted and the order for temporary injunction was passed the relationship of landlord and tenant in respect of agricultural lands in the district of Tanjore was governed by the Tanjore Tenants and Pannayals Protection Act, (Madras Act XIV of 1952). That Act was not a State-wide legislation but was confined in operation only to the district of Tanjore though the State had the power to extend it to other territories as well. The Madras Cultivating Tenants' Protection Act (XXV of 1955), received the assent of the President on 24th September, 1955, and was published in the *Fort St. George Gazette* on 27th September, 1955. But it applied to areas not covered by the Tanjore Tenants and Pannayals Protection Act. Then came Madras Act XIV of 1956 which amended the Madras Act XXV of 1955 extending the operation of Madras Act XXV of 1955 to the territories previously covered by Madras Act XIV of 1952. This Amending Act received the assent of the President on 29th September, 1956 and was published in the *Fort St. George Gazette* on 1st October, 1956.

The defendant in O.S. No. 135 of 1956, on the file of the District Munsif's Court Tiruvarur, filed I.A. No. 1162 of 1956, invoking the aid of section 6-A of Madras Act XXV of 1955 and prayed for transfer of the suit to the file of the Revenue Divisional Officer, Nagapattinam. He claimed that he was a cultivating tenant entitled to the benefits of Madras Act XXV of 1955 and that therefore the transfer of the suit to the file of the Revenue Divisional Officer, Nagapattinam, should be ordered.

The plaintiff resisted this application but the learned District Munsif ordered the transfer and hence this Civil Revision Petition has been preferred by the plaintiff challenging the correctness of the said order.

The Civil Revision Petition was heard in the first instance by Panchapakesa Ayyar, J., who directed the matter to be posted before a Division Bench observing thus :

"An important question of law affecting thousands of landlords and ryots in Tanjore district was involved."

The learned District Munsif of Tiruvarur was of the opinion that though Madras Act XXV of 1955 came into operation in the Tanjore district where the suit lands are situated only on 29th September, 1956, by reason of the Amending Act, XIV of 1956, the status of the defendant, whether he is a cultivating tenant or not, had to be determined as if the Act XXV of 1955 governed the relationship of the parties even prior to the coming into force of the Amending Act. The defendant having been restrained by an order of temporary injunction passed on 5th July, 1956, from interfering with the possession and enjoyment of the suit lands by the plaintiff was certainly out of possession at least from that date. On 29th September, 1956, when the Amending Act came into force by reason of the operation of the injunction order the defendant must be deemed to be not in possession of the suit lands. Whether

the defendant was in possession of the suit lands on the date of the institution of the suit will have to be determined only in the suit as the order for temporary injunction granted in favour of the plaintiff cannot certainly conclude the matter. The learned District Munsif is wrong in holding that the defendant is a cultivating tenant because he was in possession of the suit lands as a waramdar for the fasli year 1955-1956 overlooking the plea of the plaintiff that there was an actual surrender of possession of the lands in favour by the defendant sometime in February, 1956. We are not assuming that the plaintiff's case of alleged surrender of possession by the defendant is true. We are clearly of opinion that the finding of the learned District Munsif that the defendant was a cultivating tenant is vitiated because he wrongly assumed that the status of the defendant as a cultivating tenant can be determined on the facts and circumstances which existed prior to the coming into force of the Amending Act XIV of 1956 and which ceased to exist on the date when the Amending Act came into force and because he failed to consider the plea of the plaintiff that there was a voluntary surrender of possession of lands in his favour as early as February, 1956.

Section 3, clause (2), *Explanation II* is as follows :

> " In relation to areas where the Tanjore Tenants and Pannaiyal Protection Act, 1952 (Madras Act XIV of 1952) and to areas where the South Kanara Cultivating Tenants Protection Act, 1954 (Madras Act VI of 1954) were in force immediately before the date of coming into force of the Madras Cultivating Tenants Protection (Amendment) Act, 1956, the exrpession ' commencement of this Act' whenever it occurs in this Act shall be construed as referring to the date aforesaid ".

This provision makes it clear that in respect of the Revenue District of Tanjore Madras Act XXV of 1955 came into operation only on 29th September, 1956, the date when the Amending Act of 1956 came into force. There is no warrant for giving retrospective operation to Madras Act XXV of 1955 to the area in Revenue District of Tanjore as it cannot be that both Madras Act XIV of 1952 and Madras Act XXV of 1955 were in concurrent operation in regard to that territory.

In *Kamalambal* v. *Krishnaswami Vandayar*[1], Ramachandra Iyer, J., has taken the same view as expressed by us. At page 106 the learned Judge observed thus :

> " By reason of this *Explanation* the tenant would be entitled to claim restoration of possession if on the date of coming into force of the Madras Act XIV of 1956 or thereafter he was dispossessed but as stated already he was dispossessed on 6th September, 1956, that is sometime before coming into operation of the Madras Act XXV of 1955 as amended by Act XIV of 1956 in regard to areas to which Madras Act (XIV of 1952) applied. Madras Act (XIV of 1956) received the assent of the President on 29th September, 1955. It is therefore clear that the tenant-respondent cannot claim the benefit of section 4 (5) of Act XXV of 1955. Mr. Venkataraman on behalf of the respondent argued that the words in the *Explanation*, namely, ' the expression commencement of this Act shall be construed as referred to the date aforesaid ' would only refer to the date of coming into force of the Madras Act XXV of 1955 in its original form. I think this contention is not well founded. A reading of *Explanation II* clearly shows that the ' date aforesaid ' refers only to the date when the Act (XIV of 1956) came into force."

With respect, we agree with this observation.

The question which the learned District Munsif had to determine was whether the defendant was a cultivating tenant entitled to the benefits of Madras Act XXV of 1955 on 29th September, 1956, the date on which he, the tenant in Tanjore district, obtained the benefit of Madras Act XXV of 1955 by reason of the Amending Act XIV of 1956. The learned District Munsif failed to determine this question, and his finding that the defendant was a cultivating tenant cannot therefore be upheld.

The plaintiff claims that there was a voluntary surrender of possession of the suit lands in his favour, the defendant having given up possession in response to his request to have the lands under his personal pannai cultivation. Section 4 of Madras Act XXV of 1955 enables a dispossessed tenant in certain circumstances to obtain restoration of possession. Section 4 (1) provides that every cultivating tenant who

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1. (1959) 1 M.L.J. 105.

was in possession of any land on 1st December, 1953 and who was not in possession thereof at the commencement of this Act shall on application to the Revenue Divisional Officer be entitled to be restored to such possession. Section 4 (5) provides that any cultivating tenant who after the commencement of this Act has been evicted except under the provisions of sub-section (4) of section 3 shall be entitled to apply to the Revenue Divisional Officer within two months from the date of such eviction or within two months from the date of coming into force of the Madras Cultivating Tenants Protection (Amendment) Act, 1956, for restoration to him of the possession of the lands from which he was evicted. On the facts of the case placed before us the present case does not appear to be governed by section 4 (1) of the Act. If the defendant were to claim the benefit of restoration under section 4 (5) of the Act then he must prove eviction. If in fact the defendant had surrendered possession to the plaintiff he cannot claim to have been evicted.

In *Kuppammal* v. *Vellingiri Goundar*[1], Rajagopala Ayyangar, J., as he then was, observed thus at page 298 :

"We consider that 'eviction' as used in section 3 (1) and section 4 (2) is an eviction of this character and that in cases where the tenant surrenders possession voluntarily without being compelled to do so by any act or conduct on the part of the landlord there is no eviction. It is not our purpose to define exhaustively the acts or conduct on the part of a landlord which constitute eviction. It is sufficient for our purpose to say that there would be no eviction when a tenant voluntarily and willingly surrenders possession of the land to the landlord. So far as the present case is concerned, the admitted facts and the finding of the Revenue Divisional Officer are that the surrender was for consideration and was a result of a bargain freely and voluntarily entered into between the parties. In the circumstances there was no eviction of the first respondent from the holding which he formerly held."

The learned District Munsif has also failed to determine the question whether there was in fact a voluntary surrender of possession of the suit lands by the defendant in favour of the plaintiff. The determination of this question has a great bearing on the issue whether the defendant was a cultivating tenant or not when the Amending Act XIV of 1956 came into force. The failure of the learned District Munsif to advert to this vital question has also vitiated his finding that the defendant is a cultivating tenant.

The learned District Munsif has found as a fact that the defendant is cultivating nanja lands of 5 acres, 78 cents as owner and more than 5 acres, 78 cents as lessee under one Swaminatha Iyer and Krishnamurthy Iyer. On this finding which has not been challenged before us by the learned counsel appearing for the respondent, it is obvious that the defendant is not a cultivating tenant entitled to restoration of possession of the suit lands in view of the *Explanation* to section 4 of the Act. Section 4 (2) is as follows :

"Nothing in sub-section (1) shall be deemed to entitle any such cultivating tenant to restoration of possession (i) if, on the day this Act comes into force, he is in possession, either as owner or as tenant or as both, of land exceeding the extent specified in the *Explanation* below or if he has been assessed to any sales tax, profession tax or income-tax under the respective laws relating to the levy of such taxes during 1953-54 or 1954-1955 or............"

The *Explanation* is :

"The extent referred to in clauses (i) to (iii) above is 6 2/3 acres of wet land."

The total holding of the defendant both as owner and as lessee as found by the learned District Munsif comes to more than 11 acres. Despite this finding the learned District Munsif was of the opinion that the defendant was entitled to the benefits of the Act as a cultivating tenant and observed thus :

"Therefore the objection of the respondent that the petitioner cultivates more than 6 and 2/3 acres of nanja and hence not entitled to recovery of possession will not hold good as there is no question of recovery of possession by the defendants in this suit and the only question between the plaintiff and the defendant in this suit is who is in possession."

We are wholly unable to appreciate the logic or soundness of this reasoning.

The defendant in the suit has called in aid section 6-A of the Act which is as follows :

"If in any suit before any Court for possession of, or injunction in relation, to, any land it is proved by affidavit or otherwise that the defendant is a cultivating tenant entitled to the benefits of

1. (1957) 1 M.L.J. 293.

this Act, the Court shall not proceed with the trial of the suit but shall transfer it to the Revenue Divisional Officer, who shall thereupon deal with and dispose of it as though it were an application under this Act and all the provisions of this Act shall apply to such an application and the applicant."

This section has been considered by this Court on several occasions. In *Veluchami Naicker* v. *Mouna Gurusami Naicker*[1], it was held by a Division Bench consisting of the learned Chief Justice and Panchapakesa Ayyar, J., that section 6-A of the Act governed suits pending in a civil Court at the time that provision was enacted. The learned Chief Justice at page 629 observed as follows :

> " If the Court decides that the defendants are cultivating tenants entitled to the benefits of the Act, then it shall not proceed with the further trial of the suit but shall transfer it to the Revenue Divisional Officer. If, however, the Court comes to the conclusion that the defendants are not cultivating tenants, then it can proceed with the trial and pass such decree as it may deem fit."

The suit out of which the appeal before the Division Bench arose was one for recovery of possession in which the defendants claimed to be cultivating tenants not liable to be evicted except by the Revenue Divisional Offlcer in due conformity with the provisions of Madras Act XXV of 1955. The jurisdiction to evict a cultivating tenant is vested only in the Revenue Divisional Officer to the exclusion of the civil Court. The observation of the Divisional Bench that the suit should be transferred to the Revenue Divisional Officer if it were to be found that the defendants in that case were cultivating tenants was made because of the lack of the jurisdiction in civil Court to evict a cultivating tenant. The decision in *Ratnasami Mudaliar* v. *Ponnammal*[2] followed the above decision.

In *V. Kuppusami* v. *Subramaniaswami Devasthanam*[3], it was held by Balakrishna Ayyar, J., that having regard to the scheme of the Act and the language of section 6-A of the Act, before a civil Court can transfer a proceeding under that section it must be satisfied that the tenant is not only a cultivating tenant as defined by the Act, but he should also be entitled to some benefit or other under the Act. At page 209 the learned Judge observed thus :

> " Therefore before the civil Court can transfer a proceeding under section 6-A to the revenue Court it must be satisfied that the tenant is not merely a cultivating tenant as defined in the Act but also entitled to some benefit or other under the Act."

The learned Judge expressed the view that if both these conditions are not satisfied no question of any transfer under section 6-A of the Act will arise.

In *Syed Sahib* v. *Angamuthu Mooppan*,[4] Panchapakesa Ayyar, J. had to deal with the scope and ambit of section 6-A of the Act. In that case the suit was filed by one Syed Sahib on the file of the District Munsif's Court of Tiruchirappalli for an injunction restraining the defendant from interfering with his possession and enjoyment of the suit lands on the ground that the defendant was a mere trespasser attempting to take the law into his own hands. An application was filed by the defendant under section 6-A of the Act praying for transfer of the suit to the file of the Revenue Divisional Officer, Tiruchirappalli. The civil Court held that *prima facie* the defendant was a cultivating tenant and directed the transfer of the suit to the Revenue Court. The Revenue Court also held that the defendant in the suit was a cultivating tenant after the matter was transferred to its file. It is this order of the Revenue Court which formed the subject-matter of the Civil Revision Petition heard by Panchapakesa Ayyar, J. The learned Judge observed that the finding of the civil Court under section 6-A of the Act that the defendant was a cultivating tenant entitled to the benefit of the Act was only a *prima facie* finding and can never be a final finding binding on the Revenue Court. As stated already the suit out of which the proceedings culminated in the Civil Revision Petition was one purely for injunction. It was contended before the learned Judge that there was no petition by the alleged tenant for restoration of possession of the holding to him and that therefore there was no scope for the Revenue Court to decide the question whether

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1. (1957) 2 M.L.J. 628.
2. (1958) 1 M.L.J. 427.
3. (1958) 1 M.L.J. 208.
4. (1958) 1 M.L.J. 232.

the tenant was entitled to restoration of possession on the assumption that there was some such petition before the Revenue Court. This contention was repelled by the learned Judge in the following words :

"Section 6-A says that on the transfer of the suit by the Civil Court to the Revenue Court, the Revenue Divisional Officer shall deal with the matter and dispose of it, as though it were an application under Act XIV of 1956. No doubt, as Mr. Ramachandra Iyer pointed out, this is a legal fiction but legal fictions are well known to law, and are, in fact a kind of hidden soul in the law making for progress. Many Acts contain such legal fictions. There is no question of their validity, as the sovereign Legislature, or any other Legislature to the extent of its competence, can legislate with such fictions added on, provided there is no discrimination under Article 14 of the Constitution, or any other invalidating factor none of which exist here. So, the moment the District Munsif, Tiruchirapalli, transferred the suit for injunction, under section 6-A to the Revenue Divisional Officer that suit automatically became a petition for restoration of possession by the tenant though in fact the tenant had not filed any such petition."

This decision was followed by the same learned Judge in a subsequent decision of his, *Subbaratnam Iyer* v. *Pattavarthi Mooppan*[1]. Therein the learned Judge observed as follows :

"The lower Court never held the respondent to be a cultivating tenant. It merely presumed from the evidence on record, that the respondent might turn out to be a cultivating tenant, and that is all that section 6-A requires for entitling or requiring a civil Court to transfer a suit to the revenue Court where the question whether the person claiming to be a cultivating tenant was really a cultivating tenant would be gone into in full and finally decided, and a binding finding given thereon. I have held in a similar case that a Civil Court when transferring a suit like this is only required to satisfy itself *prima facie* that the defendant is a cultivating tenant and that it need not give a finding that he is really a cultivating tenant, it has no jurisdiction to give such a final finding, as only a revenue Court can give it.... It cannot adopt the *prima facie* conclusion of a civil Court when transferring the suit under section 6-A, though it may agree with the *prima facie* conclusion for the reasons given by it in its own finding that the defendant is a cultivating tenant".

In C.C.C.A. No 149 of 1955 and C.R.P. No. 464 of 1959—*Mohammad Karimuddin Sahib and another* v. *Mohambara Naicker*—Ramachandra Iyer, J. had occasion to consider the question of applicability of section 6-A of the Act in a suit for relief not merely for recovery of possession but also for recovery of arrears of rent or damages for use and occupation. The two decisions of Panchapakesa Ayyar, J. referred to above were cited before him. Ramachandra Iyer, J. observed thus :

"The learned Judge held in the two cases that the civil Court should come only to a *prima facie* conclusion on the question whether the defendant was a cultivating tenant or not and the final decision on that issue rested with the Revenue Court. With great respect to the learned Judge I cannot agree."

Ramachandra Iyer, J. further observed thus :

"Therefore before an order for transfer is made the Court should find that it is incompetent to give the reliefs sought by reason of the Act."

Earlier the learned Judge observed thus :

"But what section 6-A contemplates is the transfer of the suit and not the reference of any issue that is, that relating to possession."

We are of opinion that the view taken by Panchapakesa Ayyar, J. in *Syed Sahib* v. *Angamuthu Mooppan*[2] and *Subbaratnam Iyer* v. *Pattavarthi Moopan*[1], is not correct. With great respect to the learned Judge we are unable to subscribe to the view that a *prima facie* finding of the civil Court holding that a party to the suit is a cultivating tenant can deprive the civil Court of its jurisdiction to try the suit making it incumbent on that Court to transfer the suit to the Revenue Court. If the view of the learned Judge as expressed by him in those decisions were to prevail it would lead to anomalous results. What is to happen if the Revenue Court were to hold contrary to the *prima facie* finding of the civil Court that the tenant is not a cultivating tentant entitled to the benefits of the Act? There is no machinery under the Act for the Revenue Divisional Officer to retransfer the proceeding to the file of the civil Court.

1. (1958) 2 M.L.J. 184. 2. (1958) 1 M.L.J. 232.

Further the civil Court cannot lose its jurisdiction to try a suit competently laid before it on tentative conclusions or *prima facie* findings. Before the civil Court decides not to try a suit it must reach a definite conclusion and must record a comprehensive finding that it has no jurisdiction to deal with the matter. There cannot of course be a summary enquiry by a civil Court on such a vital issue as that of jurisdiction to try the suit.

With great respect to Panchapakesa Ayyar, J., we do not also agree with the view expressed by him that a simple suit for injunction laid before the civil Court can become automatically converted into a petition for restoration of possession by the tenant, once the suit is transferred to the file of the Revenue Divisional Officer on a tenatative finding that the defendant is a cultivating tenant.

Under section 4 (3) of the Act every application to a Revenue Divisional Officer under sub-section (1) for restoration of possession has to be made within 30 days from the commencement of the Act. Section 4 (5) of the Act prescribes that a cultivating tenant who has been evicted after the commencement of the Act should apply to the Revenue Divisional Officer within two months from the date of eviction or within two months from the date of coming into force of the Madras Cultivating Tenants Protection (Amendment) Act of 1956 for restoration to him of the possession of the lands. The Act thus prescribes the period of limitation for applications for restoration of possession. In *Subbiah Mudaliar* v. *Pakkiri Pandaram*[1], the learned Chief Justice has observed that the lapse of the period of limitation prescribed for restoration of possession under the Act creates a vested right in favour of the landlord against any claim for restoration of possession. There cannot therefore be an automatic conversion of a suit for injunction in the civil Court into an application for restoration of possession before the revenue Court which may have the effect of nullifying the vested rights accrued in favour of the landlord by reason of the cultivating tenant having failed to take the proper steps for restoration as prescribed by the statute.

It is of course open to the Legislature to introduce a legal fiction. But neither the civil Court nor the Revenue Divisional Officer can import a legal fiction so as to grant a relief to a party who is not asking for such a relief.

The plain words of section 6-A of the Act clearly indicate the scope of that provision. The suit which is sought to be transferred must be one for possession or injunction in relation to any land. The defendant in such a suit can if he is a cultivating tenant entitled to the benefits of the Act have the trial of the suit before the Civil Court interrupted and have the suit transferred to the Revenue Divisional Officer. On a transfer being ordered in terms of that section the Revenue Divisional Officer shall deal with and dispose of the suit as though it were an application under the Act. Before the section can operate, three conditions must be fulfilled. The first is that the defendant must be a cultivating tenant; the second is that he must be entitled to the benefits of the Act; the third is that he must on a transfer of the proceeding to the Revenue Divisional Officer be in a position to obtain one or other of the statutory reliefs provided for in his favour under the Act. Without the concurrence of these three conditions no transfer should be ordered by the civil Court under the provisions of section 6-A of the Act.

In a simple suit for an injunction laid in a civil Court for restraining the defendant in the suit from interfering with the plaintiff's possession and enjoyment of the land, the defendant even if he were to be a cultivating tenant entitled to the benefits of the Act cannot gain anything by merely having the forum of adjudication being shifted from the civil Court to the Revenue Court. It is obvious that a Revenue Court cannot grant any injunction. The Revenue Court has no jurisdiction to consider the question whether an injunction can or cannot be granted. In *Ramaswamy Pappiah* v *Ellappa Gounder*[2], decided by Ramachandra Iyer, J., the extract as per the Report of the Shortnotes is as follows :

1. (1958) 2 M.L.J. 510. C.R.P. No. 936 of 1960).
2. (1960) 2 M.L.J. (Notes of Recent Cases 26

"An injunction, which is a preventive remedy, is granted by Courts under the specific provisions of the Civil Procedure Code. There is no inherent power in any Tribunal to grant an injunction unless the jurisdiction to grant it is expressly conferred by a statute and such a power cannot be assumed by implication."

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"Hence a Revenue Divisional Officer would have no jurisdiction to grant an injunction restraining a landlord from entering his property. The tenant has always got his remedy in such cases to approach the civil Courts for relief by way of injunction."

In the present case we are not informed that the defendant in the suit has preferred any application before the Revenue Divisional Officer for restoration of possession. Whether it will be open to him to prefer any such application in future if he has not already preferred one is a matter on which we need not express any opinion. In any view of the matter we do not see the necessity for a transfer of the suit from the file of the civil Court to that of the Revenue Court. There are only three possibilities arising on the pleadings of the parties in the case. Firstly the plaintiff in the suit might have been in possession of the suit lands on the date of the suit and the defendant may not be a cultivating tenant entitled to the benefits of the Act. If this is the real position it is obvious that an injunction must issue in favour of the plaintiff. In fact even the terms of section 6-A cannot operate and the suit cannot be transferred. Secondly the plaintiff might have been in possession of the suit lands on the date of the suit but the defendant might be a cultivating tenant entitled to the benefits of the Act. In this case also the civil Court will have to grant an injunction but this decree for injunction will however be subject to such order as the Revenue Divisional Officer may pass by way of restoration of possession or otherwise at the instance of the tenant and as a result of appropriate proceedings which he might take under the Act. The third possibility is that the plaintiff might not have been in possession of the suit lands on the date of the suit. In such a case whether the defendant is a cultivating tenant entitled to the benefits of the Act or not the suit must fail. We are therefore of opinion that taking any view of the matter section 6-A of the Act cannot properly govern the case. We have held already that the finding of the learned District Munsiff even on the question whether the defendant is a cultivating tenant entitled to the benefits of the Act or not is erroneous in law and unsustainable.

The Civil Revision Petition is allowed; the judgment of the learned District Munsiff is set aside and O.S.No. 135 of 1956 is restored to the file of the District Munsiff, Tiruvarur, for being re-tried on all the issues arising in the case, the parties being at liberty to adduce such further and additional evidence as they think fit. There will however be no order as to costs.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR JUSTICE RAMACHANDRA IYER.

Kochadai Naidu and another .. *Petitioners**

v.

Nagayasami Naidu and others .. *Respondents.*

Civil Procedure Code (V of 1908) section 24 and Criminal Procedure Code (V of 1898), section 146—Proceedings transferred by a criminal Court to a civil Court under section 146 of the Criminal Procedure Code—Power of civil Court to transfer under section 24, Civil Procedure Code.

To a proceeding on a reference to a civil Court under section 146 of the Criminal Procedure Code relating to an issue as to possession of immoveable property, all provisions of the Civil Procedure Code will apply except those relating to costs, appeals, reference, review, etc. It would follow that the provisions of section 24 of the Civil Procedure Code will also apply to such proceedings and a matter referred to a civil Court under section 146 of the Criminal Procedure Code by a Magistrate could be transferred to another civil Court by the superior Court under section 24 of the Civil Procedure Code.

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*C.M.P. No. 5261 of 1960. 6th October, 1960.
(14th Asvina, 1882—Saka).

[Scope of the provisions in Section 146, Criminal Procedure Code, explained; 'proceeding' within the meaning of section 24, Civil Procedure Code, considered. Case Law referred.]

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct transfer of the proceedings in M.C.No. 8 of 1957, on the file of the Court of the District Munsif, Periakulam, to the file of the Court of the Subordinate Judge, Dindigul.

M. Natesan, for the Petitioners.

V.C. Veeraraghavan, G. Ramanujam, V. Ramaswami, S. V. Padmanabhaswami and V. Narayanaswami, for the Respondents.

The Court made the following

ORDER :—This application is filed under section 24, Civil Procedure Code, for the transfer of the proceedings in M.C.No. 8 of 1957 on the file of the District Munsif's Court, Periakulam, to the Sub-Court, Dindigul, to be tried along with O.S. No.35 of 1958 on its file. The petitioners who are the sons of the 3rd respondent, and respondents 1 and 2 are descended from a common ancestor. The former claimed that they were members of a joint Hindu family with the latter. Respondents 1 and 2, however, state that the 3rd respondent had been taken in adoption by a divided paternal grand uncle of theirs, and that there is no such coparcenary as claimed. Some time ago disputes ensued between the parties in regard to the possession of certain properties, and they assumed such proportions as to threaten a breach of the peace. The police, thereupon, initiated proceedings under section 145, Criminal Procedure Code, against both the parties before the Executive First Class Magistrate, Usilampatti, in M.C. No. 8 of 1957. The Magistrate attached the properties and forbade either party from entering them. After examining a few witnesses, the Magistrate felt that the matter was one where the questions involved could only be decided by a civil Court, and, accordingly, by his order, dated 1st December, 1958, directed the parties to establish their respective rights in a suit. Even before the disposal of that case, the petitioners had instituted O S. No. 35 of 1958 in the Sub-Court, Dindigul, for partition of the disputed properties.

While that suit was pending, there was a change in the personnel of the Executive First Class Magistrate, Usilampatti. The Magistrate who succeeded the one who passed the order, dated 1st December, 1958, was of the view that the disposal of the proceedings under section 145, Criminal Procedure Code was not in accordance with the Code of Criminal Procedure as amended: he, therefore, revived the case. Finding however, that it was difficult to decide as to which of the parties was in possession on the material date, he referred the matter to the District Munsif, Periakulam, for a decision under section 146, Criminal Procedure Code. This order was passed on 6th Novermber, 1959.

In the present petition, it is prayed that M.C. No. 8 of 1957, now pending decision in the District Munsif's Court, Periakulam, should be transferred to the Sub-Court, Dindigul, to be tried along with O.S. No. 35 of 1958.

There can be no doubt that, having regard to the questions involved, it would be convenient if not desirable that both should be tried together. The only question to be considered is whether it would be competent to a superior Court, acting under section 24, Civil Procedure Code, to transfer M.C. No. 8 of 1958 to a civil Court other than the one to which the Magistrate referrred the case.

Before applying to this Court, the petitioners approached the District Judge, Madurai, for a transfer of the proceedings so as to enable a disposal of the two matters by the same Court. The learned District Judge, while he realised that it would be convenient to have both the matters disposed of together, declined to grant the application, as in his view section 24, Civil Procedure Code, would not authorise the transfer of a *quasi* criminal proceeding, namely, the reference under section 146, Criminal Procedure Code, from the Court, in which it was pending to another civil Court.

Section 24, Civil Procedure Code, confers a power on the High Court, and the District Court to transfer any suit, appeal or other proceeding pending in a Subordinate Court, to another Court subordinate to it, which would be competent to try and dispose of the matter. The competence referred to in the section is with reference to pecuniary and not territorial jurisdiction. In a case where a dispute relating to possession is referred under section 146, Criminal Procedure Code, to a civil Court, no question of valuation might perhaps arise. Therefore, if it were found that the case would come within the scope of section 24, Civil Procedure Code, the proceedings can be transferred to any other subordinate civil Court. Further it is not disputed that the Sub-Court at Dindigul will be competent to entertain and decide M.C. No. 8 of 1957.

Now a matter referred to a civil Court under section 146, Criminal Procedure Code, is neither a suit nor an appeal. It has to be seen whether it could be comprehended by the term "proceeding".

On behalf of the respondents 1 and 2 it is contended that a matter referred to a civil Court under the provisions of section 146, Criminal Procedure Code, will not be a proceeding coming within the terms of section 24, Civil Procedure Code and even if it were held to be one such it would be a criminal rather than a civil proceeding and that it would not be one within the jurisdiction of a superior civil Court to transfer.

Before dealing with the arguments, it is necessary first to consider the nature of a proceeding under section 145, Criminal Procedure Code and the jurisdiction of the civil Court under section 146, Criminal Procedure Code. Section 145, Criminal Procedure Code, is enacted with a view to prevent offences relating to immoveable property which are likely to lead to breach of the peace. The Privy Council characterised such proceedings in *Denomoni Chowdadhrani* v. *Brojo Mohini*[1], as police proceedings intended to prevent the commission of an offence. The offences contemplated by the section would often be committed in the assertion or under the colour of a right. A summary adjudication of what essentially would be a civil dispute would be necessary before any preventive action could be taken. Section 145 (4) invests the Magistrate with a right to decide the dispute regarding possession of immoveable property and to ascertain which of the parties was in actual possession on the date of the preliminary order, or within two months prior thereto in case there was a wrongful dispossession of a party during that period. The party so found to be in possession will be entitled to be in possession till evicted in due course of law. But adjudication of possessory rights may not always be easy. Very often questions relating to possession get mixed up with those relating to title. There may be difficulty also in assessing the nature or quantum of possession sufficient to constitute actual possession. In certain cases a conflict of testimony of witneesses might itself render the decision difficult. Section 146, Criminal Procedure Code, provides for such cases. Where the Magistrate finds that none of the parties are in possession of the property, or is unable himself to decide which of the disputants is in actual possession of the property, he can refer the question for the decision of a civil Court having jurisdiction over the subject-matter of the dispute. In such a case the Magistrate should draw a statement of the case, and forward the record to the civil Court for determination as to whether any or which of the parties was in possession of the disputed property, directing the parties to appear before the civil Court on a date to be fixed by him. But once the reference is made, the civil Court will not confine to the record of evidence sent by the Magistrate : it can take such further evidence that the parties may choose to produce (sub-section (1-A)). After the enquiry, the civil Court should record a finding and send the same to the Magistrate who should dispose of section 145, Criminal Procedure Code, proceedings conformably to such finding (sub-section (1-B)). There is also a provision for an order as to payment of costs. Sub-section (1-D) states that no appeal, revision or review will lie against

1. (1901) 12 M.L.J. 83 : L.R. 29 I.A. 24 : I.L.R. 29 Cal. 187. (P.C.).

the finding of the civil Court.

A dispute about possession of immoveable property is essentially a Civil dispute; the nature of the question involved in all such disputes possibly induced the Legislature to invest a jurisdiction in the civil Court. In *Rangammal* v. *Subbarayulu*[1], Ramaswami, J., likened the civil Court functioning under section 146, Criminal Procedure Code to that of an expert referee like the Hindu Pandits and Muslim Muftis whose opinions on customary law was resorted to by British Judges in olden times. The analogy furnished by the learned Judge enabled the Advocate for the contesting respondents to raise a contention that the jurisdiction of the civil Court was merely consultative or advisory. That, however, is not correct. The jurisdiction conferred on the Civil Court, is by the statute and not one under the Magistrate's own authority. Assuming that such a reference or delegation could be legal the civil Court will have a duty to decide the question referred by virtue of the statute. The Magistrate on his part would be bound by the finding given by the civil Court on the question of possession.

Section 146 (1-A) provides for the taking of further evidence by the civil Court; that provision cannot be held to be exhaustive of the procedure to be followed by that Court; possibly it was invested by way of abundant caution to avoid a contention that the civil Court should be confined only to the materials or record sent up by the Magistrate. Having regard to the fact that the section is silent about other matters of procedure and the fact that the jurisdiction is conferred on the civil Court *qua* a civil Court, the well settled rule, namely that where a statute confers on the ordinary Courts of the land a jurisdiction to decide a particular dispute, such Courts would be governed by the ordinary rules of procedure applicable to its own proceedings under the law. Section 4, Civil Procedure Code provides that when there is a conflict between the Code and any special jurisdiction or power or any special procedure prescribed by or under any other law, it is the latter that would prevail; but in the present case there is no such conflict and it would follow that a civil Court in rendering a decision on a matter referred to it under section 146, Criminal Procedure Code would be governed by the Civil Proedure Code except in so far as it is either inconsistent with or abrogated by section 146, Criminal Procedure Code. The statute (Criminal Procedure Code) itself appears to have recognised this principle when it enacted sub-section (1-D) to section 146 prohibiting appeals, revisions and reviews evidently for the reason that if no such provision were made, there would be a right to resort to such proceedings under authority of the Civil Procedure Code.

Thus, the following characteristics exist in a matter referred to a civil Court under section 146, Criminal Procedure Code. (1). The forwarding of the case to and the decision by the civil Court is a definite step in the juricial determination of the question of possession (which is a civil right) in certain class of disputes covered by section 145, Criminal Procedure Code. (2). That jurisdiction of the civil Court is by virtue of a statute and it is neither a delegate nor agent of the Magistrate or one whose function is merely advisory; the finding or decision of that Court on the question referred would be binding on the Magistrate. (3). The Civil Court in determining the question would be governed by its own procedure except in regard to matters provided by sub-section (1-D) of section 146, Criminal Procedure Code.

It is then necessary to consider whether these characteristics would be sufficient to constitute the case during its career in the civil Court as a " proceeding " in that Court so as to render section 24, Civil Procedure Code, applicable. The word " proceeding " is defined in the Shorter Oxford Dictionary as " doing, a legal action or process, any act done by the authority of a Court of law." In " Words and Phrases " Permanent Edition, Vol. 34, a number of meanings taken from American decisions are given for the word "proceedings". Two of them which I give below bring out the essential import of the words.

(1) " The word " proceeding" ordinarily relates to forms of law, to the modes in which judicial transactions are conducted " (page 141). (2) " The term " proceeding" is a very comprehensive

1. A.I.R. 1960 Mad. 169.

term and generally speaking means a prescribed course of action for enforcing a legal right and hence it necessarily embraces the requisite steps by which a judicial action is invoked." (Page 142.)

In *Ramanathan Chettiar*, In re[1], Venkataramana Rao, J., construing the meaning of the term as it occurred in the Court-fees Act of 1870, observed that the word had been interpreted in various senses in different statutes according to the intent and scope of the statute, sometime in a narrow sense and sometimes a wide sense, and the word when used alone had been interpreted to mean " all judicial proceedings." In *Ganga Naicken* v. *Sundaram Iyer*[2], Krishnaswami Nayudu J., held that the meaning to be given to the word "proceeding " would depend on the scope of the enactment in which it occurred and the context in which the word was used. The learned Judge held that a copy application which could not be held to be a step in any action, would be a proceeding within the saving clause contained in section 87 (2) of the Madras Court-fees Act, 1955. Recently, I had to construe the same section in regard to the proceedings before the Collector antecedent to an award under the Land Acquisition Act in *Firm of Cakravarti Iyenar* v. *Collector*[3]. The following passage at page 209 stated the rule of interpretation thus :

> "It is an accepted rule of interpretation, where a statute does not provide an interpretation for a particular term or phrase, in order to arrive at the true meaning of the word or phrase one should have to understand it in connection with its context, collocation, etc. in accord with the intention of the enactment and that no word or phrase should be understood detached from the context."

Learned counsel for the contesting respondents contended that a proceeding under the Code of Civil Procedure should satisfy two conditions, namely, (1) that it should have been initiated in that Court, and (2) that the Court should be competent to give relief to the party. In support of the contention reliance was placed on the decision in *Sheonath Prasad* v. *City Magistrate*[4]. I shall advert to that decision later. *Prima facie* the first of the two qualifications set out above does not appear to be an essential one. One can refer in this connection to the decision in *Ramakka* v. *Negasam*[5] a case which in some respects is analogous to the present one. There in a suit for partition the matter was remitted for enquiry into mesne profits by a Commissioner. It was held that proceedings before the Commissioner would be governed by the provisions of the Code (Order 18, rule 1 in that case) by virtue of section 141 which made the provisions of the Code applicable to " other proceedings ". A matter which was referred to a Commissioner was treated as a proceeding before him. The second of the qualifications suggested mixes up two distinct ideas. Authority to entertain a matter and dispose of the same need not necessarily include an authority to grant the relief. For example if the jurisdiction of a Court to entertain a suit is contested, the Court can investigate the matter and if it finds that it is beyond its jurisdiction, it has only to return the plaint ; no final order in the suit could be passed. But yet it cannot be denied that it would be proceedings in that Court. I cannot, therefore, agree that in order that a matter before a Court should be held to be part of its proceedings, it should either have commenced in that Court or that the Court should have a power to grant relief thereon to a party. I have already indicated that the term " proceeding " is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. Essentially the term indicates a prescribed mode in which judicial business is conducted. Section 24, Civil Procedure Code is a provision in an enactment which is a Code, which is exhaustive on all matters provided for by it. Therefore the term should have a comprehensive meaning so as to include all matters of judicial adjudication to which the Code will apply. As the provisions of the Code will apply to a matter referred under section 146, Criminal Procedure Code that will be a proceeding to which section 24, Civil Procedure Code would apply.

It was next contended—a contention which found favour with the learned District Judge—that the proceedings on a reference under section 146, Criminal Procedure Code were criminal proceedings, and that the provisions of section 24,

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1. (1942) 1 M.L.J. 111.
2. (1956) 1 M.L.J. 63.
3. (1960) 2 M.L.J. 207.
4. A.I.R. 1959 All. 467.
5. (1923) 48 M.L.J. 89: I.L.R. 47 Mad. 800.

Civil Procedure Code could not be invoked for enabling a transfer thereof from one Court to another. I cannot agree with the contention. Section 24 is not in terms restricted to civil proceedings alone, but it is wide enough to include all proceedings that may be pending in a subordinate civil Court. That consideration apart, the proceedings so long as they remain in the civil Court should in my opinion be regarded only as a civil proceeding. Reliance is, however, placed on two decisions that have taken a contrary view. *Bodh Narain* v. *Deo Narain*[1], was the first of the cases cited. It was held in that case that a reference to a civil Court by a Magistrate under section 146 (1), Criminal Procedure Code was not a suit or a proceeding coming under section 141, Civil Procedure Code and that therefore, limitations as to pecuniary jurisdiction of the civil Court will not apply. The same view was taken in the next case on which reliance was placed, namely, *Sheonath Prasad* v. *City Magistrate*[2]. In neither of the two cases did any question arise as to the powers of transfer, whether it could be made under section 24, Civil Procedure Code or under any appropriate provisions (*e.g.* Section 561-A) of the Criminal Procedure Code. In the latter case Sri Justice Jagdish Sahai observed that the proceedings under section 146, Criminal Procedure Code on reference to the civil Court retained its old moorings and did not change its character from criminal to civil proceedings, and that they could not become proceedings instituted in that Court. The learned Judge considered that, as the initiation and final disposal of the matter was in the criminal Court, and as the function of the civil Court was of a limited character (the title to the properties not being adjudicated on), the proceedings could not be considered as a suit or one coming under section 141, Civil Procedure Code. With great respect to the learned Judge, I cannot agree with some of the observations in the judgment. I have pointed out earlier that a matter in order to constitute a proceeding of a Court need not be initiated in it nor that the Court should be competent to make a final order thereon. It is not necessary either that the Court should be competent to adjudicate the title of the parties. There are several matters, *e.g.* claim proceedings, observation proceedings, a suit under section 9 of Specific Relief Act, etc.. in which title cannot be adjudicated. It cannot be denied that they are civil proceedings. That a proceeding, though criminal in nature, could be regarded as civil, if it were to be adjudged by a civil Court, has been recognised in *Kumara Vel* v. *Shanmuga*[3]. It was held in that case that a civil Court did not cease to function as a civil Court when it considered an application made to it under section 476, Criminal Procedure Code, and that in regard to such applications, the Code of Civil Procedure would apply. Adopting the principle of the Full Bench decision, I would hold that the proceeding in the instant case would be a civil proceeding in so far as the decision of the issue referred to the Court is concerned.

A case where the civil Court was by statute entrusted with the decision of an issue arising between the parties in a proceeding before the Revenue Court arose in *Basant Lal* v. *Mt. Chirajee*[4], where it was held that the issue so referred was an original matter in the former Court and would be proceedings in that Court so as to attract the operation of section 141, Civil Procedure Code. In *Maha Ram*, v. *Harbans*[5] a Full Bench of the Allahabad High Court held that a civil Court to which an issue relating to a proprietary right submitted by a Revenue Court acting under section 271 of the Agra Tenancy Act was entitled to follow the Code of Civil Procedure in determining the issue and refer the matter to arbitration. In my opinion, the true principle is that, where the legislature confers a special jurisdiction on recognised Court and is silent as to the manner in which that jurisdiction is to be exercised, it will only be an addition to the existing jurisdiction of that Court, and all rules of procedure that apply to its ordinary jurisdiction will be attracted in regard to the special jurisdiction as well. That rule would apply to a civil Court determining an issue as to possession on a reference under section 146, Criminal Procedure Code. To such a proceeding all provisions of the Code of Civil Procedure except those relating to costs, appeals,

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1. A.I.R. 1958 Pat. 308.
2. A.I.R. 1959 All. 467.
3. (1940) 1 M.L.J. 719 : I.L.R. 1940 Mad. 762 (F.B.).
4. A.I.R. 1934 All. 86.
5. I.L.R. (1941) All. 193. (F.B.)

reference, review, etc., would apply so far as they are not inconsistent with the nature of those proceedings. It would follow that provisions of section 24, Civil Procedure Code would apply to such proceedings.

The petitioners have as stated earlier made out a case for the necessity for a transfer. The proceedings in M.C.No. 8 of 1957 on the file of the District Munsif's Court, Periakulam will, therefore, be transferred to the Sub-Court, Dindigul, to be tried along with O.S. No. 35 of 1958.

No order as to costs.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

V. Kanakaiya Chetty and Company a registered firm of Hardware and Iron Merchants carrying on business at No 148, Nynappa Naick Street, P.T., Madras and another .. *Appellants**

v

The Union of India represented by the General Manager, Southern Railway having his office at Adam's Park, P.T., Madras .. *Respondent.*

Railways Act (IX of 1890), section 72—Measure of liability—Goods lost by organized raid by thieves and by looting —If the Railway Administration is liable for the loss.

Where not merely a large scale and organized raid by thieves occurred, but the open wagon containing the goods was looted by the thieves, no general proposition can be laid down that a fact of this kind should be proved by direct evidenee by the Railway Administration. The Administration is entitled to plead that the fact could be established by circumstantial evidence also. The Railway Administration would not be guilty of any neglect if this is established.

The criterion in section 151 of the Contract Act of the care that should be taken by a man of ordinary prudence, under similar circumstances, in respect of his own goods, does not imply any heroic measure of responsibility, or conduct.

Appeal against the Decree of the City Civil Court at Madras in Original Suit No. 262 of 1955.

T. S. Nagaswami Ayyar for Appellants.

S. S. Ramachandra Ayyar for Respondent.

The Court delivered the following

JUDGMENT —The facts of this appeal are that the plaintiffs in the Court below were consignees in respect of goods consisting of 213 steel squares and 183 steel flats (of 18 feet length) weighing 20 tons. This consignment was despatched on 13th December 1953, by the Indian Iron and Steel Co., Ltd., Burnpur, West Bengal at railway risk under R.R. No. 46111, through wagon N.W. 50009 K.C. 20 G.V. The record shows that this wagon was part of an Express Goods Train which ran between Burnpur station and Madras Salt Cottaurs. When the first plaintiff obtained delivery at Madras, he found that the contents of the wagon had been disturbed, and so asked for open delivery with re-weighment It was then discovered that the goods received at Madras weighed 239 maunds, 1 seer as against the invoice weight of 547 maunds, 10 seers. Since the Railway Administration (defendant) understood delivery in terms of weight, not description of goods, it is the deficiency in weight that is material. The first plaintiff wrote on 4th January, 1954 to the Chief Commercial Superintendent of the Southern Railway claiming Rs 4,443-7-0, the value of undelivered goods.

The defence to this action by the Railway Administration is that this Express Goods Train was stopped twice by an organised band of thieves, who effected their

*C.C.C. Appeal No. 79 of 1957. 10th November, 1960. (19th Kartika, 1882-Saka).

purpose by disconnecting the vacuum pipe and thus bringing the train to a standstill, between Biccavole and Dwarapudi and again between Dwarapudi and Kadiam. This gang looted the train, and the deficiency in this case entirely arises from this organised and large-scale theft. Ultimately certain articles thrown on the track were recovered, and it is interesting to note that the Railway Administration later offered to return 88 of those articles, alleged to be part of this consignment. But the records prove that those articles were not part of this consignment, and hence the appellants refused to take delivery of them. Another important fact is that, out of a much larger gang, six persons were later apprehended by the Railway Police and successfully prosecuted. The Administration disclaims any complicity of its servants, or any responsibility springing from neglect of its duties as bailee in respect of these goods.

The learned First Assistant Judge of the City Civil Court tried this action on the merits, after framing the relevant issues. He came to the conclusion that the goods were lost by theft, in spite of due care and caution taken by the Railway Administration (*issue* 4). He dismissed the suit with costs to the defendant-Administration.

The legal principles applicable to this action are not in dispute. They are enunciated in section 72 (1) of the Indian Railways Act, and, broadly stated, the responsibility of the Administration is that of a bailee under sections 151, 152 and 161 of the Indian Contract Act of 1872. Further, sub-clause (3) of section 72 specified that this responsibility is not affected by anything relating to the responsibility of carriers in the common law of England or in the Carriers Act, 1865. It is well known that a special and higher responsibility, not being part of the ordinary law of bailment, was imposed by the law of England on carriers. We are not now concerned with this, nor with the further statutory modifications of that liability. The present liability is primarily that of a bailee, upon the standards specified in section 151 of the Contract Act, following the principles expounded in the leading case of *Coggs* v. *Bernard*[1]. I might here observe that the criterion in section 151 of the care that should be taken by a man of ordinary prudence, under similar circumstances, in respect of his own goods, does not imply any heroic measure of responsibility or conduct. Though some men might defend their goods, even at the risk of injury to person or loss of life, that is not the standard to be imposed in respect of a bailee. This is of some relevance in the present case, when we come to the facts regarding the actual raid.

The facts of the actual raid fully appear in the record from the evidence of the guard Durkaprasad (D.W. 2) and from contemporary reports, particularly Exhibits B-4, B-6, B-7, B-8, etc. There were two stages of this raid, first at Biccavole where the train arrived at 21-17 hours. When D.W. 2 peeped through the formation on the right side of the track, he found two persons running into the field from the train, after the train had been compelled to stop on the sudden drop of vacuum. There can be no doubt at all that the vaccuum pipe was disconnected, compelling the stoppage of the train, and a raid carried out. From 21-42 hours to 21-55 hours the train was stopped there, to secure two iron flats lying on the track. Again, when the train approached Dwarapudi, the guard looked out and saw iron angles dropping down on both sides of the track. He sent signals to the driver for backing the train, but the driver was unable to act upon them, presumably because of danger signals on the track. So the train went forward and the gang of robbers again got into the train, and started throwing angles on both sides. The guard himself counted more than 105 such angles. Admittedly, this second part or stage of the raid occurred between 10-08 p.m. and 10-25 p.m., when the train reached Kadiam from Dwarapudi. The detailed report of the guard (Exhibit B-5), also shows that the station staff were so terrorised that they refused to proceed and to check the effects of the raid. In Exhibit B-35, the guard complains of the indifference of the station

1. 1 S.M.L.C. 175.

staff at Dwarapudi and Kadiam, but the record makes it clear that this was not indifference, but cowardice. Apparently as the record itself suggests in one context, the staff feared that the robbers might throw stones. As I said earlier, the matter was duly reported to the Railway Police, a number of articles were recovered from the track, though unfortunately none of the articles belonging to the appellants were recovered, and certain of the miscreants at least were successfully prosecuted in due course.

In this state of evidence , the question is whether the Railway Administration (the defendant) is at all liable for deficiencies in this consignment, applying the well known legal principles to the instant facts. I shall first summarise the contentions of learned counsel for the appellants on this aspect, before I deal with them *seriatim*.

Learned counsel for appellants urges, firstly, that there is no intrinsic and satisfactory evidence to show that the loss of the articles in the open wagon in which the goods of appellants were carried, was really due to the raid. We have the evidence of the checker Sri Chakravarthi (P.W. 1) to show that the goods were loaded in the open wagon, and secured in such manner as permitted, in the usual way at Burnpur. We have the evidence about the short delivery at Salt Cottaurs, Madras, We have no evidence directly proving that, during the organised raid by the thieves. the contents of this wagon were also looted. Learned counsel pleads that the deficiency might have occurred later, by some Railway employees taking advantage of the fact of the raid, to rob these goods. Secondly, it is argued that it was physically impossible that these heavy iron goods secured in an open wagon could have been stolen during the short period of the raid, particularly as goods of this description were not found lying on the track at all. Admittedly, other goods, mainly angles, were recovered. Thirdly, it is pointed out that such documents as Exhibits B-9 and A-21 show that there were prior reports of suspected thefts on this track. The Railway Administration ought to have taken steps to prevent their recurrence. If at least, an armed sentry had been sent along with the train, to fire a shot if any such incident occurred, the thieves would have been frightened away, and there would have been no appreciable loss. Finally, it is urged that the Railway Administration was callous in the extreme in replying to the complaint of the appellants, or in taking prompt and energetic action thereon. Certain essential records have also not been produced, and all the evidence available upon this aspect has not been adduced by the defendant-Administration.

I have carefully considered these arguments, in the light of the record and the authorities cited before me. Of the authorities cited, many relate to losses under totally different circumstances, particularly from covered wagons. In addition to those authorities which I propose to specify, I might refer also to *Barada Chandra* v. *Assam Bengal Railway*[1], *Secretary of State* v. *Nand Ram*[2] and *Mathra Prasad* v *G. I. P. Railway Co.*[3]. But, unfortunately there is no domain of case-law where precedents are less helpful in determining such a responsibility as the instant one and obviously each case will have to be assessed upon its own facts ; the decisions can but reiterate the broad principles which I have earlier referred to, and which are not in dispute. Thus, in *The South Indian Railway Company, Limited* v. *Messrs. V. M. S. P. Brothers*[4] there was no actual evidence of theft. Further, the learned Judges specifically found that unknown persons must have been able to break open a closed wagon, and to get into it while it stood on the platform at Erode Station. They also found that the train could not have been entered into while it was actually running between Erode and Pasur. 'Wilful neglect' was held established under these particular circumstances. In *Brindraban* v. *G. I. P. Railway Company*[5] we have again to deal with a closed wagon, with the absence of any device to exclude thieves, and the frequency of prior thefts, in respect of which no precautions had been taken. In *Surat Cotton Spinning and Weaving Mills Limited* v. *The Secretary of State for India in*

1. A.I.R. 1926 Cal. 983.
2. A.I.R. 1929 All. 749.
3. A.I.R. 1927 All. 751.
4. (1931) 62 M.L.J. 573.
5. A.I.R. 1926 All. 394.

Counsel[1] a presumption under section 114, *Illustration* (*g*) of the Evidence Act was drawn, because certain vital evidence had been suppressed by the Railway Administration. This pointed to a complicity in the theft by some members of the Administration, which the Court assumed as a justified inference on the facts. In *Kashi Ram* v. *E.I. Railway Company*[2], 'Wilful neglect' was held established where the Railway had failed to provide any communication between the guard and the driver of the engine even for an emergency. It cannot be said that any of these cases has much bearing upon the instant facts.

I have carefully considered the arguments advanced and the probabilities stressed by learned counsel for the appellants. I have no doubt whatever that, not merely a large scale and organised raid by thieves occurred in this case, but that the open wagon containing the goods of the appellants was looted by these thieves. Obviously, we cannot lay down a general proposition that a fact of this kind should be proved by direct evidence. If such a burden were to be imposed on the Railway Administration, it would imply that the administration is liable as a bailee, unless it could adduce evidence of persons who saw the entire theft or robbery at every stage, and with regard to every wagon. Clearly, the Administration is entitled to plead that the fact could be established by circumstantial evidence also. The evidence of the guard that he saw 15 thieves, does not at all appear to be conclusive that no more took part. On the contrary, it is quite likely that a much larger number took part, and that the guard could see this number alone. Again, the evidence relating to the recoveries does not seem to me to exclude the possibility that many other goods in this train were looted, and thrown on the track, which were not recovered at all. We simply do not know how many people organised the raid, and what arrangements the thieves had made for taking away the articles as they were thrown on the track. It is true that the goods of the appellants were in a open wagon, secured in such fashion that the thefts could not have happened without the use of at least a hammer, and without the co-operation of several men. But when the thieves were audacious enough to cut or disconnect the vacuum pipe, and carry out a large-scale raid, taking advantage of the lonely locality and the night time, I do not see why they should not have brought implements, in order to remove all those articles. On the contrary, the alternative hypothesis that, taking advantage of this raid, railway employees at some later stage might have removed those articles for their gain, seems to me to be quite fantastic. It is not supported by a single fact or probability in the record. Learned counsel for the Administration has furnished me with the actual transit particulars of this train, and it is at least clear that the train arrived only two hours late at Tondairpet marshalling yard. It is true that the register of timings possessed by the guard has not been produced, but the evidence is that this was lost during the Godavari floods. There is no evidence *per contra*. It is true that a check could have been made of this wagon, by detaching it, at an earlier stage of the journey, such as at Rajahmundry station. But the instructions do not appear to require this, or even to permit this. Since the train arrived in time at Salt Cottaurs, or almost in time, an extensive check of the contents of this Express Goods Train could not have been made, nor I may add, could any railway employees, even acting in large-scale concert, have looted the goods of the plaintiff's wagon. Rule 110 of the Rules referred to by learned counsel, merely requires detachment or readjustment, of a open truck, where the load is apparently shifted or where such adjustment is necessary. It is not clear from this rule that this has any reference at all to the measures to be taken after a theft or similar incident. Presumably, this applies to the times when the guard makes his inspection, at the commencement of the journey, and before reaching the destination. As the rules stand, I see nothing in the rules to justify the argument that the wagon should have been detached and the contents inventoried, and checked earlier by the guard himself. In any event, this will not affect the main issue of fact.

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1. (1937) 2 M.L.J. 689. 2. A.I.R. 1927 Pat. 9.

On the whole, I am thoroughly satisfied that a large-scale raid by thieves took place, and that the contents of the wagon of the plaintiffs suffered loss during this raid, and because of the activities of the thieves. It is true that this is established by circumstantial evidence alone, but no other inference is possible upon the facts and probabilities. As regards prior thefts, there is only certain evidence that one or two suspected instances were reported in the recent past. It is difficult to see what measures the Railway Administration could have taken, at least with regard to open wagons secured in the usual manner, short of allotting an armed sentry or guard to each goods train. Pilferages in the previous cases appear to have been mere attempts, and were probably treated as isolated instances. I do not see that there was a responsibility on the Railway Administration to send an armed escort with this particular goods train.

In result, therefore, I agree with the finding of the learned Judge below on the main issue of fact, that the loss in this case was wholly due to the raid, and that the administration was not guilty of any neglect in this respect. The record does not justify the inference that the Administration failed to discharge its duties as bailee, and was hence bound to make good the loss.

But, before parting with this appeal, I must observe that the subsequent conduct of the Administration in dealing with this claim, has been unsatisfactory in the extreme. The Administration replied to the claimant after a lapse of nearly 10 months, whereas, considering the gravity of the loss and the understandable chagrin and disappointment of the appellants, the matter should have received the most expeditious, thorough and sympathetic consideration. Indeed, it may very well be that the bitterness and frustration resulting from the very indifferent way in which the Administration chose to justify and explain its own responsibilities as bailee in the matter, once the question was mooted, have been largely instrumental in bringing about this action. For this reason, I disallow costs to the Railway Administration-defendant throughout, though in dismissing the appeal costs must usually follow the result. Further, I desire to place on record one or two constructive suggestions in the context of the present facts. Firstly, the Railway Administration must realise that its responsibilities as bailee are very real, and that when the occasion arises to justify them, this is not to be lightly regarded, or taken as a matter of ordinary office routine. Claims of this character should receive top priority as matters requiring urgent attention at a high level of efficiency and responsibility. The circumstances should not merely be thoroughly investigated, but the claimant should be assured that everything is being done to investigate the claim and to make good the loss, if the Railway employees have been to blame in any way. Also, even if the Railway Administration is not liable as bailee, because of such unfortunate circumstances as an organised raid by outside thieves, the Administration would do well to consider the claim sympathetically, without prejudice to its own stand. With these observations the appeal is dismissed, with the direction that parties should bear their own costs throughout.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUNHAMED KUTTI.

Ajab Bai .. *Petitioner**

v.

T. Ramanujachari and another .. *Respondents.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), *section* 33 (2)—*Applicability—Order regarding Court-fee on report of Court-fee Examiner—If can be revised or reviewed by succeeding judge.*

Two conditions are necessary before a defendant, who claims to be a prior mortgagee, can be called upon to pay court-fee on his claim under section 33 (2) of the Madras Court-fees and Suits

*C.R.P. No. 1747 of 1959. 16th December, 1960.
(25th Agrahayana, 1882—Saka).

Valuation Act. The first is that he should pray in his written statement that the amount due on his mortgage or charge be determined. The second is that there should be a direction in the decree for the payment of such amount to him. It is not open to a succeeding Judge to revise or review an order of his precdecessor regarding Court-fee to be paid on the written statement on a report of the Court-fee Examiner.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the City Civil Court, Madras, dated 8th May, 1959 and made in O.S. No. 2003 of 1956.

R. Narasimhachari and *N. Varadarajan*, for Petitioner.

The Government Pleader (*A. Alagiriswami*), for State.

N. C. Raghavachari and *N. S. Varadachari*, for Respondents.

The Court made the following

ORDER.—This Civil Revision Petition raises a question of Court-fee under section 33 of the Court-fees Act.

The facts briefly are: The plaintiff in O.S. No. 2003 of 1956 on the file of the City Civil Court filed a suit on a mortgage impleading the mortgagor, the first defendant, and the second defendant, the petitioner herein, alleging that she is a puisne mortgagee. The second defendant filed a written statement stating that she is not a puisne mortgagee but a prior mortgagee. Issues 4 to 6 were raised on this contention. They were found for the second defendant and the learned Judge gave judgment in the following terms:

"As a result of my findings on Issues 1 to 6, there will be a mortgage decree in favour of the plaintiff as against the first defendent as prayed for subject to the right of the second defendant. Time for payment six months."

At the time of drafting the decree the office, it would appear brought to the notice of the Judge that inasmuch as the second defendant claimed priority right in respect of her mortgage, she is bound to pay Court-fee on the written statement. This matter was gone into by the learned Judge, he directed that the second defendant should pay Court-fee on the amount claimed by her and the decree be drafted in Form No. 9 of Appendix D, Civil Procedure Code and granted time for payment till 10th July, 1959. The correctness of this order is challenged in this Civil Revision Petition.

Under sub-section (2) of section 33 of Madras Court-fees Act which alone is relevant for the present purpose, two conditions are necessary to call upon a defendant who claims to be a prior mortgagee to pay Court-fee on his claim. The first condition is that he should pray in his written-statement that the amount due on his mortgage or charge be determined. The second is that there should be a direction in the decree for the payment of such amount to him. Neither condition is satisfied in this case, and therefore the order directing payment of Court-fee on the written statement of D-2 does not appear to be sustainable.

There is yet another objection to the order of the learned Judge. On a report by the Court-fee Examiner, the predecessor-in-office of the learned Judge had already gone into the question whether Court-fee has to be paid on the written-statement filed by the second defendant. In this order the learned Judge had held that the prayer made by the second defendant being superfluous and there being no prayer for payment, no Court-fee need be paid by her. It was not open to the succeeding learned Judge to review or revise this order.

In *Janaki Ammal* v. *Rangachari*[1], Ramachandra Iyer, J. held that where the question of Court-fee has been decided on merits by one Judge, the same cannot be reopened by the same Court. The stages at which it could be enquired into has been indicated by the learned Judge. They are: (1) Before the registration of the plaint or appeal. In such cases, it will be open to the Court to review, correct and further review its decision in the manner specified

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1. (1960) 2 M.L.J. 527.

in section 12 (1) of the Madras Court-fees Act ; (2) After the suit or appeal has been registered, an issue on the question of Court-fee can be raised by the defendant or respondent and the Court should decide the matter. In such cases, the decision will be binding on the Court that rendered it, unless a fresh decision is aksed for by the Court-fee Examiner ; and (3) on the objection of Court-fee Examiners under section 18 of the Act, when a decision has been given on the report of the Court-fee Examiners, no further review or reconsideration is possible except by an appellate Court under section 12 of the Act.

My attention was however drawn to sub-section (3) of section 33 by the Government Pleader who was given notice in this case. That sub-section to my mind contemplates a stage when the prior mortgagee tries to withdraw his amount. That stage has not been reached.

I am satisfied that the order passed by the learned Judge is incorrect. The same is therefore set aside. I make no order as to costs.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

G. R. Ramachari and Co., Madhurai .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Partnership—Dissolution—Valuation of Stock-in-trade—Procedure.

In respect of a partnership the privilege of valuing the opening and closing stocks in a consistent manner (either according to cost price or market price) is available only to continuing businesses and it cannot be adopted where the business comes to an end and the stock-in-trade has to be disposed of in order to determine the exact position of the business on the date of closure.

In order to arrive at the correct picture of the trading results of the partnership on the date when it ceases to function, the valuation of the stock-in-hand should be made on the basis of the prevailing market price.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (2) of the Indian Income-tax Act, 1922 (Act XI of 1922), in R.A. Nos. 590 and 591 of 1954-55 on its file (I.T.A. No. 652 and E.P.T.A. No. 13 of 1954-55, Assessment year 1945-46) for decision on the following question of law, *viz* :—

" Whether on the facts and in the circumstances of the case, the valuation of closing stock as on 11th September, 1944, with reference to the branches at Bombay and Nagpur as adopted by the Tribunal was correct in law ?"

K. Srinivasan and *D. S. Meenakshisundaram*, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax and *S. Ranganathan*, for Respondent.

The Judgment of the Court was delivered by

Srinivasan, J.—The assessee was a partnership concern consisting of two partners, Ramachari and Anantaram. It manufactured and sold textiles known as Bombay Dhavanies. Its central office was at Madurai and it had its branches at Bombay and Nagpur. In the course of the account year from 13th April, 1944 to 12th April, 1945, disputes arose between the partners which led to the dissolution of the partnership. It resulted in the accounts being taken in respect of Madurai shop from 13th April, 1944 to 7th July, 1944 and the accounts of the Bombay and Nagpur shops upto 11th September, 1944. It would also appear that Ramachari took over the entire stock. In the suit between the two parties in this connection, it was decided by the High Court that in order to settle the claims *inter se* the parties, the stock as on the final dates of accounting should be valued at the market price.

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*R.C. No. 71 of 1956. 8th September, 1960.
(17th Bhadra, 1882—Saka).

The original assessment for the assessment year 1945-46 had been completed on 20th March, 1950. This was set aside on appeal by the Assistant Commissioner who directed that a fresh assessment should be made. It was found then that as against the value of the stock which Ramachari took away relating to the Nagpur and Bombay branches which was shown in the books as Rs. 22, 286 the valuation as fixed by the High Court for the settlement of the disputes among the partners was Rs. 31,001. The Department accordingly took the view that the difference represented the "realisable position" and that for the purpose of

> "dissolution of a firm and consequent division of assets and liabilities the schedules that are prepared have to be on the basis of the ruling market price at the date of such dissolution as the valuation involves adjustments of the rights and obligations of the partners *inter se*, the consequential profit or loss requires to be ascertained and divided among the various partners."

On this basis, the Department held that this difference of Rs. 8,715 represented the profits of the partnership and made the assessment accordingly. In appeal the Appellate Assistant Commissioner confirmed this assessment. He was of the further view that when Ramachari took over the stock in hand it was not equivalent to the taking over of stock from one accounting period to another but a transfer from one assessable entity to another. He thought there was a virtual sale by the firm to the individual partner and accordingly that any profit arising from this sale even if it was only notional could be brought to tax. The further appeal to the Appellate Tribunal also failed. In the view of the Tribunal, notional stock valuation at the opening and the closing of the accounts every year was available only in respect of continuing businesses for unsold stock and that when a finality is reached in a business by the termination of the business as in this case, the necessity for such valuation disappears and the

> "actual realisation price of the stock by transfer to one of the partners at prices fixed by the decree has to take its place."

Under section 66 (2) of the Act the following question has been referred to us:

> "Whether on the facts and in the circumstances of the case, the valuation of closing stock as on 11th September, 1944, with reference to the branches at Bombay and Nagpur as adopted by the Tribunal was correct in law ?"

The facts are clear from what has been stated above, and the short question is whether, in a case where the business comes to an end, the assessee is entitled to value the closing stock in the same manner as he has been doing when he was continuing the business. It is not denied by the Department that the valuation of the stock both at the opening and the closing of any year was being made at cost price in earlier years when the business was continuing. The assessee claims that he is entitled to adopt the same method even when the business is closed and the assessable entity ceases to exist. A somewhat vague claim was put forward that in such an event what remains on hand as stock-in-trade loses its character as such and becomes capital assets. We are not prepared to accept this proposition. It is obvious that when a business ceases, all its stock-in-trade has to be disposed of and brought to account in order to balance the books. The goods on hand do not lose the character of stock-in-trade, and this propostion put forward by the assessee has no authority to sustain it.

On behalf of the assessee, the decision in, *In the matter of Messrs. Chouthmal Golapchand*[1], has been relied upon. That was a business which was carried on by four partners, and in the relevant accounting year there was an opening stock of shares valued at the cost price of Rs. 85,331. During that accounting year the parties entered into an agreement to dissolve the firm on and from 30th March, 1936, which was the last day of the accounting year. In pursuance of that agreement, even during the course of the accounting year and prior to the actual dissolution, they divided the stock-in-hand, which consisted of shares, *in specie*. They purported to value this stock at the prevailing market price at the date on which they divided

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1. (1938) 6 I.T.R. 733.

it and claimed a loss of Rs. 33,365 in the business. This claim of the assessee was repelled, and the pertinent observation of Costello, J., was

"To state the matter succinctly, I agree that if these shares were put into the accounts at cost they ought to have been taken out of the accounts at cost."

It would be noteworthy that the division of the stock-in-trade was *in specie* and the loss was not incurred as the result of any sale transaction. It is also important to notice that the partnership continued to run till the closing of accounting year. It was observed in this decision :

"Having put in the value of these shares as at cost and being in the position that they were not able, and in fact did not seek to change the system of accounting in this particular case, we must take the cost price of these shares as the starting point. It seems to me, therefore, that if there had been any real sale of these shares in the course of the year 1992 (Ramanavami) it might have been open to the assessees to say that it was between the cost and the sale price that there was this difference of Rs. 33,365. But there never was a sale. Therefore, I prefer to say that there was a division of these shares and that division took place, as the learned Commissioner states, on 9th March, 1936. The partners for their own purpose chose to say that they would take over the shares or rather their portion of the shares. What they said as regards a loss seems to me to be definitely an *ipse dixit*............"

Derbyshire, C.J., quotes the observations of Lord Buckmaster in *Commissioner of Income-tax, Bombay Presidency* v. *Ahmedabad New Cotton Mills Co., Ltd.*[1] :

"The method of introducing stock into each side of a profit and loss account for the purpose of determining the annual profits is a method well understood in commercial circles and does not necessarily depend upon exact trade valuation being given to each article of stock that is so introduced. The one thing that is essential is that there should be a definite method of valuation adopted which should be carried through from year to year, so that in case of any deviation from strict market values in the entry of the stock at the close of one year it will be rectified by the accounts in the next year."

It is obvious from the above that the privilege of valuing the opening and closing stocks in a consistent manner is available only to continuing businesses and that it cannot be adopted where the business comes to an end and the stock-in-trade has to be disposed of in order to determine the exact position of the business on the date of closure.

In *Chainrup Sampatram* v *Commissioner of Income-tax, West Bengal*[2], a firm carrying on business at Calcutta as bullion merchants transferred some part of the stock to Bikaner where the partners resided. Their value at cost was credited in the books of the firm. It was claimed by the Department that it amounted to a sale to the partners for their domestic use and the market value of bullion was taken to arrive at the taxable profits. The decision proceeded on a different point. The learned Judges observed :

"It is wrong to assume that the valuation of the closing stock at market rate has, for its object, the bringing into charge any appreciation in the value of such stock. The true purpose of crediting the value of unsold stock is to balance the cost of those goods entered on the other side of the account at the time of their purchase, so that the cancelling out of the entries relating to the same stock from both sides of the account would leave only the transactions on which there have been actual sales in the course of the year showing the profit or loss actually realised on the year's trading."

Later on they observed :

"In the present case, although it would appear that the cost price of part of the silver despatched to Bikaner was less than the market price at the end of the year, the reference did not raise any question regarding the basis on which the amount in dispute, *viz.*, 2,20,887 was arrived at. On the other hand, the question referred assumed that the said sum was correctly computed and put in issue only its assessability in law on a true construction of section 4 (1) (*b*) and section 14 (2) (*c*) of the Act."

This decision is important for the purpose of showing the basis for the valuation of the opening and closing stocks in any year in a consistent manner.

In *Kikabhai Premchand* v. *Commissioner of Income-tax*[3], a similar question arose. The assessee, who was a dealer in silver and shares and who was the sole owner of

1. (1929) 58 M.L.J. 204: L.R. 57 I.A. 21 at 23: 24 I.T.R. 481. I.L.R. 54 Bom. 213.
2. (1953) S.C.J. 655 : (1954) S.C.R. 211 : 24 I.T.R. 481.
3. (1953) S.C.J. 721 : (1953) 2 M.L.J. 810 : 24 I.T.R. 506.

the business, maintained his accounts according to the mercantile system. During the relevant year of account, he withdrew some silver bars and shares from the business and settled them on certain trusts. In his books the assessee credited the business with the cost price of the bars and shares so withdrawn. The Department sought to bring to tax the difference between the cost price and the market value at the date of the withdrawal. This view was upheld by the Appellate Tribunal and the High Court. But on appeal to the Supreme Court it was decided that no income arose to the assessee as a result of such transfer. After observing that in revenue cases regard must be had to the substance of the transaction rather than to its mere form, their Lordships proceeded to state ;

> " In the present case disregarding technicalities it is impossible to get away from the fact that the business is owned and run by the assessee himself. In such circumstances we are of opinion that it is wholly unreal and artificial to separate the business from its owner and treat them as if they were separate entities trading with each other and then by means of a fictional sale introduce a fictional profit which in truth and in fact is non-existent. Cut away the fiction and you reach the position that the man is supposed to be selling to himself and thereby making a profit out of himself which on the face of it is not only absurd but against all canons of mercantile and income-tax law..........The appellant has reflected the true state of his finances and given a truthful picture of the profit and loss in his business by entering the bullion and silver at cost when he withdrew them for a purely non-business purpose and utilised them in a transaction which brought him neither income nor profit nor gain."

It seems to us that none of these cases has any application to the facts of the present case. There is no authority directly in point dealing with this question: where a partnership concern dissolves its business in the course of the accounting year, what is the basis on which the stock-in-trade has to be valued as on the date of dissolution. We have accordingly to deal with the matter on first principles.

The case of a firm which goes into liquidation forms a close parallel to the present case. In such a case all the stock-in-trade and other assets of the business will have to be sold and their value realised. It cannot be controverted that it is only by doing so that the true state of the profits or losses of the business can be arrived at. The position is not very different when the partnership ceases to exist in the course of the accounting year.The fact that Ramachari one of the ex-partners took over the entire stock and continued to run the business on his own, is not relevant at all, when we consider the profits or losses of the partnership which has come to an end. It should therefore follow that in order to arrive at the correct picture of the trading results of the partnership on the date when it ceases to function, the valuation of the stock in hand should be made on the basis of the prevailing market price.

It is contended on behalf of the assessee that, when the High Court adopted the market price of the goods as on 11th September, 1944, it did so in order to adjust the claims between the partners, and that fact should have no bearing on the question of the valuation under the income-tax law. That is no doubt true. But in a case of this kind we are of the view that the market price alone should be taken in order to arrive at the trading results of the business. The judgment of the High Court and the report of the Commissioner in connection with the valuation of the stock would only serve as evidence of the market value of the goods on the date in question.

It is further claimed by the assessee that after taking over the goods he has valued them at cost price as was done by the partnership itself when the goods belonged to the partnership. We do not see how this fact can affect the position. It is true that because Ramachari as an individual carrying on business has taken over the goods of the partnership and has valued them at cost price, there would be a greater margin between that price and the eventual sale price leading to a larger profits in his hands being brought to tax. It was no doubt open to him to have valued the goods at the market price because on the dissolution of the partnership when accounts were settled between the parties he had to pay the difference to his partner Anantharam on the basis of the market price on the date of the

dissolution. That he failed to record the value in his individual accounts at the price at which they had to be dealt with on the dissolution of the partnership is not a factor that can affect the conclusion as to the principle on which the closing stock has to be valued in the case of a dissolved partnership in order to arrive at the true position of the profits of the partnership.

We accordingly answer the question referred to us in the affirmative and against the assessee. The assessee will pay the costs of the Department, counsel's fee Rs. 250.

K.L.B. — *Reference answered against assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Krishnamurthy Ayyar .. *Petitioner**

v.

Vijayaraghavachariar .. *Respondent.*

Partnership Act (IX of 1932), sections 9 and 12 (d)—Suit for dissolution of partnership and for accounts—Evidence—Value of account-books kept by the partnership—Presumption—Rebutted.

Under the Partnership Act every partner has a statutory right to inspect the books of accounts of the firm, to scrutinise the entries made therein and thereby inform himself of the progress of the business of the firm. When the account books of the partnership firm is produced by a partner as being those maintained in the regular course of business they are *prima facie* evidence against each of them and also for any of them against the others. But the presumption about their genuineness is a rebuttable one and if any of the partners seeks to surcharge or falsify the accounts it is open to him to prove the same by evidence. The Court might however give special directions in regard to the accounts under Order 20, rule 17, Civil Procedure Code.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the District Munsif, Salem, dated 24th March, 1959 and made on the Memo. of Commissioner in I.A. No. 1686 of 1957 in O.S. No. 766 of 1955.

D. Ramaswami Ayyangar, for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) *R. Viswanathan* and *C. Rangaswami Ayyangar,* for Respondent.

The Court made the following

ORDER.—The plaintiff in O.S. No. 766 of 1955 on the file of the Court of the District Munsif of Salem (O.S. No. 65 of 1954, Sub-Court, Salem) sought relief for dissolution of the suit partnership and for taking accounts. He alleged that himself, the defendant in the suit, and one K. Rajam Iyengar formed a partnership under the name and style of Sri Rajeswari & Co., (Handlooms), Salem. According to the plaintiff the partnership was one terminable at will. The plaintiff prayed for a declaration that the firm had been dissolved on 14th March, 1951 or on any other date according to law and also prayed for taking the accounts of the firm.

The defendant contended that the only partners of the firm were himself and the plaintiff and that Rajam Iyengar was never a partner. He stated that the plaintiff was in management of the partnership business, and that he acted on his own responsibility and disposed of the stocks on 14th March, 1951. He charged the plaintiff with having evaded the giving of the true accounts to the defendant.

Several issues were framed in the suit and at the trial of the suit the account books of the firm were marked as Exhibits A-13 to A-23. The learned District Munsif of Salem found that Rajam Iyengar was also a partner in the suit partnership that the partners were entitled to share equally the profits and contribute equally

* C.R.P. No. 965 of 1959. 29th April, 1960. (9th Vaisakha, 1882—Saka).

to the losses sustained by the firm, and that the amounts advanced by the plaintiff to the suit firm shall not carry any interest. He further held that the suit firm was dissolved on 5th March, 1954 and that the accounts of the firm should be taken from 14th December, 1945, the date on which the business commenced upto 5th March, 1954, the date of dissolution. In the result the learned District Munsif passed a preliminary decree for taking accounts of the suit firm in acordance with his findings in the judgment.

T. Lakshminarayanan, Advocate, was appointed as the Commissioner in the final decree proceedings to go into the state of accounts between the partners. On behalf of the defendant a memorandum was filed before the Commissioner stating that hehad reasons to believe that the accounts of the firm had not been properly andcorrectly kept by the plaintiff. Paragraph 4 of the memorandum, which is material, is as follows :—

> " It is submitted that in so far as there is no finding by the Court that any of the books before the Commissioner are regularly and properly kept, it is untenable for the plaintiff to request the Commissioner to proceed on the basis of the books and without going into the truth of the entries contained in the said books............"

A memorandum was also filed on behalf of the plaintiff before the Commissioner. Paragraph 3 of the memorandum was as follows :

> " The books of accounts of the partnership are produced in Court and the Income-tax returns have been prepared based on those books and the income-tax assessments have been finalised and the income-tax due by the partners have also been paid. So at this stage the defendant should not be allowed or permitted to raise any objections with regard to any particular entry in those account books. He is not in law entitled to raise any objection or to lead any evidence at this stage before the Commissioner regarding any entry in the account books. Admittedly the books filed in the case are the books of the suit partnership and the defendant is fully aware of all the entries in the books and maintained by firm."

In view of this contest between the parties as to how far the account-books of the firm produced before the Commissioner should form the basis for further proceedings to work out the rights and liabilities of the partners the Commissioner filed a memorandum before the learned District Munsif on 16th January, 1959. He stated thus in his memorandum :—

> " As the objection raised is stated to be legal one I am unable without a direction from Court as to whether I should go into the details regarding the objections filed by the parties."

This sentence is incomplete and it shows the perfunctory manner adopted by the Commissioner. The Commissioner wanted a direction from the Court whether he should proceed to take accounts as found entered in the books of account or whether he should entertain objections with regard to all or any of the entries in the account-books raised by the defendant. He also wanted a direction whether any evidence can be taken in regard to the dispute between the parties relating to the account-books of the firm.

The learned District Munsif of Salem heard arguments upon this memorandum filed by the Commissioner and passed an order on 2nd March, 1959. He was of the opinion that under the circumstances, it was too late for the defendant to contend that the account-books were not genuine. He gave a specific direction to the Commissioner that he need not go into the correctness or otherwise of the entries made in the account books. The Commissioner was directed to take the account-books as such and proceed with the enquiry in the light of the preliminary decree and to submit his report after taking the accounts of credits and debits and liabilities of the partners and all dealings and transactions between the parties between 14th December, 1945 and 5th March, 1954.

The defendant has filed the above Civil Revision Petition against the said order feeling himself aggrieved by the mode of directions issued by the Court below in the matter of taking accounts.

The learned advocate for the petitioner contended that there was no warrant or justification for the Court below to assume that the account-books of the suit

partnership produced already were genuine so as to preclude him from challenging their correctness at this stage. He further contended that if the account-books already produced purporting to be those of the suit partnership be taken as conclusive evidence of the transactions entered therein, the defendant will stand deprived of all his rights in the matter as he is compelled to acquiesce in the " *fait accompli* ". This argument has considerable force and has to be given effect to. Under section 9 of the Indian Partnership Act partners should render true accounts and full information of all things affecting the firm to any partner or his legal representatives. Section 12 (*d*) of the Act provides that every partner has a right to have access to and to inspect and copy of any of the books of the firm. Maintaining true and proper accounts in the regular course of business of any partnership firm is one of the duties imposed upon the partners in general. Every partner of a firm has got a statutory right to inspect the books of accounts of the firm, to scrutinise the entries made therein and thereby to inform himself of the progress of the business of the firm. When a set of partnership accounts is therefore produced by one partner claiming that the books of account relate to the partnership business, and that they were maintained regularly in the usual course of business, the law attaches some evidentiary value to them by investing them with the character of *prima facie* genuineness. In *Lodge* v. *Prichard*[1], Knight Bruce, L. J., observed as follows :—

" *Prima facie* books of the partnership are evidence among all the partners, for them all and against them all, owing to the agency which pervaded all the partnership transactions. If one partner succeeded in the establishing a case of fraud that would form a ground for an exception from the general rule ; nor is there anything in the rule to exclude an allegation of a mistaken or erroneous omission or insertion."

In *Daji Abaji* v. *Govind Narayan*[2], Macleod, J., as he then was, held that the partnership books being accessible to all the partners and being kept more or less under the surveillance of them were *prima facie* evidence against each of them, and also for any of them against the others, but that they were not conclusive evidence if the person complaining of them can by clear evidence show that there was an error in the books. The learned Judge also held that when there was a question of surcharging and falsifying the accounts the case alleged must be clearly proved by the persons impeaching them. The learned Judge observed at page 814 as follows :—

" *Lindley on Partnership* (at page 566) says as follows, " with respect to evidence upon which the accounts are to be taken ; as regards the partnership books. These being accessible to all the partners, and being kept more or less under the surveillance of them all, are *prima facie* evidence against each of them and therefore also for any of them against the others."

Mr. Raikes wishes to read this passage as if it ran :

" If it is proved that all the partners have had access to the books and if it is proved that they have been kept more or less under the surveillance of them all, then they are *prima facie* evidence. This is a construction which the words above quoted cannot possibly bear. The clear meaning is that owing to the nature of the relationship between partners the books must be taken as being accessible to all and as being kept more or less under the surveillance of them all. If Mr. Raikes' argument were corresct it would follow that one partner who took no part in the active business of the firm and never went near the office might call upon his co-partner in a partnership account to prove every item appearing in the books."

The learned Judge ultimately repelled the contention of Mr. Raikes and held that the partnership books of account were *prima facie* evidence between the partners either for or against them.

It is clear that the books of account of the suit partnership already produced in the Court below constitute *prima facie* evidence amongst the partners for them all and against them. But the learned District Munsif was however in error when he held that the Commissioner need not go into the correctness or otherwise of the entries made in the account-books. The presumption in favour of the genuineness of the account-books of the firm is certainly a rebuttable presumption as it will be always open to the person challenging the account-books to show that they are not genuine or to show that particular entries in the account-books are fictious and not

1. (1853) 3 De. G. M. & G. 906. 2. (1908) 10 Bom. L.R. 811.

genuine and thus destroy the *prima facie* evidentiary value afforded by the books of accounts.

Order 20, rule 17 of the Civil Procedure Code is as follows :

" *Special directions as to accounts.*—The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account has to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised."

The learned District Munsif in the present case ought to have issued directions in the light of Order 20, rule 17, Civil Procedure Code, but he failed to do so. Indeed the learned Advocate-General appearing for the respondent did not seek to support the judgment of the Court below in its entirety but submitted that the proper direction that should issue was one under Order 20, rule 17, Civil Procedure Code. I agree with this contention.

I therefore direct that the account books of the partnership produced and marked in the case should be taken as *prima facie* evidence of the truth of the matters therein contained and that the parties interested will have liberty to take such objections thereto as they may be advised. Subject to this modification the Civil Revision Petition is dismissed. There will be no order as to costs.

R.M. ——— *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

The State of Madras represented by the Deputy Commissioner of Commercial Taxes, Coimbatore Division, Coimbatore .. *Petitioner**

v.

The Erode Yarn Stores .. Respondent.

Madras General Sales Tax Act (IX of 1939), *section* 5 *and Madras General Sales-tax Rules, Rule* 6—" *Turnover* "—*What is turnover for purposes of license fee under section* 5 *of the Act.*

Only that part of the turnover of the dealer which comes within the scope of section 5 of the Madras General Sales Tax Act either eligible to total exemption from tax or to concessional rate of tax at a preferential rate or at a single point that should be turnover for purposes of computation of licence fee.

Petition under section 12 (*b*) (1) of Madras General Sales Tax Act (*Vide* Rule 13 (*c*) (i) (*a*) praying the High Court to revise the Order of the Sales Tax Appellate Tribunal, Madras, dated 30th September, 1957 and made in T.A. No. 445 of 1957 Appeal No. 325/56-57 dated 19th March, 1957 on the file of the Commercial Tax Officer, Coimbatore (South); A 2. 447/55-56 dated 15th December, 1956 on the file of the D.C.T.O., Erode I.)

G. Ramanujam, for the Government Pleader on behalf of the Petitioner.

K. Srinivasan and *D. S. Meenakshisundaram*, for Respondent.

The Judgment of the Court was delivered by

Srinivasan, J.—The question that is raised by this revision petition filed by the State of Madras is what is the turnover for purposes of the licence under section 5 of the Act. The assessee is a dealer in yarn. In respect of the assessment year 1955-56, the assessing authority determined the turnover taxable at 3 pies in the rupee at Rs. 71,846-2-6 and the turnover subject to tax at ½ per cent. at Rs. 3,87,032-6-6. The turnover covered by the license was fixed at Rs. 39,90,544 for which license fee of Rs. 2,000 was levied. On appeal, a certain part of the turnover was deleted from that assessable to tax at ½ per cent. and the licensable turnover was accordingly fixed at Rs. 37,18,933.

* T.C. No. 8 of 1959. (Revision No. 7 of 1958).

17th November, 1960. (26th Kartika, 1882—Saka).

In the appeal before it, the Tribunal took the view, following earlier decisions of its own, that the licence turnover is the turnover which is assessed to single point tax on the strength of the license, and that the turnover that gets exempt with or without the license should be excluded from the computation of the license fee. Accordingly, the Tribunal fixed the turnover liable to license fee at Rs. 2,71,611.

The contention of the petitioner State is that the totality of the turnover which is Rs. 39,90,544 is the turnover on which the license fee should be paid. It is claimed that where the taxability or exemption of a given turnover is dependent or conditional on taking out of a license, it is that turnover which becomes eligible for either exemption or the concessional rate of tax or levy of tax at a single point, that is the turnover for purposes of the license, and that the view of the Tribunal that the liability to the license fee is limited to the taxable turnover is not in accordance with the provisions of the Act or the Rules thereunder.

It seems to us that the contention of the State has to be upheld. Section 5 of the Act provides for exemptions and reductions of tax in certain cases and also provides for the levy of tax at a single point in the case of certain articles. This is made "subject to such restrictions and conditions as may be prescribed, including the conditions as to licences and licence fees." Clearly then, unless a license is taken in accordance with the rules and such restrictions and conditions as may be imposed by the licence are complied with, the concessions contemplated by section 5 will not be available. That the scheme of the Act is a multi-point levy and that section 5 marks a departure from that scheme under certain conditions is now well established by decisions. Section 6-A further lays down that if a licence as required under section 5 is either not taken out or if any of the restrictions or conditions of the license are contravened, the dealer loses any right to the concessional levy contemplated by section 5 and becomes liable to be assessed under section 3. These provisions accordingly make it abundantly clear that a licence is essential for the purpose of getting the benefits of the concessions contemplated by the Act.

It would not normally speaking be necessary to explain the scope of section 5 but for the fact that the scope of the relevant rule defining the turnover in cases where section 5 of the Act is attracted calls for scrutiny. Rule 6 of the Madras General Sales Tax Rules as it stood in the relevant year dealt with licences. Under sub-rule (4) (*a*) a graduated scale of fees for the grant or renewal of licences was fixed. It would be noticed that under section 5 as it stood six different commodities were dealt with. Section 5 (1) relates to the sale of handspun yarn or cloth woven on handlooms which is declared to be totally exempt from taxation under section 3 of the Act. Sub-rule (4) (*b*) of Rule 6 also provided that the licence for dealing in that commodity was to be free of any charge or fee. In the case of the other commodities covered by section 5 (*ii*) to (*vi*), sub-rule (4) (*a*) provided different rates of licence fees. For instance, for dealing in cotton or cotton yarn other than haudspun yarn, the licence fee was Rs. 75. For dealing in cloth woven on handlooms wholly or partly with mill yarn the licence fee was Rs. 25. For dealing in bullion and or specie the fee was Rs. 100. This was the minimum fee up to the limit of turnover of Rs. 20,000 per annum in each of these cases. The expression used against the column fixing the fee is "if the turnover does not exceed Rs. 20,000 per annum." The question really centres round what is meant by "turnover" in this rule. On behalf of the State it was the contention that this expression should be taken as defined in the body of the Act itself, where it means "the aggregate amount for which the goods are either bought by or sold by a dealer......" It is claimed therefore that the turnover means the totality of the sales of the dealer. We are unable to give this expression such an extended meaning. Inherent in the provision for a scale of graduated licence fee and for different quantum of fee in respect of different goods, the expression 'turnover' found here must be interpreted in relation to its context and the turnover would accordingly mean only that part of the total turnover of the dealer in respect of which a licence is required under section 5. Otherwise there would be no meaning in differentiating the various

goods covered by various sub-sections of section 5 and in fixing a different scale of fees in respect of each of those commodities. We have already referred to section 6-A of the Act which provides for the denial of the concessions contained in section 5 of the Act if a licence is not taken out. That clearly points to the conclusion that no part of the turnover which is taxable at the normal rate under section 3 of the Act could be brought into the turnover for purposes of section 5 of the Act or for the computation of a licence fee under the rules.

It seems to us therefore that for the purpose of computation of the licence fee only that part of the turnover of the dealer which comes within the scope of section 5 either eligible to total exemption from tax or to concessional rate of tax at a preferential rate or at a single point that should be turnover for purposes of computation of the licence fee.

In the view we have taken we set aisde the order of the Tribunal and restore that of the Commercial Tax Officer in so far as computation of the turnover for the licence fee is concerned.

It is not denied that as a result of the decision in *Guruvayya Naidu* v. *State of Madras*[1], the maximum licence fee leviable cannot exceed Rs. 1,000. Subject to this, it will be open to the Department to fix the licence fee on the turnover indicated above.

The petition is allowed. There will be no order as to costs.

K.L.B. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATADRI.

Narasimhulu Chettiar .. *Petitioner.**

v.

K. Ramanatha Mudaliar .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 34, *rule* 14—*Prohibition against sale of mortgage property—Scope and object of.*

The provisions of Order 34, rule 14 of the Civil Procedure Code are intended to prevent the mortgagor's equity of redemption being lost at the instance of a mortgagee. Hence where a mortgagee obtains a decree on a promissory note executed by the mortgagor for arrears of interest due on the mortgage the mortgagee cannot bring the mortgaged property to sale in execution of the dscree as it will be a claim arising under the mortgage. A decree for rent arising out of a lease back in favour of the mortgagor by the mortgagee in possession as part of the mortgage transaction is a claim arising under the mortgage within the meaning of Order 34, rule 14 of Civil Procedure Code. It is not necessary that the mortgagee should be able to institute a suit for sale in enforcement of the mortgage before the prohibition could apply.

Habib v. *Daulatram*, A.I.R. 1956 Raj. 121, differed.

Petition under section 25 of the Act IX of 1887 praying the High Court to revise the Order of the Court of the Subordinate Judge of Kumbakonam, dated 13th November, 1958 and made in E.A. No. 268 of 1958 in S.C.S. No. 87 of 1956.

K. R. Venkatarama Sarma and *K. S. Venkatrama Ayyar*, for Petitioner.

K. S. Desikan and *K. Raman* for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This revision petition involves the construction of Order 34, rule 14, of the Code of Civil Procedure. The petitioner before us was the plaintiff in a small cause suit (S.C.S. No. 87 of 1956) filed in the Court of the Subordinate Judge, Kumbakonam. That suit was instituted for the recovery of a sum of Rs. 830-10-3, being the amount alleged to be due for principal and interest under

1. (1957) 2 M.L.J. 469 : I.L.R. (1958) Mad. 35 : (1957) 8 S.T.C. 690.

* C.R.P. No. 2168 of 1958. 2nd December, 1960.
(11th day of Agrahayana, 1882—Saka).

a promissory note, dated 15th March, 1954, for Rs. 740 executed by the respondent herein. The suit was decreed in his favour. In execution of the decree, certain properties belonging to the respondent were brought to sale. These properties were subject to three usufructuary mortgages under three bonds, dated May 1953, July 1953 and March 1954, for Rs. 6,000, Rs. 4,000 and Rs. 1,000 respectively, and executed by the respondent in favour of the petitioner, that is the plaintiff-decree-holder in the small cause suit. The respondent objected to the proceedings in execution and filed an application, E.A. No. 268 of 1958, praying that further execution proceedings might be dropped. The application purported to be made under Order 34, rule 14, of the Code of Civil Procedure. How the respondent sought in aid the provisions of that rule is this. The respondent, after the execution of the usufructuary morgages, took back the mortgaged properties from the mortgagee on lease on a certain rent. As he committed default in the payment of rent, he was compelled to execute the promissory note, on foot of which the small cause suit was brought.

The learned Subordinate Judge has found on the evidence that the promissory note was executed in discharge of the arrears of rent due and it must be regarded as a claim arising under the mortgages. This finding was not—and indeed, could not be—challenged before us. Order 34, rule 14 (1), runs thus:—

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by initiating a suit for sale in enforcement of the mortgage, and may institute such suit notwithstanding anything contained in Order 2, rule 2".

The respondent-judgment-debtor contended that, as the decree which was being executed was a decree for the payment of money obtained by the mortgagee in satisfaction of a claim arising under the mortgages, he was not entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgages. This objection was upheld by the learned Subordinate Judge. The decree-holder has filed the above Civil Revision Petition against the said decision.

The petition came on originally before one of us, but was referred to a Division Bench.

Undoubtedly, the language of Order 34, rule 14 (1), *primâ facie*, supports the view taken by the lower Court. Here the mortgagee has obtained a decree for payment of money in satisfaction of a claim arising under the mortgage. It must be taken to be well established that a decree for rent arising out of a lease back in favour of the mortgagor by the mortgagee in possession as part of the mortgage transaction is a claim arising under the mortgage. As already mentioned, this position was not seriously disputed. The mortgagee was therefore not entitled to bring the mortgaged property to sale in execution of such a decree. In *Kuttyal* v. *Sanjiva Rao*[1], the essential facts were similar to the facts in the present case. Chandra Reddi, J., as he then was, held that the prohibition contained in Order 34, rule 14, would apply. He explained the purpose of the provision thus:

"The provision was enacted by the Legislature for the benefit of the mortgagor, so that the mortgagee may not purchase the equity of redemption in enforcement of a money decree which he may obtain against the mortgagor, in respect of a claim arising under the mortgage. The intention of the Legislature seems to be that all claims arising under the mortgage should be adjudicated by the civil Court either at the time of the redemption of the mortgage or when the mortgagee brings a suit on his mortgage".

In *Kalyanasundaram* v. *Subramanya*[2], there is an elaborate discussion of the question whether a sale of the mortgaged property in contravention of Order 34, rule 14, Civil Procedure Code, is only voidable, or, is altogether void. But we are not concerned with that question in this case, as the sale has not taken place and the respondent's application was to prevent sale from taking place in contravention of Order 34, rule 14 of the Code.

1. (1952) 2 M.L.J. 675 at 679. 2. (1954) 1 M.L.J. 507 : I.L.R. (1954) Mad. 690.

The entire argument on behalf of the petitioner was founded on the admitted fact that, as the mortgages executed by the respondent in his favour were usufructuary mortgages, he cannot institute a suit for sale in enforcement of the mortgages. The contention was that the prohibition contained in Order 34, rule 14 (1) would only apply when the mortgagee would have a right to institute a suit for sale in enforcement of the mortgage. If this requirement is not satisfied, then, the provision would have no application. Learned counsel for the petitioner relied on the decision of the Rajasthan High Court in *Habib* v. *Daulatram*[1], in support of his contention. It was held there that, in order to make Order 34, rule 14 applicable, two conditions were necessary, namely, (1) that the claim on which the mortgagee seeks to bring the mortgaged properties to sale arises under the mortgage, and (2) that the mortgagee can in a given case bring a suit for sale in enforcement of his mortgage. Both these conditions must be fulfilled in order to attract the disability imposed by this rule. That case related to a pure and simple usufructuary mortgage, and as the mortgagee could not bring a suit for sale, the disqualification raised by Order 34, rule 14, was held to be not applicable to him. Modi, J., who delivered the judgment of the Division Bench, after referring to several decisions of different High Courts, proceeded to state as follows :—

"It is clear from the review of case law made above that, in all these cases, the applicability of Order 34, rule 14, was considered almost solely on the test whether the money decree obtained by the mortgagee, in satisfaction whereof he claimed the sale of the mortgaged property, amounted to a claim arising under the mortgage or not ; and once it was held that it was a claim which arose under the mortgage and was not distinct from it, this was considered sufficient to attract the operation of Order 34, rule 14.

The further consideration, which in some of these cases certainly appears to arise, that it was not possible for the mortgagee to institute a suit for sale at all in enforcement of the mortgage, received little or no consideration."

The *ratio decidendi* of the decision is to be found in the following passage :

" With great respect, it appears to us that the disqualification raised against the mortgagee by the rule in question clearly imports that he can bring a suit for sale to enforce his mortgage, and it is only where he can bring such a suit that the disqualification can be held to be applicable. As we have already pointed out, the mortgagee in the case of a pure and simple usufructuary mortgage cannot bring a suit for sale at all, and that being so, in fairness and justice, the disqualification raised by rule 14 cannot, in our opinion, be held applicable to him."

With great respect to the learned Judges of the Rajasthan High Court, we are unable to find anything in the language of Order 34, rule 14 (1), which expressly or impliedly imposes a condition that the mortgagee should be able to institute a suit for sale in enforcement, of the mortgage before the prohibition can apply. Logically, the contention on behalf of the petitioner would lead to the application of the rule of prohibition to the case of a simple mortgage, which *inter alia* provides that a suit for sale shall not be instituted till a certain date, and before that date the mortgagee obtained a decree for payment of money in satisfaction of a claim under the mortgage, say, for accrued interest. The construction sought to be placed by learned counsel for the petitioner on Order 34, rule 14, Civil Procedure Code, would permit the very mischief which, in our opinion, the provision was intended to provide against, namely, the extinguishment of the mortgagor's equity of redemption at the instance of the mortgagee without giving an opportunity to the mortgagor to exercise his right of redemption. It is well setttled that, if in execution of a decree, such as the decree in the present case, the mortgaged property is sold to either the mortgagee himself or to a third person, the mortgagor will lose his right of redemption.

The learned Judges of the Rajasthan High Court, apparently, thought that the application of the rule to the case of a usufructuary mortgage would entail hardship to the mortgagee. We do not think so. It must not be overlooked that a person who takes a usufructuary mortgage pure and simple is presumably aware that he can realise the amount advanced by him only by the enjoyment of the usufruct,

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1. A.I.R. 1956 Raj. 121.

that is, the rents and profits from the mortgaged property. Once it is found that a particular claim for money is a claim arising under the mortgage, on principle, the same rights and consequent disabilities should also apply to it. The amount due in respect of such a claim would also have to be recovered in the same way, namely, by enjoyment of the usufruct. The mortgagor would not be entitled to redeem the property unless he pays to the mortgagee not only the amount advanced, but also the amount for which the mortgagee has obtained a decree in satisfaction of claim arising under the mortgage. When the usufructuary mortgagee is precluded from bringing the mortgaged property to sale to enforce his mortgage, he should be equally precluded from bringing the property to sale to satisfy a claim arising under the mortgage. With respect, we are unble to accept the reasoning or conclusion of the learned Judges of the Rajasthan High Court. No other decided case was brought to our notice which supports the petitioner's contention.

The Civil Revision Petition is dismissed with costs.

R.M. —————— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAMACHANDRA AYYAR.

The Management of "Woodbriar" Estate, Devarshola P.O. and Sussex Estates, Nellacotta, P.O. Nilgiris District .. *Petitioner* *

v.

The Workers in 'Woodbriar' Estate, Devarshola P.O. and Sussex Estates, Nellacotta P.O. represented by the Secretary, Tamilnad Plantations, Workers' Union, Coonoor, The Nilgiris and another .. *Respondents*

Industrial Disputes Act (XIV of 1947),—Jurisdiction of tribunal under—Disciplinary action against employees—Scope of interference by tribunal.

It is now well settled that an Industrial Tribunal, while adjudicating on an industrial dispute relating to the dismissal of a workman for misconduct, is only to satisfy itself that the management has come to a decision in a *bona fide* domestic enquiry. Except in cases of want of good faith, victimisation or unfair labour practice, violation of principles of natural justice or perverse or baseless decision, the judgment of the management will not be interfered with.

The Industrial Disputes Act does not prescribe any procedure for the management to follow in a domestic inquiry for investigating misconduct of its employees. The only obligation of a person conducting the enquiry is that he will have to act according to the rules of natural justice. Though perhaps it may be advisable to do so, there is no obligation on the part of the employer conducting the enquiry to record the evidence much less in the language known to the employee. The memorandum of evidence if recorded by the employer, is only intended for his own use and he would be at liberty to make such corrections as may be necessary if mistakes are committed. So long as the evidence recorded is not challenged as incorrect or that portions have been fraudulently inserted, the tribunal cannot reject it as not affording proper basis for the action of the management.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.D. No. 4 of 1959 on the file of the Labour Court, Coimbatore and quash the proceedings therein dated 31st March, 1959.

N. Govindan and *S. V. Kumaraswamy* for Petitioner.

S. Mohan Kumaramangalam and *K. V. Sankaran* for Respondents.

The Court made the following

ORDER.—The Sussex Estate in the Nilgiris, one of the two estates belonging to and managed by the petitioner, had amongst its employees one M. Mohamed and

* W.P. No. 457 of 1959.

28th July, 1960.
(6th Sravana, 1882—Saka

one P. Hydross. For violating certain clauses of the standing orders, and for abusing the superintendent of the estate in vulgar language when questioned about it, the two workers were charged by the management on 4th December, 1958. When the charges were being handed over to the workers by the superintendent on the following day, the workers were alleged to have behaved in an insubordinate manner by abusing the superintendent in vulgar and filthy language. The management, thereupon, framed charges against the two workers in respect of what happened that day, and on certain other matter. M. Mohamed was charged (1) for abusing the superior officer in filthy language when the previous charge-sheet was handed over to him, (2) for declaring openly that he would disobey the orders of his superiors, and (3) for riotous and disorderly beaviour at the muster ground. The other worker, Hydross, was charged (1) for instigating the other workers to " go slow " in their work, and (2) for abusing the superior officer in vulgar language when the previous charge-sheet was served upon him. The management held an enquiry on 15th December, 1958. At the enquiry, evidence was adduced both by the management as well as the workers. The workers were found guilty of the charges made against them, and they were dismissed. An indistrial dispute was raised consequent on such dismissal, and the State Government referred for adjudication to the Labour Court, Coimbatore, by G.O. Ms. No. 253 (Labour), dated 22nd January, 1959, the following issues :

1 Whether the dismissal of Mohamed and Hydross is justified and to what relief they are entitled ;

2 To compute the relief, if any awarded, in terms of money, if it can be so computed.

It will be seen that the substantial question before the Labour Court was whether the disciplinary actions taken against the two workers were justified. The Labour Court did not find that there was any lack of good faith on the part of the management, that there was either unfair labour practice or victimisation, or that the finding arrived at by the management in the enquiry conducted by it was either perverse or baseless. But it held (1) that the charge-sheets were in English and there was no evidence on the side of the management to show that they were read out and translated to the workers in the language known to them ; (2) that the evidence in the enquiry was not recorded in the language known to the workers, although such evidence was given in Malayalam and Tamil ; (3) that there were some corrections in an ink different from that of the rest of the depositions at crucial portions relating to the charges against the workers; and (4) that there was no definite finding by the enquiring officer that the charges, as laid, had been proved. The Tribunal, therefore, held that the enquiry had not been made in a proper manner and that the same was vitiated by irregularity in regard to recording of evidence and making corrections thereof, causing prejudice to the workers. In that view, the Tribunal passed an order, setting aside the order of dismissal of the workers. The propriety of the award is questioned in this writ petition, filed by the management.

The scope of the powers of an industrial tribunal to interfere with an order of dismissal passed by an employer after a departmental enquiry has been laid down by a number of decisions of the Supreme Court. In *Indian Iron and Steel Co.* v. *Their Workmen*[1], S. K. Das, J. observed :

> " Undoubtedly, the management of a concern has power to direct its own internal administration and discipline ; but the power is not unlimited and when a dispute arises, industrial tribunal have been given the power to see whether the termination of service of a workman is justified and to give appropriate relief. In cases of dismissal on misconduct the tribunal does not, however, act as a Court of Appeal and substitute its own judgment for that of the management. It will interfere
>
> (i) when there is a want of good faith,
>
> (ii) when there is victimization or unfair labour practice,
>
> (iii) when the management has been guilty of a basic error or violation of a principle of natural justice, and
>
> (iv) when on the materials, the finding is completely baseless or perverse."

1 (1958) M.L.J. (Crl.) 266 : (1958) S.C.J. 285 : (1958) 1 L.L.J. 260 (at 269 and 270).

In *Balipatra Tea Estate* v. *Its Workmen*[1], the Supreme Court held that an Industrial Tribunal, while adjudicating on an industrial dispute relating to the dismissal of a workman for misconduct, had not got to decide for itself whether the charge framed against the workman concerned had been established to its satisfaction, and it had only to be satisfied that the management was justified in coming to the conclusion (in *bona fide* and proper domestic enquiry), that the charges against the workman was well founded. As I have already stated the Tribunal did not find that there was any lack of good faith on the part of the management in making the charges, or in conducting the enquiry. Nor has it been found that the management has been guilty of any basic error or violation of any principle of natural justice. The workers, no doubt, pleaded that the management intended to victimise them, and that it had been guilty of unfair labour practice. There is, however, no basis for the complaint in the evidence, and as the Labour Court has not either referred or given finding on that aspect of the question, it must be assumed that there is no basis for the complaint that there has been victimisation or unfair labour practice. In those circumstances, the tribunal should have only seen whether, on the materials before the management, the finding was justified or so baseless or perverse that it could not accept the same. It is not the case of either party that, on the materials before the management, the conclusion, to which it came, was baseless or perverse. But the Labour Court has proceeded to set aside the order of dismissal passed by the management, on the ground that the procedure followed in the enquiry was not proper. It is needless to point out that the Industrial Disputes Act does not prescribe any procedure for the management to follow in domestic enquiries for investigating misconduct in its employees. Independent of the statute, it cannot be said that the management is under an obligation to record depositions of the witnesses at the domestic enquiry and adopt the procedure, which a Court of law adopts in the trial of cases. In cases where however the management records evidence, it will be open to the industrial tribunal to look into that evidence and ascertain whether the management had sufficient justification to take disciplinary action it did. But, if there is no such record of evidence, it will be for the tribunal to take evidence to see whether the impugned disciplinary action had been effected *bona fide* in the exercise of the powers of the management. In the absence of any statutory provisions relating to the procedure in a domestic enquiry, the only obligation of a person conducting the enquiry is that he will have to act according to the rules of natural justice. The essentials of the rule of natural justice applicable to such cases have been laid down in *Local Government Board* v. *Arlidge*[2]. At page page 138, Lord Shaw observed:

> "If a statute prescribes the means, it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these, certain ways and methods of judicial procedure may very likely have to be imitated; and lawyer-like methods may find special favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natrual justice are *ex necessitate* those of Courts of justice is wholly unfounded."

Lord Parmoor at page 140 observed:

> "Where, however, the question of the propriety of procedure is raised to a hearing before some tribunal other than a Court of law, there is no obligation to adopt the regular forms of legal procedure. It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice."

These observations, which were made in regard to a statutory tribunal, would equally apply to the case of a domestic tribunal, where an employer conducts an enquiry in respect of a charge against his employee. It would, therefore follow that there would be no obligation on the part of the employer conducting enquiry to record evidence, though perhaps it might be advisable to do so. Nor is there any obligation to take down evidence, either in regional language or in the language known to the employee. The memorandum of evidence, if taken by the employer, is only intended for his own use. He would be at liberty to make such corrections

1. (1959) 2 L.L.J. 245. 2. L.R. (1915) A.C. 120.

as they may be necessary, if mistakes are committed. The mere fact, that corrections are made, does not mean that the record is in any way vitiated. In all cases where an employer wishes to take disciplinary action against an employee, the only obligation on the part of the former is to have a proper enquiry into the alleged misconduct of the employee; such enquiry must begin with the supply of specific charge-sheet to the employee. The guiding principle is that the enquiry should be conducted with due adherence to the principles of natural justice, that is, without any bias, giving the employee an opportunity for adequately representing his case, etc. If, in the course of enquiry, the management chooses to record evidence and at a later stage an industrial dispute is raised in regard to the conclusion arrived at the enquiry, the industrial tribunal can refer to the record of the depositions made by the employer for coming to the conclusion that the enquiry was held on proper lines. But, if there is any reason to suspect the correctness of the record, it would be open to the tribunal to reject it, and insist upon evidence being given before it to ascertain whether there had been a proper enquiry, and whether the punishment meted out by the employer was justified. So long as the evidence recorded by the employer in the domestic enquiry has not been challenged as incorrect or that the portions thereof have been fraudulently inserted, the tribunal cannot reject the record as not affording proper basis for the management's action. The reason is that such records need not conform to the practice adopted by Courts in recording depositions like explaining the record of depositions to the witness concerned, etc. These considerations apart, I am of opinion that the conclusion arrived at by the tribunal on the alleged defects in the record of depositions are not correct. There was no complaint on the part of the workers that the charges, which were in English, were not understood by them or that they were in any way handicapped at the time of the enquiry by the form in which the charges were made. That the charges were properly understood by the concerned workers, is clear from the fact, that they attended the enquiry without any complaint as to the form of the charges. I cannot accept the view of the tribunal that there is obligation on the part of the management to read out and explain the charge-sheets to the workers in their own language, unless a *bona fide* request is made to them in this behalf by the workers. I have already stated that there is no rule that evidence in a domestic enquiry should be recorded in the language of the workers or that the procedure of explaining the same to them should be adopted. In this particular case, all the witnesses, except the Superintendent, gave their evidence in the vernacular. It is stated that the evidence of the superintendent which was given in English, was interpreted to the workers in their own language then and there. There is no substance in the finding of the tribunal that there were corrections and additions in the depositions. I have been taken through the depositions, and I find that the corrections are merely formal. There is evidence to show that such corrections were made then and there in the course of taking evidence in the presence of the workers. There is no suggestion that the employer *mala fide* behind the back of the workers tampered with the depositions given, and that the depositions, as recorded, did not correctly represent the substance of the evidence given at the enquiry.

Another infirmity relied on by the tribunal is the absence of specific findings on each of the charges. If no finding is given in a domestic enquiry in regard to a particular charge, it can only be assumed that the employer did not wish to proceed with that charge. In the present case, there is definite finding that the charge of insubordination against the workmen has been established. It is also specifically stated that the punishment awarded was for that offence. If the management did not give specific findings on the other charges, it can only mean that they had dropped those charges. The quantum of punishment is entirely for the management to decide. As I have stated, the two workemen were dismissed as a result of a *bona fide* enquiry, the charges framed against them not being actuated by any ulterior motive on the part of the management. In those circumstances, the Labour Court would have no jurisdiction to set aside the order of dismissal passed on the two workers by the employer.

Rule *nisi* is made absolute. The writ petition is allowed with costs. Advocate's fee Rs. 100.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Lokambal Achi ... *Appellant**

v.

P. Srinivasa Pillai and others ... *Respondents.*

Civil Procedure Code (V of 1908), section 144—Restitution—Principle of—Money deposited in Court in pursuance of decree—Decree reversed on appeal—Basis of restitution.

Where money is deposited into Court or is paid over to the decree-holder in pursuance of a decree and that decree is reversed or altered in appeal, the principle of restitution requires that the judgment-debtor should be placed in the position which he would have occupied if the original decree had not been passed, *i.e.*, the loss occasioned to him by being deprived of the use of the money which he paid over to the decree-holder or deposited into Court must be made good to him. This will be the interest on the money deposited or paid over by him. But where the deposit in Court has been made subject to conditions which the decree-holder may be unable or unwilling to comply with then he would not be liable to pay any interest by way of restitution.

Appeal against the Order of the District Court of South Arcot, dated 30th September, 1958 and passed in A.S. No. 399 of 1957 preferred against the Order of the Court of the Subordinate Judge of Cuddalore, dated 27th August, 1957 and made in E.A. No. 537 of 1956 in O.S. No. 65 of 1943.

T. Munuswami Reddi, for Appellant.

J. R. Gundappa Rao, for Respondent.

The Court delivered the following

JUDGMENT :—Lokambal Achi, the decree-holder in Original Suit No. 65 of 1943 on the file of the Subordinate Judge of Cuddalore is the appellant before me. On 9th October, 1950, she obtained a decree in that Court for Rs. 12.278-1-0. Defendants 2 to 5 in the suit appealed to this Court in A.S. No. 117 of 1951. While the appeal was pending, Lokambal Achi levied execution. The judgment-debtors then moved this Court for stay of execution and by an order of this Court made on 29th March, 1951, it directed the judgment-debtors to deposit in Court a sum of Rs. 5,000 in cash. The judgment-debtors were further directed to furnish security for the balance of the decree amount and costs. The judgment-debtors deposited Rs. 5,000 on 11th April, 1951, but instead of furnishing security in respect of the balance of Rs. 7,496-5-0 they elected to deposit that money into Court. This they did on 25th June, 1951. On 11th July, 1951, the decree-holder applied for a cheque for Rs. 1,056-5-0 stating that it represented the costs of the suit. A cheque was ordered to issue for this amount and this was done apparently on 7th August, 1951. On 13th September, 1955, this Court disposed of Appeal No. 117 of 1951 by remanding the suit to the lower Court for disposal afresh in accordance with the provisions of Act IV of 1938. A revised decree was made by the Subordinate Judge for a sum of Rs. 2,245-13-0 plus costs amounting to Rs. 353-4-0 and subsequent interest on the sum of Rs. 1,700. On 16th August, 1956, the decree-holders were permitted to draw the balance of the decree amount in accordance with the modified decree except for a sum of Rs. 500. In 1956 the judgment-debtors filed E.A. No. 537 of 1956 for a direction to the decree-holders to pay them (1) interest on Rs. 5,000 at 5½ per cent. per annum from 11th April, 1951 to 7th August, 1951 ; (2) interest on Rs. 3,943-11-0 as from 7th August, 1951 up to the date of petition ; and (3) interest on Rs. 7,496-5-0 from 25th June, 1951 up to the date of petition at 5½ per cent. The total interest they claimed was a sum of Rs. 3,233-4-0. The contention of the judgment-debtors, that is to say the petitioners in E.A. No. 537 of 1956 was that

* A.A.A.O. No. 51 of 1959. 30th June, 1960. (9th Asadha, 1882—Saka).

they were entitled to these amounts by way of restitution under section 144, Code of Civil Procedure. The learned Subordinate Judge dismissed the application observing :

> "In the matter of restitution, the Court has to take into consideration both the parties and not only the party who applies for restitution. In this case the decree-holder has not drawn that portion of the deposit amount for which he had to furnish security. It is the decree-holder's case that he could not furnish security being in impecunious circumstances."

On appeal, the learned District Judge held :

> "As per the revised decree, the decree-holder was entitled to Rs. 1,624-1-0. He has drawn only Rs. 1,056-5-0 the costs awarded to him as per the decree on 15th October, 1951. As he was entitled to Rs. 1,624-1-0 out of the sum of Rs. 5,000 deposited by the petitioners, the latter can claim only interest by way of compensation on the difference *i.e.*, Rs. 5,000 minus Rs. 1,624-1-0=3,375-15-0. I am of opinion that interest at 3 per cent. per annum will be reasonable compensation for the loss sustained by the petitioners in this case. They are therefore entitled to restitution to the extent of Rs. 497-38 nP."

The decree-holder has now come to this Court in appeal.

Two amounts are involved in the present controversy. One is Rs. 7,496-5-0 which the judgment-debtors deposited on 25th June, 1951. They cannot possibly claim interest on this amount because in respect of this amount they were called upon only to furnish security. They were not really called upon to put that money into Court. Instead of furnishing security as they were ordered to do, they elected to put the money into Court. Both the Courts have properly found that the judgment-debtors are not entitled to interest on this amount.

The other sum is the difference between the amount of Rs. 5,000 which the judgment-debtors put into Court on 11th April, 1951 and the amount for which Logambal Achi finally got a decree. The question is whether the judgment-debtors are entitled to any and, if so, what interest on this amount.

All the decisions of this Court that have a bearing on this matter have been placed before me by learned counsel. Various other decisions commencing from *Rodger* v. *The Comptoir D'Escompete De Paris*[1], were also read and discussed. It is unnecessary to examine these cases seriatim. It will be sufficient to observe that two principles have been held to be applicable to situations similar to the present. One is the principle of restitution incorporated in clear terms in section 144, Code of Civil Procedure. The lower Court passes a decree. In pursuance of that decree, the judgment-debtor puts the money into Court or pays it over to the decree-holder. That decree is reversed or altered in appeal. Then the principle of restitution requires that the judgment-debtor should be placed in the position which he would have occupied if the original decree had not been passed. If that decree had not been passed, he would have had the use of the money which he deposited into Court or paid over to the decree-holder; and that use he has lost. That loss must be made good to him ; and that can be done only by requiring the decree-holder to pay interest on the money. This principle has been applied without qualification where either the money has been actually paid over to the decree-holder or has been deposited in Court and no conditions have been imposed or difficulties placed in the way of the decree-holder drawing out that amount. If the money has been really made available to the decree-holder he would be bound to pay interest if the decree is reversed.

The other principle is this. Even though the money has been deposited into Court, but the deposit has been made subject to a condition like furnishing security which the decree-holder may be unable or unwilling to comply with or other difficulties are placed in the way of the decree-holder with the result that the money was really not available to him at all then he would not be required to pay interest ; and the reason of the rule is that to do so would be to require him to pay for an advantage which he never really enjoyed through no fault of his own.

1. 24 L.T. 111.

Taken separately both the principles are eminently just and equitable but in their actual operation they may sometimes clash, as for instance, in situation similar to the present. In such cases Courts must effect such equitable adjustment as the circumstances will permit.

At page 429 in *Gauridutt* v. *Madho Prasad*[1], the Court observed :

> " I think it quite consistent with this to hold that there is no hard and fast rule that interest must be allowed from the date of deposit or yet that it must be withheld until the date of withdrawal or any other date..........The Court will do what seems just having regard to all the circumstances of the case.............."

I may also refer to the observations of Mahajan, J., in *Bhagwant Singh* v. *Sri Kishen Das*[2]. At page 139 it is explained :

> " An order of restitution in the manner asked for in the circumstances of this case would be contrary to the principles of the doctrine of restitution which is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the *real justice of the case*."

These observations suggest that the principle of restitution should be applied keeping in view the *real justice of the case.*

In the present controversy no doubt the decree which the learned Subordinate Judge originally passed was subsequently varied but, at the same time, the fact remains that the money which was deposited by the judgment-debtors was not really available to the decree-holder. The usual rate of interest which a Court awards is 6 per cent. In the present case, however the learned District Judge directed that interest should be paid only at 3 per cent. and when he did so, it seems to me, he was in substance effecting an adjustment between the two principles which apply to situations of this kind. That being so I am not prepared to disturb the finding of the learned District Judge. It was however pointed out that the figures adopted by the learned District Judge in paragraph 12 of his order require rectification. So far as this is concerned, counsel have agreed before me that as a matter of computation merely, this figure may be reduced by one-third and the amount payable by way of restitution fixed at Rs. 331-59 nP.

The appeal is allowed to this extent and the order of the learned District Judge modified accordingly There will be no order as to costs.

No leave.

R.M. *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Kanniah Chettiar .. *Appellant**

v.

Kuppuswami Chettiar .. *Respondent.*

Penal Code (XLV of 1860), section 425—Mischief—Knowledge of the likelihood of the wrongful loss—Necessity.

Criminal Procedure Code (V of 1898), section 417—Appeal against acquittal—Interference—Scope of.

The offence of mischief as defined in section 425, Penal Code, relates not merely to intention but also to the knowledge of the likelihood of wrongful loss being caused. It is enough if the accused knew that by blocking the channel through which the complainant had a right to take water for his land, wrongful loss would be caused to the complainant. Once this is established the co-existence of a civil remedy really does not make any difference.

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1. A.I.R. 1943 Pat. 427.
2. (1953) S.C.J. 188 : 1953 S.C.R. 559 : A.I.R. 1953 S.C. 136 at p. 139.

* Crl.Appeal No. 931 of 1959.

8th December, 1960.
(17th Agrahayana, 1882—Saka.)

Interference with an acquittal would be justified only for substantial and compelling reasons evident from the record.

Appeal against the Judgment of the Court of the District Magistrate (*J*), Kumbakonam, in C.A. No. 331 of 1959 (C.C.No. 1217) of 1959 on the file of the Court of the Sub-Magistrate, Kumbakonam).

C. K. Venkatanarasimhan, for Appellant.

M. Narayanamurti for *K. S. Naidu* and *R. Vijayan*, for Respondent.

The Court delivered the following

JUDGMENT.—Though I would be most reluctant to interfere with an acquittal, and the authorities are explicit to the effect that interference with an acquittal would be justified only for substantial and compelling reasons evident from the record, the present case appears to be one in which interference is essential in the interests of justice, for, the acquittal of the respondent by the learned District Magistrate of Kumbakonam, in appeal with regard to an alleged offence under section 430, Indian Penal Code, is contrary to what the learned District Magistrate has himself indicated earlier in the judgment as confirming the findings of the learned Sub-Magistrate of Kumbakonam. Upon those finding, assuming that they are decisively established, as I have to assume with regard to concurrent findings upon a simple question of fact by the two Courts below, it is clear that the learned District Magistrate has erred in applying the relevant principles of law. There were only two ingredients to be established in this case. Firstly, the complainant had to establish that there was a channel between R.S. No. 240 and R.S. No. 241/1 through which the complainant is entitled to take water for the irrigation of his own land R. S. No. 240. Secondly, the complainant had to establish that the accused (respondent) obstructed the water flowing through this channel, with an inferable intention to cause wrongful loss, and thereby committed an offence under section 430, Indian Penal Code.

Both these elements appear to have been established on the explicit facts on record. The learned Sub-Magistrate observed:

"Hence the owner of R.S. No. 240 has the right to irrigate through the detailed *Kanni* between R.S. Nos. 240 and 241/1."

That *Kanni* is, admittedly, the channel which was obstructed. The learned District Magistrate observed:

"The testimony of the complainant, his witnesses and that of D.W. 1, discloses that the water from the aforesaid channel was being used for irrigating the 67 cents of land in R.S. No. 240, belonging to the complainant's principal."

As regards the alleged obstruction, the facts were never in dispute.

Under those circumstances, it seems to be evident and undeniable that the complainant has a legal right to take water in the channel, for, that is the effect of the testimony that has been accepted by both the Courts. Hence, the learned District Magistrate was in error in observing that the evidence did not disclose that the complainant had the legal right to use the water in the channel blocked by the respondent. A legal right of this character is a question of fact, which has to be proved like any other fact by the requisite evidence. Since both the Courts do not dispute either the evidence or its effect, the legal right must be held as established in this case. The decision cited by the learned District Magistrate *Tun Aung*, In re[1], has no aplication, because that was a case where the legal right was not proved.

Once this is conceded, and the obstruction is also conceded, the question is really one of drawing the necessary inference. I must here point out that 'mischief' as defined in section 425, Indian Penal Code, relates not merely to intention, but also to knowledge of the likelihood of wrongful loss being caused. It is enough if the accused knew that by blocking this channel through which the complainant (appellant) had a right to take water for his own land, wrongful loss would be

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1. (1907) 7 Cr. L.J. 448.

caused to the complainant. Once this is established, the co-existence of a civil remedy really does not make any difference.

As the law seems to have been misapplied to the facts of this case, I allow the appeal and convict the respondent under section 430, Indian Penal Code. Taking all the circumstances into account, and as a nominal fine appears to be adequate in the interests of justice, the respondent is sentenced to a fine of Rs. 40 or in default to three weeks simple imprisonment.

V.S. ——— *Appeal allowed and Accused convicted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARYANAN.

The Public Prosecutor, Madras .. *Petitioner**

v.

H. L. Modi .. *Accused.*

Sea Customs Act (VIII of 1878), sections 167 (8-l) and 178-A (2)—Scope of.

Section 167 (8-*l*) of the Sea Customs Act is an omnibus provision and before a person could be held guilty of an offence under the section the prosecution must prove by dependable evidence that the goods were smuggled ones. The presumption under section 178-A of the Act will be attracted only in cases where the goods seized fall within the specified class. Merely because a person is in possession of goods, not falling under the category specified in section 178-A, and is unable to account satisfactorily for its acquisition, it cannot be said that an offence under section 167 (8-*l*) of the Act is committed.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Chingelput Division in C.A. No. 4 of 1959 (C.C. No. 370 of 1958 on the file of Sub-Divisional Magistrate Poonamallee) and to enhance the sentence passed upon the respondent herein.

M. Narayanamurthi for the Public Prosecutor on behalf of the State.

R. M. Seshadri and *B. T. Sundararajan*, for Accused.

The Court made the following

ORDER.—Crl. R.C. No. 843 of 1959, to take up these related proceedings in their logical order, is a proceeding in revision against the conviction of the revision petitioner (H.L. Modi), under section 167 (8-*l*) of the Sea Customs Act, which conviction was confirmed in appeal by the learned Sessions Judge of Chingleput. Crl.R.C. No. 842 of 1959 is a revision proceeding by the Public prosecutor against the sentence in the case, which was reduced on appeal by the learned Sessions Judge of Chingleput to a fine of Rs. 1,000 alone, setting aside the sentence of rigorous imprisonment for three months imposed by the trial Court.

The facts are very simple, though the matter reveals a somewhat tangled history with regard to the facts of trial. On 14th December, 1957, this revision petitioner (H.L. Modi) disembarked at Meenambakkam aerodrome from an aeroplane which flew from Bombay to Madras. He was interrogated by certain Customs Officials and his trunk was searched; with the result that underneath certain articles of clothing a tin box was found containing 247 wrist watches of "Record" manufacture, most of them new. A mahazar was duly drafted for the seizures, and, in the office of the Collector of Central Excise where the petitioner was detained for some time, he made a statement admitting the broad facts, which is Exhibit-P. 2 in the case. Subsequently, the petitioner was charge-sheeted under section 167 (8-*l*) of the Sea Customs Act. At a later stage of the proceedings, section 5 of the Imports and Exports (Control) Act, 1947, was added as a supplemental charge, and the case was transferred to the file of the learned Sub-Divisional Magistrate, Poonamallee, as offences triable by a First Class Magistrate were involved.

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* Crl. R.C. Nos. 842 and 843 of 1959. 7th December, 1960.
(Crl. R.P. Nos. 822 and 823 of 1959). (16th Agrahayana, 1882—Saka.)

But, when the case reached the stage of arguments before the learned Sub-Divisional Magistrate, it was virtually conceded that the charge relating to section 5 of the Imports and Exports (Control) Act, 1947, could not be sustained; it was accordingly dropped. The essence of the case, as far as this charge is concerned, was that the revision petitioner, a businessman residing at Pondicherry, illicitly imported these identical watches prior to 1st November, 1954, and later illicitly smuggled them into Indian Union limits, after the merger of Pondicherry. But frankly, the prosecution were unable to establish the identity of the watches upon which this charge depended. The charge was relinquished and, as I already stated, the revision petitioner was convicted under section 167 (8-*l*) of the Sea Customs Act alone.

Learned counsel for the revision petitioner (Mr. R. M. Seshadri) has pressed before me the main argument that, once the charge under section 5 of the Imports and Exports (Control) Act, 1947, was dropped, the charge under section 167(8-*l*) of the Sea Customs Act did not survive, viewed broadly with reference to the facts of the record. In the revision proceeding itself other matters are mooted, such as the request of the revision petitioner to examine himself under section 342-A, Criminal Procedure Code, as, at one stage of the proceedings in this Court, Somasundaram, J., was inclined to record the further evidence of the person from whom the revision petitioner claimed to have purchased these watches at Bombay. But, admittedly, nothing else was done. The question now is whether the charge under section 167 (8-*l*) of the Sea Customs Act can be said to survive at all, upon the established facts. If it does not survive, there is obviously no further question of recording of evidence, or the rights of the revision petitioner (accused) to examine himself, flowing from that supplemental evidence.

On a careful consideration of the facts of the present matter, I am inclined to agree that no offence separately punishable under section 167(8-*l*) of the Sea Customs Act has been made out in this case, once it is conceded that the identity of the watches was not established. Section 167(8-*l*) is itself something of an omnibus provision, the wording of which is not particularly happy. But even a careful dissection and analysis of its terms fails to reveal any offence which the revision petitioner could be said to have committed upon the proved facts. It is claimed by the learned Public Prosecutor that, in his statement (Exhibit P-2), the revision petitioner admitted that he was aware that these were watches upon which duty had not been paid. First of all, I am not at all certain how far Exhibit P-2 could be safely accepted and acted upon. Secondly, even if it is to be acted upon, such an admission clearly cannot form the basis for any conviction of the revision petitioner. The prosecution must prove, by some other dependable evidence, that these watches had been imported into India without duty, and were, in fact, smuggled goods. Actually, the Legislature has been very well aware of the difficulty of proving this, and has enacted section 178-A of the Act by virtue of Amending Act XXI of 1955. Under section 178-A(1) and (2) there is a presumption that certain categories of goods are smuggled goods, when they are seized under the Act in the reasonable belief that they were of that character. Section 178-A (2) refers to these categories, and also refers to a notification which the Central Government may make. Neither under the sub-section, nor under any such notifications, are wrist watches of that description. This matter is not in dispute. Hence, there was no presumption that, even when the revision petitioner was in possession of so large a quantity of wrist watches as 247, they were smuggled goods or goods imported into India from abroad without due payment of duty. Since the purchase of these goods was not prohibited, even on a large scale, and duty was payable in respect of such goods only on the occasion of import into the country, the revision petitioner could obviously have acquired these goods quite legitimately at Bombay or elsewhere. The fact that bills were not produced or that he failed to satisfactorily account for the acquisition, will not raise any presumption against him, unless the goods fall within the scope of section 178-A of the Act. With regard to penal provi-

sions of this character, it is the imperative duty of Courts to interpret them narrowly, with regard to the specific language employed, and not to extend their boundaries by some mode of construction, designed to aid the administration. On the contrary, in all such cases, where the administration experience any difficulty, its true remedy is to seek the aid of the Legislature in tightening the provisions of the law. The construction of Courts with regard to penal provisions will always be strict, and mindful of the liberties of the subject.

In this connection, Mr. Seshadri has drawn my attention to certain observations in W.P. No. 786 of 1957 dealt with by a Bench of this Court (Rajagopalan and Balakrishna Ayyar, JJ.), wherein the learned Judges have observed with regard to very similar facts, that even where goods appear to have been acquired not through the normal trade channels in the open market, there was no inference that

> " the goods had been illegally imported or even that the petitioner knew at the time of the acquisition of these goods that they had been illegally imported into the country, the learned Judges proceeded to point out that " it was certainly not the case of the Department that the articles mentioned in the list or any of them were not available in the market in India, though import of these articles was restricted."

In the present case, there is not even evidence that the import was greatly restricted, and such data as are available seem to prove, on the contrary that any person who was willing to lay out the necessary capital could have acquired these watches in a perfectly legitimate manner.

Under the circumstances, I am constrained to conclude that the charge that section 167(8-*l*) of the Sea Customs Act was not at all established against the revision petitioner. Since that is only conviction, the proceeding will have to be allowed by acquitting the revision petitioner upon the charge, and setting aside the sentence of fine. The fine if paid, wil be refunded.

Crl.R.C. No. 843 of 1959 is hence allowed. Crl.R.C. No. 842 of 1959 filed by the learned Public Prosecutor is dismissed.

R.M. — *Cr. R. C. No.* 843 *of* 1959 *allowed and Cr. R. C.No.* 842 *of* 1959 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

The Public Prosecutor .. *Appellant**

v.

P. S. S. Somasundaram Chettiar .. *Respondent.*

Employees Provident Fund Act (XIX of 1952), *section* 14-*A, Proviso—Applicability—Code of Criminal Procedure* (*V of* 1898), *section* 417*—Appeal against acquittal—Scope of interference.*

The question whether the *Proviso* to section 14-A of the Employees Provident Fund Act is fulfilled on the facts is an issue of fact like any other to be determined on the individual merits.

There is no substantial or compelling reason for interfering with the order of acquittal, nor do the facts involve any question of law in reality.

Appeals under section 417 or 417 (3) of the Code of Criminal Procedure, 1898 against the acquittal of the aforesaid Respondent (Accused No. 2) of offences under section 14 (2) of Employees' Provident Funds Act, 1952, read with clauses (*a*) and (*e*) of paragraph 76 of the Scheme, by the Additional First Class Magistrate, Coimbatore, in C.C. Nos. 491 and 492 of 1958 on his file.

V. V. Radhakrishnan for The Public Prosecutor, for Appellant.

V. T. Rangaswamy Iyengar for *K. Kalyanasundaram*, for Respondent.

The Court delivered the following

JUDGMENT.—These are appeals preferred by the State against the acquittals of the Respondent in two related cases, in which the facts are identical, but the

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* Crl. A. Nos. 286 and 287 of 1959. 24th November, 1960. (3rd Agrahayana, 1882—Saka.)

periods of time concerned are different. In both these cases, the Inspector of Provident Funds, Coimbatore, prosecuted Messrs. Kaleeswarar Mills, Ltd., Coimbatore, the first accused, and the present Respondent, the General Manager of the Mills, the second accused, for an alleged offence under section 14 (2) of the Employees' Provident Funds Act (XIX of 1952) read with paragraph 76 of the Employees' Provident Fund Scheme, 1952. What has subsequently happened is that the prosecution was withdrawn as against the first accused (Messrs. Kaleeswarar Mills, Ltd.), and it survived only as against the Respondent. After proceedings into the facts in great detail, the learned Additional First Class Magistrate of Coimbatore held that the Respondent was saved by virtue of the *Proviso* to section 14-A of the Act which is in the following terms :

> " Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge, or that he exercised all due diligence to prevent the commission of such offence."

The State pleads that the Respondent did not satisfy the terms of this *Proviso*, and that, hence, upon the admitted facts of the record, he ought to have been convicted. The learned Public Prosecutor urges that the admitted facts arr that Kaleeswarar Mills, Ltd., did make deductions from the wages bills of its employees during the relevant periods, and thus it withheld a large sum representing the contribution of the employees to the provident fund. Under the Act, the Mill was bound to make a similar contribution itself, and the failure to do this is an offence under rule 76 (*a*) of the Employees' Provident Fund Scheme, 1952. It is strenuously contended that this really amounts to a kind of breach of trust, by which both the Mills and the General Manager (Respondent) are liable, within the terminology of section 14-A (1). On this ground, the acquittal is impugned as wrongful and opposed to law.

Sri V. T. Rangaswami Iyengar for the Respondent raises a plea that the Mills having been exonerated in these proceedings, or the prosecution of the Mills withdrawn, the liability of a person like the Respondent (General Manager) does not separately survive, since the Mills or the concern is the party mainly liable under section 14-A. There is something to be said for this view, for a reading of section 14-A makes it clear that the company or organisation is made liable for the offences as a juristic person. But it is not really necessary for me to furnish an interpretation of this section, in this context. The real question is whether it is now, expedeient, or essential in the interests of justice, that the acquittal of the Respondent should be interfered with.

I find from a perusal of the judgment of the learned Magistrate, that he has made an exhaustive analysis of the facts with reference to the *Proviso* relied on by the Respondent. The learned Magistrate seems to believe that the Respondent strained every nerve to save the Mills as a going concern, including running hazards himself in order to provide credit, and that the situation deteriorated to such an extent that the Respondent was quite unable to make any provision for the provident fund contribution of the employer. Other and more urgent demands had to be be met, and it was the collapse of the company, financially speaking, which led to the inability. It seems to me that the facts do justify the inference that the Respondent has tried very hard to save the company. Even if I were inclined to take a somewhat different view of the facts, it will still entirely be a question of fact whether the test laid down by the *Proviso* has been fulfilled in an individual case.

I am therefore very clear that there is no substantial or compelling reason for interfering with the order of acquittal, nor do the facts involve any question of law in reality. The question whether this *Proviso* is fulfilled on the facts, is an issue of fact like any other, to be determined on the individual merits. The learned Magistrate seems to be perfectly conscious of this, as well as of the obvious position that, since he relies upon a *Proviso*, it is for the accused to show that he exercised " all due diligence ".

I hence dismiss these appeals. Before parting with them, I desire to observe that this does not mean that the liability of the employer or of a person situated as a General Manager under an employer concerned, to deal fairly with the workers in respect of their provident fund contributions, and in respect of the employer's own liability under Act XIX of 1952, is not a very real one, or is one that can be lightly evaded. On the contrary, the Legislature has thought it fit to enforce this liability by means of a penal provision, really because it does amount to a kind of trust, and the unwarranted infringement of it, to a breach of trust. With these observations, the appeals are dismissed.

V.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

M. Venkatarathinamma .. *Petitioner**

v.

Corporation of Madras by the Assessor K. R. Srinivasan, 89 and 90 Division, Ripon Buildings, Park Town, Madras.. *Respondent.*

Madras City Municipalities Act (IV of 1919), Schedule IV, Rule 21 (2)—' Distraint is impracticable '—What amounts to.

Under rule 21 (2) of Schedule IV of the Madras City Municipalities Act the Corporation can resort to procedure of prosecuting a defaulter for non-payment of property tax only when it is established that the procedure of distraining the property of the defaulter is impracticable. It must be established by evidence that the distraint was impracticable and if the evidence discloses that no attempt was made to find out whether there were any articles of the accused available on the premises for being distrained, resort to prosecution of the defaulter is not valid.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Sixth Presidency Magistrate of the Court of the Presidency Magistrate, Saidapet, Madras, dated 29th April, 1960 and made in Municipal No. 559 of 1960.

G. K. Subramaniam, for Petitioner.

T. Chengalvarayan, for Respondent.

The Public Prosecutor (*P. S. Kailasam*), for State.

The Court made the following

ORDER.—This is a revision against the order of the Sixth Presidency Magistrate Saidapet, Madras, in M.C. No. 559 of 1960.

There is no doubt that there were arrears of house-tax due in respect of house No. 2, III Main Road, Gandhi Nagar. Under Rules 20 and 21 of Schedule IV of the City Municipalities Act, this tax can be recovered by means of distraint. Under sub-rule (2) of Rule 21 if for any reason the distraint or a sufficient distraint of the defaulter's property is impracticable, the Commissioner may prosecute the defaulter before a Magistrate. In this case it is the case of the Corporation that the distraint became impracticable and, therefore, they had resorted to this remedy. It is contended before me that it has not been established that the distraint became impracticable in this case. Learned counsel, Mr. G. K. Subramaniam, appearing for the Peitioner, has pointed out how on the evidence of P.Ws. 2 and 3 the Tax Collector and Bailiff, it cannot be said that the distraint became impracticable. P.W. 2 in his chief-examination has stated that he went to the house with the Bailiff, P.W. 3 in the case. He stated that there were no articles in the house except a trunk containing clothes. He was subjected to a very severe cross-examination and in the cross-examination he stated that he did not open the trunk and that he did not know the contents of the trunk. He further stated that there was furniture inside the house but he did not know to whom they belonged. He also stated that he did not

* Crl. R.C. No. 618 of 1960. (Crl. R.P. No. 594 of 1960). 26th August, 1960. (4th day of Bhadra, 1882, Saka.)

enquire where the articles of the accused were kept. He added that the accused was occupying only two rooms in the front portion. It was also elicited in the re-examination that there were no articles in the said rooms. P.W. 3 deposed that the accused was living in the room attached to the kitchen and he found cooking utensils and an old bench. He stated that they never went to the front room. There are thus contradictory statements between P.W. 2 and P.W. 3 as to the room to which they went for the purpose of distraint. The Bailiff does not speak of the trunk containing clothes as being available for distraint. If it had been established clearly either that there was nothing in the rooms occupied by the accused which were worth distraining, that is, by mentioning the articles which they noticed and they were not worth distraining for the amount involved, or if P.Ws. 2 and 3 had stated that the rooms occupied by the acused were locked and they had no access to them, and, therefore, the distraint became impracticable, then one could understand that the distraint really became impracticable. But the evidence of P.Ws. 2 and 3 leaves the impression that probably neither of them went to the premises in question and tried to find out whether there were any articles in the rooms belonging to the accused for the purpose of distraint. In those circumstances I cannot say that under sub-rule (2) of Rule 21 it has been established that the distraint became impracticable. It is only when the distraint became impracticable that a prosecution can be launched against the accused.

I set aside the conviction and sentence. I do not acquit the accused but only order that the fine, if paid, be refunded. Nor do I order a retrial in this case. It is open to the Corporation to distrain the goods in accordance with law, *i.e.*, as provided in the Rules. If it is ultimately found that the distraint became impracticable, the Corporation can again launch a prosecution against the accused for recovery of the amount. There can be no plea of *autrefois acquit* under section 403 of the Code of Criminal Procedure, because I am not acquitting the accused in this case, only the conviction and sentence are set aside; and I leave it open for another prosecution if the distraint becomes impracticable.

R.M. ——— *Conviction and sentence set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTANARAYANAN.

M. R. Krishnamoorthy .. *Petitioner.**

Penal Code (XLV of 1860), sections 107 (2) and 405—Abetment of breach of trust by conspiracy—Proof—Essentials.

Criminal Procedure Code (V of 1898), section 439—Interference in revision against conviction—Principles.

Where the abetment was a form of abetment by conspiracy as set forth in clause (2) of section 107 of the Penal Code, any charge of conspiracy is not established merely by proof of association together nor by mere suspicion of guilt.

Where the record is itself not capable of sustaining a conviction and the conscience of the Court is roused to the extent of compelling the Court to find that the accused ought not to have been convicted upon the evidence interference in revision would be warranted.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of Session of the North Arcot Division at Vellore in C.A. No. 46 of 1960 (S.C. No. 4 of 1960 on the file of the Additional Assistant Sessions Judge of the Court of Session of the North Arcot Division at Vellore).

M. Srinivasagopalan and *M. R. Krishanan*, for Petitioner.

V. V. Radhakrishnan, for the Public Prosecutor, on behalf of the State.

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* Crl. R.C. No. 1226 of 1960. (Crl. R. P. No. 1195 of 1960). 22nd November, 1960. (1st Agrahayana, 1882, Saka).

The Court made the following

ORDER :—The facts of this case have been so fully stated in the judgments of both the Courts below, that I do not propose to recapitulate them in great detail here. It is sufficient for me to state that accused 1 in the case, a Cashier employed at the Tirupattur branch of the State Bank of India, was convicted upon his admission of guilt, of criminal breach of trust in respect of a sum of Rs. 36,000 odd belonging to the Bank. There can be no doubt that, on the occasion in question, accused 1 secreted these monies on his person from the till of the Bank, and, on the pretext of leaving the building for lunch refreshment, escaped to Madras *via* Vellore through taxis and trains, in the company of the second accused (revision petitioner). The second accused was then a Havildar of an Assam Company of Rifles, on leave at Tirupattur, and staying at Mani's Hotel, a restaurant run by his near relative. The second accused has been convicted of the offence of abetment of the criminal breach of trust, of which the first accused was admittedly guilty. A separate charge of criminal conspiracy against this revision petitioner failed in proof. The question is, whether the circumstances justify the conviction of the revision petitioner upon the charge of abetment, under any categories of the offence as defined under section 107, Indian Penal Code.

Both the Courts below appear to think that the following pieces of evidence are significant, and that, in their cumulative effect, they justify an inference of guilt as far as the revision petitioner is concerned. These pieces of evidence are (1) evidence of close association and friendship between the two accused, (2) evidence of movements of the revision petitioner along with accused 1 or by himself, in the vicinity of the State Bank of India building, sometime prior to the offence or shorttly prior to the offence, (3) evidence of P.Ws. 11 and 12 to the effect that the second accused obtained elastic rubber bands stiched for the first accused at the tailoring establishment of P.W. 11, ostensibly for the purpose of securing the socks worn by accused 1 along with the pants at the knee level. The suggestion here is that these bands must have been utilised by accused 1 in secreting the currency notes which he took away from the Bank, and (4) the evidence of the subsequent movements of the two accused together in their journey from Tirupattur to Madras, and of lavish expenditure somewhat disproportionate to their means.

But I am persuaded, after a careful review of the record of evidence, and consideration of the probabilities, that the conviction of this revision petitioner rests, at the best for the prosecution, upon either conjecture, however reasonable according to worldly experience, or a mere moral feeling that the party must be guilty. In other words, there is really nothing beyond a cloud of suspicion. Suspicion cannot substitute legal proof, and where it is so substituted for adequate legal evidence, and a conviction has been based thereon, a miscarriage of justice has really occurred, which merits interference in revision by this Court.

In this context I would desire at the outset to observe, since the Courts below do seem to consider that the abetment in this case was a form of abetment by conspiracy as set forth in clause (2) of section 107, Indian Penal Code, that any charge of conspiracy is not established merely by proof of association together, nor by mere suspicion of guilt. Here, I cannot do better than to reiterate the passage in Underhill's Criminal Evidence, 5th edition, section 508 which will be found set forth in *Sivasubramanian Pandian* v. *State*[1], a Bench decision of this Court to which I was a Party. I could understand the inference of the Courts below, if the evidence had been more specific or if it had permitted any clearer inference. Since accused 1 was the Cashier of the Bank, it is abundantly clear that the movements of this revision petitioner in the vicinity of the Bank prior to this occurrence are of no singificance whatever. The evidence shows that accused 1 was inside the Bank in his capacity as cashier, actually handling monies, and that he took advantage of this opportunity to commit misappropriation and breach of trust. Since the hotel of Mani Iyer is, more or less, in the same neighbourhood, the physical movements of the revision petitioner are of practically no significance. As regards close association and friend-

1. 1960 M.W.N. (Crl.) 159.

ship, here again, this would be relevant only if they tended to show any concert or preparation with regard to the particular crime designed ; general association may imply nothing more than a not very fastidious predeliction for doubtful company. That may be morally reprehensible, but it is not the basis for any legal inference.

As regards the bands ordered at the tailoring shop of P.W. 11, in which this revision petitioner does appear to have taken some initiative, the difficulty is that there is absolutely no evidence to connect these elastic bands with the actual offence. That is sheer conjecture, and it may be totally beside the mark, just as it may be a shrewd guess at the truth. Currency notes could be concealed in several ways about the person, and a cashier, presumably a trusted official, could easily leave the Bank building on the pretext of proceeding outside for lunch with these notes in his interior pockets. Elastic bands appear to be a device not necessarily called for with regard to the mechanics of the offence. In any event, we do not know that the bands had anything to do with secreting the notes. Again, we do not know that this revision petitioner (accused 2) was really let into the secret of the scheme by the first accused.

The subsequent movements of these two persons are of practically no signficance. The learned Sessions Judge does not appear to be correct in his view of the law that the subsquent expenditure of monies is also a necessary element in proving a criminal breach of trust. In any event, the bulk of the monies were retained with accused 1, who was later found in possession of a fair sum and of luxury goods of admitted value when he was arrested at Calcutta. Only a very small sum of over Rs. 200 was recovered from the possession of the revision petitioner. It may be that he was not conscious of anything more criminal than being out for a lark in the company of accused 1, who was temporarily flush of cash. Even if accused 2 had suspicion about the source of this cash, that would not make him an abettor.

In *Esakki Thevar* v. *State*[1], I have examined the decisions of this Court laying down the principles upon which interference in a criminal revision would be warranted, in the case of a conviction. The authorities amply show that where the record is itself not capable of sustaining a conviction, and the conscience of the Court is roused to the extent of compelling the Court to find that the appellant ought not to have been convicted upon the evidence, such interference would be warranted. The present is clearly such a case, for we cannot permit suspicion to substitute legal proof, so long as we adhere to the system of criminal jurisprudence which we have inherited from the past, which is the chief glory of our administration of justice, and the chief protection of the citizen in this country.

I hence allow the revision, acquit the revision petitioner, and direct that he be set at liberty.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE SRINIVASAN.

D. K. R. Chinnasamy Sah .. *Appellant**

v.

Rajamba Bi .. *Respondent.*

Husband and wife—Void marriage—Status of parties—Suit for declaration of—Applicability of the maxim in pari delicto.

Where the status of parties, whether or not one is the wife of the other, is concerned, the principle of *pari delicto* cannot be relied on to refuse to grant the declaration sought for. Where a marriage is void *ab initio* by virtue of the Statute prohibiting bigamous marriage, the fact that both parties to such a marriage were guilty is not a ground for refusing the relief of declaration that the marriage is void at the instance of either party.

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1. 1959 M.W.N. (Crl.) 136.

* S.A. No. 70 of 1959. 23rd November, 1960. (2nd Agrahayana, 1882, Saka).

Appeal against the Decree of the Additional Judge, City Civil Court, Madras, in Appeal Suit No. 166 of 1957, preferred against the Decree of the Second Assistant Judge, City Civil Court, Madras, in O.S. No. 141 of 1956.

V. Srinivasa Ayyar, K. Raman and *P.V.B. Mani*, for Appellant.

S. Mohankumaramangalam and *S. Palaniswami*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff-appellant sued for a declration that the respondent is not his wife and for a permanent injunction restraning her from calling herself the plaintiff's wife and taking or continuing any proceedings against the plaintiff in that capacity. The case was that the plaintiff married the respondent in 1953, though his first wife was then, and is still, alive. Apparently, some disputes arose between the two subsequently, and, the respondent filed an application in the Magistrate's Court under section 488, Criminal Procedure Code. This seems to be the reason for the plaintiff's filing the suit for the declaration and injunction.

Before the trial Court, it was alleged by the plaintiff-appellant that there was no valid marriage by reason of the absence of the requisite religious ceremonies ; but that has been found against by both the trial Court and the lower appellate Court. The position accordingly, is that, while no doubt a proper form of marriage was gone through between the parties, the marriage itself was claimed to be void by reason of Act VI of 1949.

The trial Court granted a decree for the declaration and injunction sought; but, on appeal, the learned Additional City Civil Judge came to the conclusion that, on the principle of *pari delicto*, the plaintiff ought not to be granted the relief. It is against this decree that the present appeal has been filed.

The marriage having been contracted during the period when Act VI of 1949 was in force, there is no doubt whatsoever that, under section 4 (i) thereof, that marriage was void. Act VI of 1949 was repealed by the Central Act XXV of 1955. This later Act, however, dealt with marriage contracted only subsequent to the passing of that Act. Notwithstanding the repeal of Act VI of 1949, there is no doubt that the rendering of a marriage void during the continuance of Act VI of 1949 was fully effective and a marriage which was void under the Act could not possibly become valid by reason of the repeal of that Act. It has been correctly so found by the learned Additional City Civil Judge. The only question, therefore, is whether the lower appellate Court was right in the view that it took that the plaintiff ought not to be granted the reliefs that he prayed for.

It seems to me that, where the status of a party is concerned, the principle of *pari delicto* cannot possibly be relied on in refusal of the grant of a declaration sought. It will be seen that, even under the Central Act, section 11 enables either party to a marriage to present a petition for a declaration that it is a void marriage, if such marriage contravenes any of the conditions specified in clause (iv) or (v) of section 5 of that Act. Obviously, the Legislature took the view that, notwithstanding that either the one or the other or both parties of a void marriage should have been guilty of contravention of the provisions of the Act, yet, either party could, on a petition presented under that section, obtain the declaration of the void nature of the marriage. That being so, the general principle of *pari delicto*, upon which the lower appellate Court has relied, should not normally have any application in cases of this nature. As argued by learned counsel for the appellant, this principle would have far-reaching effect only in cases of contracts of a different kind, where, on the basis of an illegal contract voluntarily and consciously entered into, a person seeks the assistance of the Court to recover any property. In such cases, the Court could, in the proper exercise of its discretion, rightly refuse to grant the relief. But the present case is not of that kind. When, as I have pointed out, even the Legislature has not chosen to place any disability upon a party to a void marriage,—however guilty that party might be—in seeking the assistance of the Court to have such a

marriage declared void, it is not proper that on the general principle of *pari delicto*, the declaration should be refused. I am of opinion, therefore, that, when once it is found,—and that fact is not denied by either side—that the marriage is void *ab initio* by reason of section 4 (1) of Act VI of 1949, the plaintiff is entitled to the declaration.

I am not, however, prepared to hold that he is also entitled to the other relief of injunction as well. It would be open to him to plead in the Magistrate's Court that the respondent, not being his wife, is not entitled to maintenance. The other declaration that he seeks, namely, to restrain her from calling herself as the plaintiff's wife, is also refused, as there is no allegation that the respondent is doing so, with the result that any interest of the plaintiff is jeopardised.

In the result, the decree of the lower appellate Court is set aside, and that of the trial Court restored only to the extent of granting a declaration that the marriage of the respondent with the plaintiff is void. In the circumstances, the appellant will bear the costs in this Court; and the order as to costs made by the lower appellate Court will stand.

No leave.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

K. Govindaraja Iyengar .. *Appellant**

v.

Petha Ponnan *alias* Govinda Chetty .. *Respondent.*

Judicial Officers' Protection Act (XVIII of 1850), section 1—Scope of.

The immunity given by section 1 of the Judicial Officers' Protection Act, 1850, to Judicial Officers against being sued in respect of acts done by them in their capacity as such officers is no doubt absolute. But that does not imply that higher agencies in administrative control of the Judicial Officers or Court concerned, may not take cognisance of their conduct and deal with it. It is only the party that is prevented from seeking redress through Court by canvassing the motive of the Judicial Officer who acts in his judicial capacity.

Appeal against the Order of the District Court of Salem, dated 25th August, 1958 and made in A.S. No. 379 of 1957 preferred against the decree of the Court of the District Munsif of Sankaridrug, at Salem, in O.S. No. 325 of 1956.

D. Ramaswami Ayyangar and *P. R. Varadarajan*, for Appellant.

M. Srinivasagopalan, for Respondent.

The Court made the following

ORDER.—The facts out of which this appeal arises are as follows: The appellant was the defendant in an original suit filed before the learned District Munsif of Sankaridrug at Salem for recovery of a sum of Rs. 600 as damages for false and malicious prosecution. The plaint averments, with which alone we need be concerned for the disposal of the appeal, were as follows. The defendant (appellant) was the President of the Pottipuram Panchayat Court, and this Court launched a prosecution of the plaintiff (respondent) for an alleged offence committed in respect of a judicial proceeding before it under section 174, Indian Penal Code. It is not in dispute that the Panchayat Court passed a resolution that the plaintiff (respondent) should be so prosecuted, for alleged deliberate failure to appear in that Court notwithstanding service of summons, and that the appellant filed that criminal complaint purely in his capacity as the President of the Court, which was the real complainant. The criminal case ended in an acquittal. The plaintiff brought forward this action, alleging that there was prior enmity between him and the defendant (appellant)

* A.A.O. No. 10 of 1959. 7th May, 1960. (17th day of Vaisakha, 1882, Saka).

and that, in fact, the summonses in the Panchayat Court proceeding were not even sought to be served upon him.

The learned District Munsif dismissed the suit with costs holding (upon issue 1) that section 1 of the Judicial Officers Protection Act (XVIII of 1850) was a total bar to the suit.

The learned District Judge, in appeal, set aside the judgment and decree of the District Munsif, and remanded the case for fresh trial and disposal according to law, in the light of certain observations made by him. Th defendant (appellant) claims that this order of the appellate Court is quite erroneous and opposed to law, and that no such remand of the suit could have been made, in view of the clear and unambiguous provisions of the Judicial Officers Protection Act (XVIII of 1850).

Upon a careful consideration of this matter, I am of the view that the appeal ought to be allowed, and that the order of the learned District Judge is manifestly erroneous. The judgment and decree of the learned District Munsif are prefectly correct, and indeed, unassailable in my view. The learned District Judge has fallen into a confusion of ideas upon the matter. The question is not whether the defendant (appellant) was instrumental in persuading the Panchayat Court to pass such a resolution and to file such a complaint, and whether his instrumentality in this aspect was due to prior enmity between the parties. The simple question is whether the filing of the complaint was not a judicial act done by the defendant in his capacity as the President of the Panchayat Court, and representing that juristic entity. I am quite unable to see how there could be any difference of opinion upon this aspect. The analogy drawn by the learned District Judge of a person filing a complaint before the Police, and being liable to be sued in damages for false prosecution, notwithstanding the fact that the Police actually prosecuted, is quite misleading and inapplicable. Once it is conceded that the complainant in this case was the Panchayat Court, that the offence complained of was in relation to a judicial proceeding of that Court, and that the appellant acted in his official capacity as President of that Court, section 1 of the Judicial Officers Protection Act (XVIII of 1850) would be a complete bar to any such suit. It is noteworthy that the words "in good faith" occurring in section 1 relate to the jurisdictional capacity, about which there is really no dispute in the present case, and not to any question of purity of motive. The very wide immunity granted by this Act has, in fact, come up for judicial comment. The argument that such wide and unqualified protection would sometimes cover the evil intentional acts of corrupt judicial agencies was raised, but not considered as a good ground for any other view of the beneficient provision of this Act. Sir Lawrence Jenkins, C.J., tersely put the matter thus in *Girjashankar* v. *Gopalji*[1] :

> "The protection afforded to judicial officers rests on public policy. And though thereby a malicious Judge or Magistrate may gain a protection designed not for him, but in the public interest, it happily does not follow that he can exercise his malice with impunity. His conduct can be investigated elsewhere and due punishment awarded."

In other words, the immunity given by the Act is absolute. But, that does not imply that higher agencies, in administrative control of that judicial officer or Court, may not take cognizance of such conduct, and deal adequately with it. But the subject or citizen is not permitted to obtain a redress through a Court of law, by canvasing the motive of the judicial officer who acts in his judicial capacity.

I find an interesting decision in Lower Burma Reports (1872-1892) 83, where there are striking observations about the possible dissatrous effect of an opposite view of the provisions of this Act. As stated in this ruling :

> " A contrary system would produce great inconvenience by allowing every losing party, of whom there must be one in every suit, to bring an action against the Judge, and the Judge in his turn, if unsuccessful, suing the other Judge who had pronounced against him."

Further commentary is needless.

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1. I.L.R. 30 Bom. 241.

I therefore allow this appeal, set aside the judgment and decree of the learned District Judge in appeal remanding the suit, and restore the decree of the learned District Munsif dismissing the suit with costs. Following the event, the appellant will have his costs here.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

K. Parthasarathy .. *Appellant**

v.

The Municipal Council, Kumbakonam, by its Executive Officer, the Commissioner .. *Respondent.*

Madras District Municipalities Act (V of 1920) *and rule* 32 (1), *Schedule IV—Illegal seizure of animal by Municipality—Municipality—If entitled to feeding charges during detention of such animal—Section* 99 (4) *of the Act—If presumption under section applicable to " cart ".*

Rule 32 (1) of the rules framed under Schedule IV of the Madras District Municipalites Act, 1920, can only apply to a case where the original seizure of the animal by the Municipality was permissible in law. Where the seizure by the Municipality is itself illegal, the Municipality cannot have any claim by way of reimbursement of the feeding charges in respect of such animal.

Quaere.—Whether presumption under section 99 (4) of the Act has application in respect of 'cart' as the language of the section is confined only to a 'carriage'.

Appeal against the Decree of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 45 of 1958, preferred against the Decree of the Court of the District Munsif of Kumbakonam in Original Suit No. 41 of 1957.

D. Ramaswami Ayyangar and *P. R. Varadarajan*, for Appellant.

K. S. Desikan and *K. Raman*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff in O.S. No. 41 of 1957, on the file of the Court of the District Munsif, Kumbakonam, sued the Mnnicipal Council, Kumbakonam, represented by its Executive Officer, the Commissioner, for recovery of a sum of Rs. 132 under the following circumstances. The plaintiff owned a country-cart with two bullocks. The cart and the bullocks were kept in the village of Ramanujapuram, of which place the plaintiff was a permanent resident. Ramanujapuram is a village situate at a distance of seven miles from the municipal limits of Kumbakonam. The cart drawn by the bullocks was within the municipal limits of Kumbakonam on 6th September, 1956, carrying straw and fuel for the domestic use of the plaintiff's uncle who was residing at Mudukku Street, in Kumbakonam. The goods were unloaded and the cart drawn by the bullocks was on its way back to the village along Darasuram Road. The cart was then stopped by the employees of the Municipal Council on the ground that the cart was liable to pay tax under the Municipalities Act and that no such tax had been paid. The plaintiff's case was that the municipal staff yoked the bulls to the cart and had the cart drawn to the premises of the office of the Municipality in spite of protest made by the driver of the cart. The Municipality collected from the plaintiff a sum of Rs. 31-2-0, consisting of Rs. 24 being the feeding charges for the bullocks during the period of their detention by the Municipality, Rs. 4-2-0 being the tax payable on the cart, Re. 1 tax on each of the bulls and Re. 1 for penalty and incidental charges. This amount together with the claim for damages for mental pain and distress estimated at Rs. 100 formed the subject-matter of the suit.

The defendant-Municipality contested the suit on the ground that what was levied and recovered from the plaintiff by way of tax and feeding charges was properly done in the exercise of their statutory functions and that the plaintiff was not

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* S.A. No. 1128 of 1958.

19th September, 1960.
(28th Bhadra, 1882—Saka).

entitled to seek to recover that amount. Of course, they contended that there was no cause of action for any claim by way of damages against them.

The learned District Munsif of Kumbakonam who tried the suit upheld the defence of the Municipality and non-suited the plaintiff. There was an appeal by the aggrieved plaintiff which was heard by the Subordinate Judge of Kumbakonam in A.S. No. 45 of 1958. The learned Subordinate Judge concurred with the trial Court in holding that the cart-tax was properly levied in conformity with the statute, but held that there was no jurisdiction on the part of the Municipality to levy a sum of Rs. 2 by way of tax on the bulls, as no notice was served on the plaintiff calling upon him to pay the tax and as section 102 (1) of the Act was not shown to have been complied with. With regard to feeding charges, the learned Subordinate Judge took the view that, inasmuch as the cart, which was subject to tax, was properly seized, the feeding charges in respect of the bulls incurred by the Municipality were properly payable by the plaintiff In the result, the learned Judge granted a decree in favour of the plaintiff for recovery of a sum of Rs 2, but otherwise confirmed the judgment and the decree of the trial Court.

This Second Appeal has been preferred by the plaintiff.

The judgment and decree of the Courts below in regard to the levy of the cart-tax are clearly unexceptionable. There was evidence in the case to justify the jurisdiction of the Municipality to levy cart-tax on the facts and circumstances of this case. Learned counsel for the appellant contended that the judgment of the lower appellate Court was vitiated as the presumption under section 99 (4) of the Madras District Municipalities Act invoked, cannot have application in respect of a cart, as the language of that provision was confined only to ' carriage ' as defined under the Act. There is, no doubt, force in this contention ; but it must be pointed out that that is not the only basis on which the Municipality sought to levy cart-tax on the plaintiff's cart. There are no grounds for interference in Second Appeal on this question of cart-tax properly levied by the Municipality and recovered from the plaintiff.

The Municipality has not preferred an appeal with regard to the disallowance of the levy of tax on bulls. It has therefore to be taken that the levy on the bulls was unlawful and without jurisdiction. The question that arises for consideration is whether the Municipality can claim the feeding charges of the bulls for the period of the custody of the bulls with them, once it is found that they had no authority to seize the bulls. Learned counsel for the appellant contended that rule 32 (1) of the Rules framed under Schedule IV of the Act can only apply to a case where the orignal seizure itself was permissible in law. I agree with this contention. It follows that the Municipality had no claim by way of reimbursement of the feeding charges in respect of the bulls. The plaintiff will therefore be entitled to a decree in addition to the decree already passed in his favour, for recovery of a sum of Rs. 24. The Second Appeal is partly allowed, and the decree of the lower appellate Court is modified accordingly.

There will be no order as to costs in this Second Appeal.

No leave.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Susila and another .. .. .. *Appellants*.*

Suppression of Immoral Traffic in Women and Girls Act (CIV of 1956), *sections* 2 (*a*), 3 (1) *and* 7 (1)—*Applicability—"Brothel"—Keeping a brothel or allowing premises to be used as a brothel—Proof—Prostitution in or near public place—Offence.*

Where two girls live in a house and use the house for prostitution, and money is paid to one of them who goes to the bed room with the man seeking her company, and the money is ultimately found on the other girl, it must be held that both of them are using the premises for the mutual gain of both of them. It is not necessary that the prosecution should further establish that what is paid to one of them comes into the hands of the other and *vice versa*. When both the girls are in the house and a man seeking the company of a girl comes there and one of the girls bargains or demands money and one of them tells the visitor that he can have either of them on payment of a certain amount and the other girl is silent without protesting that she would bargain for herself and merely allows the first girl to bargain for her also and finally the offer is accepted by the visitor who chooses one of the girls and goes into the room with her and the money paid to the latter girl is ultimately found with the other girl, it is a perfectly reasonable and normal inference to draw that the house was being used for prostitution for the mutual gain of both of them, and as such a " brothel " as defined in section 2 (*a*) and the offence under section 3 (1) of Act CIV of 1956, is established beyond all reasonable doubt.

When the premises in question is within 200 yards of a place of a religious worship, and a nursing home and hospital, the offence under section 7 (1), is also made out against the girl prostitute who keeps company with the visitor.

Appeal against the Judgment of the Sixth Presidency Magistrate of the Court of Presidency Magistrates, Saidapet, Madras, in Case No. 6855 of the Calendar for 1959.

C. K. Venkatanarasimhan for *P. N. George* and *K. Ayyappan*, for Appellants.

The Public Prosecutor (*P. S. Kailasam*), for State.

The Court delivered the following

JUDGMENT.—The two accused who are the appellants herein were tried by the Sixth Presidency Magistrate on the following charges : The first charge against the first accused is for an offence under section 3 (1) of Act CIV of 1956 for keeping a brothel ; the second charge against the first accused is for being a tenant and occupier of the premises in question within a distance of two hundred yards of Valliammal Temple and Ramakrishna Clinic, knowing the same to be used for prostitution, an offence punishable under section 7 (2) (*b*) of the above Act. As against the second accused also two charges were framed : (1) that she was also keeping a brothel, an offence punishable under section 3 (1) of the Act, and (2) that she carried on prostitution in the said premises within two hundred years of Valliammal Temple, a place of religious worship, and Ramakrishna Clinic, a nursing home and hospital, an offence punishable under section 7 (1) of the Act. The first accused has been acquitted on the second charge framed against her, that is, an offence under section 7 (2) (*b*). She has been convicted on the first count, that is, for keeping a brothel house, and sentenced to imprisonment for one year and a fine of Rs. 50. The second accused was also convicted and sentenced on the first count and sentenced to imprisonment for one year and a fine of Rs. 50. On the second count also she has been convicted and sentenced to two months' imprisonment and in her case the sentences were made to run concurrently.

The facts of the case are these. The Assistant Commissioner of Police, Vigilance, on receipt of information that in the house D.No. 18, Parangusapuram, Kodambakkam, the two accused were running a brothel, arranged for a trap to be laid on 25th October, 1959. He sent for P.W. 1, who is said to be having a shop at No 120, Arcot Road, which is near the premises in question. He was asked whether he would accede to go to the brothel house, pay the amount which would be given to him in marked notes and give a signal to indicate acceptance of the offer of money

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* Crl. A. No. 241 of 1960. 23rd August, 1960.
(1st day of Bhadra, 1882—Saka).

by the accused for their prostitution. He agreed to the same. Then P.W. 5 paid P.W. 1 Rs. 40 in marked notes (M.O. 1 series), that is, four ten rupee notes in the presence of P.W. 2 and another. A mahazar Exhibit P-1 was prepared and P.W. 5 attested the same. At 4 P.M. P.W. 1 went to the house in question. He was accompanied by another person who stood at some distance from the house. That person was to receive the signal given by P.W. 1 and communicate the same to P.W. 5 and his party.

P.W. 1 entered the house and found two girls sitting on two chairs. They asked him what he wanted and he said that he wanted a girl for keeping company in a bed-room. Then Accused 1 is said to have told him that he could choose either of them, referring to herself and Accused 2, and pay Rs. 50. To quote her own words, " You can choose one of us and pay Rs. 50". Then P.W. 1 told her that he was prepared to pay only Rs. 40. Thereupon Accused 1 is said to have told P.W. 1 that he can have Accused 2 for Rs. 40. P.W. 1 agreed. Then P.W. 1 attempted to pay Rs. 40 to Accused 1. But she directed him to handover the money to Accused 2. So, he gave the money to Accused 2. After payment of the money to Accused 2, as per the arrangement, he came to the verandah and lighted a cigar thus giving the signal. Then coming in, he went into the bed-room with Accused 2.

When he was inside the room, the Assistant Commissioner entered the house along with the witness P.W. 2 and another. He then found Accused 1 sitting on a chair in the hall. He questioned her as to who was the new comer and about the other girl, referring to Accused 2. Accused 1 is said to have pointed out to him the bed-room. The Assistant Commissioner then went near the bed-room with P.W. 2 and another witness. The door of the bed-room was then closed but not bolted. He opened the door and found P.W. 1 and Accused 2 on a cot in a compromising position. He asked them to come out. They dressed and then came out. He questioned P.W. 1 about the currency notes handed over to him and P.W. 1 told him what he did, *viz.*, that he handed over the money to Accused 2 and when P.W. 5 questioned Accused 2, Accused 2, told him that she handed over the money to Accused 1. Then P.W. 5 questioned Accused 1 and she produced M.O. 1 series from her waist. He showed the notes to P.W. 2 and the woman witness who accompanied him. A mahazar, Exhibit P-2, was prepared, and on a comparison of the notes, it was found that the notes produced by Accused 1 were the same as were given to P.W. 1 before he entered the brothel. After further investigation, a charge-sheet was filed against both the accused for the offences mentioned earlier in the judgment.

There is no doubt that the Assistant Commissioner is a Special Officer appointed under the Act for the purpose of investigating this case. The lower Court has found that this premises is used both by the first and second accused and that there is no proof that it was solely in the occupation of Accused 1, and therefore, acquitted the first accused of the second charge, but convicted the first accused on the first charge and the second accused on both the charges framed against her.

The main contention of the learned counsel, Mr. Venkatanarasimham, who appears for both the accused, is that the facts disclosed will not make section 2 (*a*) applicable to the premises in question and make it come under the definition of a brothel contained in that section. A " brothel " is defined as follows :

" ' Brothel ' includes any house, room, or place or any portion of any house, room or place, which is used for purposes of prostitution for the gain of another person or for the mutual gain of two or more prostitutes."

The contention of the counsel is that what is proved is only one act of lapse of conduct on the part of Accused 2 and that will not make her a prostitute and the premises a brothel. He relies on a decision of Ramaswami, J., in C.A. No. 536 of 1939.

On the question as to whether the evidence disclosed that the premises is a brothel, the following circumstances have to be noticed. P.W. 1 is a stranger. He goes to the house of the accused who are utter strangers to him. When he was

questioned as to why he came there, he says that he wanted a girl for his company. Immediately Accused 1 says that he can choose one of them for Rs. 50 and P.W. 1 says that he can pay only Rs. 40. The offer is accepted and the first accused asks P.W. 1 to take Accused 2 and both of them go to the bed-room. This evidence in my opinion is sufficient to prove that both of them are prostitutes. It is not likely that unless they were prostitutes, the moment a stranger comes and wants a girl they will offer themselves, one of them or both of them, on payment of any consideration It is only a prostitute who can offer her body for payment to a stranger when he comes and asks for her company. The demand of P.W. 1 for the company of a girl and the answer of the first accused that he could choose one of them for Rs. 50 then P.W. 1 offering to pay only Rs. 40 and thereafter Accused 1 accepting the offer and asking P.W. 1 to take the second accused, these circumstances, in my opinion, are sufficient to establish that both of them are prostitutes within the meaning of section 2 (*a*) of the Act.

Once it is established that both of them are prostitutes, then the question that arises is whether the premises was used as a brothel. Learned counsel contends that in this case money was paid to Accused 2. Accused 1 therefore did not receive the money for the prostitution of Accused 2. When P.W. 1 offered the money and if she has received the money and sent Accused 2 along with P.W. 1 into the bed-room, then it would certainly amount to running a brothel. But inasmuch as Accused 1 did not receive the money and directed the money to be paid to Accused 2 who was going to offer her body to P.W. 1, it cannot be said that Accused 1 was making any gain on the prostitution of another, that is, Accused 2. The further contention is that though the money might be recovered from Accused 1, it would only amount to Accused 2 giving the money to Accused 1 for the purpose of safe custody during the time when Accused 2 was inside the room with P.W. 1. I have already held that both the accused are prostitutes. No doubt, the money was paid to Accused 2 and it was recovered ultimately from Accused 1. The fact that two prostitutes are living in a house and using the premises for prostitution, and the fact that the money paid to one of them, that is to the person who goes with the man seeking her company and the recovery of the same from the other would establish that both of them are using the premises for the mutual gain of both of them. Considerable stress was laid on the meaning of the words 'mutual gain of two or more prostitutes' and it was contended that it must be established that there was reciprocity between them and that in this case what is established is only that accused 2 paid the money to Accused 1 and the contrary, namely, that Accused 1 paid Accused 2 for her prostitution has not been established, and that therefore the facts cannot be taken as establishing that there was a case of a premises being used as a brothel for the mutual gain of two or more prostitutes. It seems to me that it would be a reasonable inference to be drawn on the facts disclosed that these two women are in the house for the mutual gain of both of them. It is not necessary that the prosecution must further establish that what is paid to Accused 1 comes into the hands of Accused 2 and *vice versa*. From what has been established in this case, *viz.*, that when both the girls were in the house and when a man seeking the company of a girl came there and one of the girls bargains or demands money and one of them tells the visitor he can have either of them on payment of Rs. 50 and the other girl is silent without protesting that she would bargain for herself and mererly allows the first girl to bargain for her also and finally the offer is accepted by the visitor who chooses one of the girls and goes into the room with her and the money paid to the girl keeping his company is ultimately found with the other girl, I think it is quite a reasonable and normal inference that can be drawn from the facts that the house was being used for prostitution for the mutual gain of both and in this view it seems to me that the offence under section 3 (1) has been extablished beyond all reasonable doubt.

An argument was advanced that it was the mother of the two girls who rented the house and that she was in that house as a patient and therefore it could not be said that the two accused rented the house. The evidence of P.W. 5, the Assistant Commissioner of Police, shows that no one else was found in the house and that

the mother was not there. Assuming that the mother has rented the house, there is still the use of the premises by the two accused. There is, therefore, no substance in this contention.

So, so far as Accused 1 is concerned, she has been rightly convicted under section 3 (1) of the Act.

As regards Accused 2, she has also been proved to be keeping a brothel for mutual benefit of both, *viz.*, herself and Accused 1. She was therefore rightly found guilty under section 3 (1) of the Act. As regards the second charge against her, it is not disputed that the premises in question is within 200 yards of the Valliamman Temple, a place of religious worship, and the Ramakrishna Clinic, a nursing home and hospital, and on the footing that Accused 1 and Accused 2 were using the premises as a brothel for their mutual gain, the offence under section 7 (1) is made out against her and her conviction under that section is, therefore, justified.

The result is that the conviction of the first appellant on the first count and of the second appellant on both the counts are confirmed. The sentences imposed are the minimum prescribed under the Act and, therefore, I am unable to interfere with the sentences either, and they are also confirmed; and the appeal is dismissed.

P.R.N. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Ramayya Manatrayar .. *Appellant**

v.

Tholasiayya Sethurayar .. *Respondent.*

Registration Act (XVI of 1908), sections 17 and 49, Proviso—Sale of land of value Rs. 45—*Sale deed unregistered—Effect—Delivery of possession—Whether sufficient.*

If the unregistered sale deed of land of the value less than Rs. 100 is accompanied by delivery of property, the sale would be effective by virtue of delivery of possession and would not be rendered nugatory by the unregistered deed. By the *Proviso* inserted in section 49 of the Registration Act by Act XXI of 1929, the deed would be evidence of the contract of sale.

Varatha Pillai v. *Jeevarathnammal*, (1920) 38 M.L.J. 313 : L.R. 46 I.A. 285 : I.L.R. 43 Mad. 244 (P.C.), referred.

Mohammed v. *Mohammed*, A.I.R. 1936 Mad. 301, followed.

Appeal against the Decree of the Court of the Subordinate Judge, Tanjore, in A.S. No. 101 of 1956 (O.S. No. 87 of 1955, District Munsif's Court, Thiruvayyaru).

G. R. Jagadisan and *T. S. Srinivasan*, for Appellant.

T. S. Kuppuswamy Ayyar, for Respondent.

The Court delivered the following

JUDGMENT :—This appeal is directed against the decree and judgment of the learned Subordinate Judge of Tanjore, in A.S. No. 101 of 1956, reversing the decree and judgment of the learned District Munsif of Tiruvaiyaru in Original Suit No. 87 of 1955.

The suit property consists of $3\frac{1}{4}$ cents situated in the village of Nemam. This property originally belonged to one Venkatachala Iyer. He mortgaged the same with possession to one Vyakulam Pillai on 14th October, 1885, for Rs. 30. Then Venkatachala Iyer sold the property to Gnanaprakasam Pillai, son of the above-named Vyakulam Pillai on 23rd May, 1909, for Rs. 45. It is the case for the plaintiff that ever since Gnanaprakasam Pillai was enjoying the property as full owner till his death in 1944. There was a partition suit in the family of that Gnanaprakasam Pillai, O.S. No. 12 of 1949, District Court, Tiruchirapalli. In that suit,

* S.A. No. 689 of 1957. 10th July, 1959. (19th Asadha, 1881-Saka).

the suit property was allotted to the share of Royar Pillai, one of the sons of Gnanaprakasam Pillai. Vakulam Pillai, another son of Gnanaprakasam Pillai had obtained a decree for mesne profits in his favour. In pursuance of the decree for mesne profits this property was brought to sale in E.P. No. 184 of 1953 and in the auction sale held by the District Munsif's Court, Tiruvaiyaru, on 2nd September, 1954, the plaintiff Tholasiayya Sethurayar purchased the property for Rs. 125. The sale was confirmed on 22nd March, 1955. The plaintiff took the delivery, according to himself, of the suit property through Court on 1st April, 1955. The first defendant is said to have attested the delivery account.

On the other hand, the case for the third defendant who is the contesting defendant is that the sale deed of 1909 in favour of Gnanaprakasam Pillai is a fabricated document and that Gnanaprakasam Pillai was in enjoyment of the property only as a usufructuary mortgagee and that the third defendant was a tenant under Royar Pillai and was enjoying the property for about 15 years and that subsequently he purchased this item under a sale deed, dated 6th May, 1955, from Ramaswami Aiyar, one of the sons of the original mortgagor and he was enjoying it and that the plaintiff is not entitled to the property.

The learned District Munsif found that the plaintiff had no title to the suit property. He therefore, dismissed the suit.

On appeal the learned Subrodinate Judge came to a diametrically opposite conclusion and held that the plaintiff had established the sale of 1909 as a true and valid one, and, therefore, he decreed the suit for the plaintiff as against the third defendant. Hence this Second Appeal by the defeated third defendant.

The two points which arise for determination before me are (1) whether the conclusion of the learned Subordinate Judge that the sale deed of 1909 is a true one is correct and secondly the point of law relating to the unregistered sale deed.

In regard to the truth of the sale deed the learned District Munsif has analysed the evidence and has given six reasons for not believing the genuineness of the sale deed. The learned Subordinate Judge has gone into the matter thoroughly and come to the conclusion that singly and cumulatively the reasons put forward by the learned District Munsif make out that the sale deed was not a genuine one.

On a review of the entire circumstances of the case, I have come to the conclusion that the learned Subordinate Judge has come to the conclusion he has done on acceptable and relevant evidence. The sale deed itself is engrossed upon very old stamp papers. It is extremely unlikely that after half a century stamp papers would be procurable to write this document. This sale deed has been attested by three persons who died about quarter of a century ago. It is extremely unlikely that this plaintiff would have been able successfully to forge the signatures of those departed people. On the other hand, we have got the evidence of the son of that Gnanaprakasam Pillai, about the sale deed, as to how his father was enjoying the property under the sale deed. It is also extremely unlikely, having regard to the extent and the value of the property, that an elaborate fabrication would have been done, thus exposing these people to severe penalty if the forgery, if any, were to be discovered. In other words, the sale deed had got the hallmark of a true document and I am unable to say that the learned Subordinate Judge was not justified in coming to the conclusion which he had done.

On that conclusion, namely, that the sale deed is genuine, it follows tha possession of the plaintiff's predecessor-in-title must be attributed only to this sale. The learned advocate, Mr. Jagadisa Aiyar, rightly stresses that the title and possession of the plaintiff's predecessor must be under the sale deed and possession should not be merely as *qua* usufructuary mortgagee. But as pointed out by the learned advocate, Mr. Kuppuswamy Aiyar, in these cases it becomes often a metaphysical argument and it is only from the surrounding circumstances that we can say where one ends and the other begins. Otherwise how can any usufructuary mortgagee prove that his possession which continued was as *qua* vendee under that document. In this case the sale deed clearly declares that

possession had been given by the vendor to the vendee. Then we have got the evidence of P.W. 3, the son of Gnanaprakasam Pillai, that his father got possession of the property under the sale deed and continued to enjoy the same. The sum total of the evidence in this case shows that the possession of the usufructuary mortgagee got converted into that of possession as vendee.

Therefore, on the facts there are no grounds to interfere with the decree and judgment of the learned Subordinate Judge.

The point of law urged is that even though there need not be a registered sale deed for the conveyance of property below the value of Rs. 100, if a sale deed is written it must be registered. On this subject there is a considerable amount of case-law as gathered and the settled law on the subject can be stated as below :—

If the deed is not registered, there is no transfer and property does not pass. This is so even if the property is tangible immoveable property of value less than Rs. 100. Mere delivery of the deed will not operate as delivery of the property ; nor will a recital in the sale deed of delivery of possession suffice, for such a recital might be inserted without any attempt at fulfilment . But if the unregistered deed of value less than Rs. 100 is accompanied by delivery of the property, the sale would be effective by virtue of delivery of possession and would not be rendered nugatory by the unregistered deed. The deed would be evidence of the contract of the sale or of any negotiations concerning the transaction. (*See* section 49 of the Registration Act as amended by Act XXI of 1929).

An unregistered deed may, under the judgment of the Privy Council in *Varatha Pillai* v. *Jeevarathnammal*[1], be used as evidence of the character of possession.

These principles will be found embodied in *Makanlal* v. *Bunku Bugari*[2] ; *Biswanath Prasad* v. *Chandra*[3] ; *Nathu* v. *Sulale Chand*[4] ; *Kathari* v. *Bhupathy*[5] ; *Dayaram* v. *Sibaram*[6] ; *Triboran* v. *Shankar*[7] ; *Brajaballa* v. *Akhoy*[8] ; *Umajha* v. *Chitu*[9] and *Nagayya* v. *Sayamma*[10].

Thus in the case of tangible immoveable property worth less than Rs. 100 if the transfer is not made by delivery there must be a registered sale deed. An unregistered deed would be invalid and would not operate as constructive delivery. But if there is delivery it is, as already stated, not rendered nugatory by the existence of an unregistered deed. But the delivery need not be contemporaneous with the unregistered deed ; it may take place some time after. In a Madras case, *Kuppuswami* v. *Chinnaswami*[11], it was said that the execution of an unregistered sale deed invalidated the oral sale by delivery as the deed excluded evidence of the agreement of sale. But this has been dissented from by the Patna High Court, in *Keshwar Mahton* v. *Sheonandan*[12], and it has been held that a sale deed though not registered is admissible as evidence of the contract of sale (*Puchha Lal* v. *Kunj Behari Lal*[13]). This is now made clear with reference to certain suits by the *Proviso* inserted in section 49 of the Registration Act by Act XXI of 1929. Justice Curgenven in *Mohammed* v. *Mohammed*[14], held that where there is a unregistered sale deed followed by possession of land sold for less than Rs. 100 title will pass.

Bearing these principles in mind if we examine the facts of this case, apart from the unregistered sale deed, there has been delivery of the property and enjoyment of the same. Consequently, the fact that the sale deed has not been registered will not make any difference to the title which passed under the sale deed.

The net result of this analysis is that this Second Appeal has got to be dismissed and in the circumstances without costs.

K.L.B. — *Appeal dismissed.*

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1. (1920) 38 M.L.J. 313 : L.R. 46 I.A. 285 : I.L.R. 43 Mad. 244.
2. I.L.R. 19 Cal. 623.
3. (1921) 40 M.L.J. 489 : L.R. 48 I.A. 127 : I.L.R. 48 Cal. 509 : A.I.R. 1921 P.C. 8.
4. A.I.R. 1934 Nag. 18.
5. (1915) 29 M.L.J. 721.
6. A.I.R. 1925 All. 206.
7. A.I.R. 1943 Bom. 431.
8. (1925) 30 C.W.N. 254.
9. A.I.R. 1926 Pat. 89.
10. A.I.R. 1951 Mys. 42.
11. 111 I.C. 677 : A.I.R. 1928 Mad. 546.
12. (1929) 122 I.C. 533.
13. (1913) 18 C.W.N. 445.
14. A.I.R. 1936 Mad. 301.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

The Workers employed in the 32 Textile Mills in Coimbatore District represented by the District Mill Workers Union, Coimbatore represented by its Secretary .. *Petitioner**

v.

The Dhanalakshmi Mills Limited, Tiruppur and others. .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 2 (b)—Award—Meaning of—Compromise entered into between certain workers and managements recorded by Tribunal—If an award—Sections 7, 7-A, 7-B and 10 as amended by Act (XXXVI of 1956)—Scope—Old Tribunal under the Act abolished—Dispute referred back—If could be dealt with by the new Tribunals under the Amended Act.

Section 2 (*b*) of the Industrial Disputes Act, 1947, defines an 'award' as meaning an interim or final determination of an industrial dispute. Such a determination should be a judicial one in which the Tribunal exercises its own judgment. Though a Tribunal under the Act might take note of a compromise entered into between the workers and management in any dispute before it, the compromise should be adopted as its own determination of the dispute in order to make it an award of the Tribunal. An Industrial Tribunal under the Act has no power merely to record a compromise like the civil Courts under Order 23, rule 3 of Civil Procedure Code. Such a recording cannot by itself amount to a determination as such of the question referred to it. Having regard to the nature and scope of an industrial dispute and an award under the Act, which would affect parties other than those actually appearing before the Tribunal, a compromise by a few cannot amount to a settlement of the dispute. It is therefore necessary that the Tribunal should either make its own award or adopt a compromise as its award after considering whether it is proper in the interests of all workmen concerned in the dispute. For this purpose the Tribunal should give an opportunity to the concerned parties to show that the compromise could not be adopted.

On a fair construction of the various provisions of the Industrial Disputes Act, as amended by Act (XXXVI of 1956), industrial disputes referred to for determination by the Tribunals under the Act before the amending Act of 1956, could be decided by the appropriate Tribunal constituted under section 7, 7-A, or 7-B of the Amended Act as the case may be.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the Award, dated 25th March, 1957, passed by the Industrial Tribunal, Coimbatore, in I.D. No. 13 of 1952 and published in *Fort St. George Gazette*,—Supplement to Part I, dated 24th April, 1957, at pages 9 to 13 and quash the said award.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for Petitioner.

K. Rajah Iyer, M. R. Narayanaswami, T. Ramakrishna, for the Additional Government Pleader (*M. M. Ismail*) and *B. Lakshminarayana Reddy*, for Respondents.

The Court made the following

ORDER :—Some time in 1952, there was a dispute between the management of 32 mills in Coimbatore and the workmen employed therein in regard to the bonus payable to the latter for the years, 1949, 1950 and 1951. By G. O. Ms. No. 2019, dated 9th May, 1952, the State Government referred the dispute for adjudication to the Industrial Tribunal, Coimbatore, constituted under section 7 of Act XIV of 1947. The Industrial Tribunal took on file the dispute as I.D. No. 13 of 1952, and issued notices to the Secretary of the Coimbatore District Textile Workers' Union and to the Honorary Secretary, the South Indian Mill Owners' Association, Coimbatore, the parties mentioned in the Government Order, requiring them to file their respective statements in connection with the dispute. The Government communicated a copy of the G. O. to three other Unions, namely, the Coimbatore District Textile Mills' Staff Union, the Coimbatore District Textile Jobbers' Union and the National Textile Workers' Union. The notices were issued to those Unions as well by the Industrial Tribunal. No notice was, however, given to the petitioner namely, the District Mill Workers' Union, Coimbatore, although they had participated in the antecedent conciliation proceedings which culminated in the reference under section 10 of the Act.

* W.P. No. 735 of 1957.

29th April, 1960.
(9th Vaisakha, 1882, Saka).

At an early stage of the enquiry, there was a dispute between the parties as to whether the managment should give inspection of their accounts to the Union representatives. Although the Industrial Tribunal directed the management to give inspection of the accounts, the order was quashed on 30th October, 1954, by this Court in W.P. Nos. 755 and 756 of 1952. In the meanwhile, that is, on 22nd October, 1952, an agreement was entered into between the management and the District Textile Workers' Union, Coimbatore, in regard to the subject-matter of dispute. The petitioner, namely, the District Mill Workers' Union, did not accept that compromise, and they made their position clear by a letter to the management on 28th October, 1953. The workers, received the bonus agreed to be paid under the agreement referred to above, without prejudice to their rights. That this agreement was not taken by the parties or by the Industrial Tribunal as a final settlement of the claim, is clear from the fact, that after the disposal of the writ petitions, W.P. Nos. 755 and 756 of 1952, the Industrial Tribunal set down I.D. No. 13 of 1952, for hearing, and issued notices to various Unions, the petitioner being one of them. In response of that notice, claim statements were filed on 14th March, 1957, by the petitioner and the other Unions, on the basis of what is now come to be known as the Full Bench formula.

Three Unions which were represented by the Indian National Trade Union Congress (hereafter referred to as I.N.T.U.C.), namely, (1) The National Textile Workers' Union, Coimbatore, (2) The Coimbatore District Textile Workers' Union, Coimbatore, and (3) The Coimbatore District Textile Mill Staff Union, entered into an agreement with the management in respect of bonus for the years 1949 to 1952. To that agreement, the petitioner, the District Mill Workers' Union, Coimbatore, was not an assenting party. Indeed, on the 23rd March, 1957, the petitioner sent a communication to the Industrial Tribunal, Coimbatore, stating that the Union was not consulted by the management, while entering into the compromise. The petitioner, therefore, requested the Tribunal to continue the enquiry into the dispute which had been pending for quite a long time. The industrial dispute was taken up for hearing on the same day. The agreement, dated 23rd of March, 1957, was sought to be recognised as one in final settlement of the dispute; the petitioner disassociated itself from the compromise, and wanted to agitate the question of bonus. The Industrial Tribunal overruled the petitioner's claim for hearing on the merits of the case and passed an award in terms of the agreement, dated 23rd March, 1957. Annexed to the compromise was the agreement which was signed by the General Secretary of the Tamil Nad Indian National Trade Union Congress for the workers represented by the Union affiliated thereto, and by the Chairman of the South Indian Mill Owners' Association on behalf of the management of 30 mills.

The main reasons, on which the Industrial Tribunal rejected the claim of the petitioner for hearing of the case are these: (1) that the petitioner was not a party to the reference, either at the initial or subsequent stages and that no interest had been taken by them in the proceedings; (2) that the petitioner did not object to the agreement between the District Textile Workers' Union and the management; (3) that that industrial dispute having been contested only by the National Textile Workers' Union and that Union having settled the matter, the petitioner could not urge any independent claim; and (4) that the notice issued by the Tribunal to the petitioner could not confer a right as a party and that, therefore the petitioner was bound by the compromise.

The order of the Tribunal, declining to enquire into the matter, and merely recording the compromise between the Indian National Trade Union Congress Unions and the management, cannot amount to a valid adjudication of the industrial dispute which was referred to it for adjudication. The Tribunal was obviously under a misapprehension in regard to the binding nature of the two compromises, successively entered into by the District Textile Workers' Union and the National Textile Workers' Union with the management. I have already referred to the fact

that the former agreement was not relied on by the management or by the other workers as in any way binding on them. The proceedings were allowed to continue, even after the compromise was entered into on 28th October, 1953. No disability would attach to the petitioner by reason of the fact that it did not protest when that agreement was filed. It must also be said that, factually, that statement of the Tribunal is wrong, because the petitioners made it clear, by their letter, dated 28th October, 1953, the receipt of which is not denied by the management, that they would not be bound by the compromise with the District Textile Workers' Union.

The question that has to be decided is whether the compromise, entered into on 23rd March, 1957, with the Indian National Trade Union Congress Unions, could be held to finally terminate the industrial dispute, and whether there has been a valid award in regard to it. The Industrial Tribunal merely adopted the compromise, and passed an award in terms thereof. There was no finding arrived at by the Industrial Tribunal after hearing all the parties as to whether that agreement was a fair, and just settlement of the dispute, so that it could be adopted as an award by the Tribunal itself. The dispute that was referred to for adjudication was one between the management and the workers in the 32 mills. Section 2 (*b*) of the Act defines 'award' as meaning an interim or a final determination of any industrial dispute. The order of the Industrial Tribual, dated 25th March, 1957, purports to be a final determination of the dispute, and nothing is left outstanding to be decided. There has been no determination as such by the Industrial Tribunal of the question referred to it. The Tribunal had merely adopted the agreement between the parties. Section 15, which prescribes the duties of the Tribunal, directs it to hold its proceedings expeditiously, and submit its award to the appropriate Tribunal. There is no power in the Industrial Tribunal similar to one conferred under Order 23, rule 3 of the Code of Civil Procedure to record a compromise. What the Industrial Tribunal is empowered, is to pass an award which is defined as interim or final determination. It is implicit in the word "determination" that it should be judicial, implying that the Tribunal exercises its own judgment. This does not, however, mean that the Tribunal is precluded from taking note of a compromise entered into between the workers and the management. Where there is a compromise, it should consider whether, in its opinion, the compromise could be adopted as its own determination of the dispute, that is, whether it is fair, just and equitable between the parties. This is necessary as the award would affect parties other than those actually appearing before the Tribunal. Section 18 of the Act states that an award which has become enforceable shall be binding on the parties to the industrial dispute, namely, the management and all the workmen. The binding nature of the award does not depend on any particular worker or the Union to which he belongs being *eo nomine* a party. Section 36 enables a workman who is a party to the dispute to be represented by an officer of a registered Trade Union, of which he is a member, or where he is not a member of any Trade Union, by an officer of any Trade Union connected with, or by any other workman employed in the industry in which the worker is employed and authorized in such manner as may be prescribed. The aforesaid provisions make it clear that, although a particular Union or a worker has not been made *eo nomine* a party to the dispute in the sense that no notice was issued to it or to him, any award that may be ultimately passed will be binding, on him. The concerned worker or Union is therefore given a right to be represented and heard in the industrial dispute. The nature of the dispute is such, that numerous persons would be interested in it, notice could not be given to every one of them. The right adjudicated is not an individual right, but one common to all the workmen.

A compromise by a few cannot, therefore, amount to a settlement of the dispute, for a compromise can only bind those who are parties to it. It is, therefore, necessary that, the Industrial Tribunal should either make its own award or adopt compromise entered into by the parties as a part of its award after considering whether it is a proper one from the point of all the workmen concerned in the dispute. For that purpose the Tribunal should give an opportunity to all the concerned parties to show whether the compromise could be so adopted. It was not

therefore competent for the Tribunal to have disposed of the matter, as if it were a dispute between the actual parties to the compromise.

The Tribunal has given a finding that the petitioner could not be heard to oppose the compromise. Section 36 makes it clear that the petitioner is entitled to be heard. As I stated before the right of a worker to be heard does not depend on a notice having been given to him. It is not disputed that a large section of the workers are represented by the petitioner-Union, and that even assuming that no notice was issued to the Union, they would be entitled to be heard on the dispute referred for adjudication. Further the petitioner had been taking active part in these preceedings. It had filed claims on behalf of the workers, and the Tribunal itself issued notice of the hearing to the petitioner. I cannot see how the petitioner could be said to be bound by the agreement entered into by the Indian National Trade Union Congress Unions. It follows that there had been no valid award by the Tribunal, so as to bind all the workers.

The management has, no doubt, settled with the District Textile Workers' Union and the Indian National Trade Union Congress Unions but these Unions do not represent the entirety of the workers working in the various mills. A considerable section of the workers belonged to the petitioner-Union. It may be that what was paid by the management to the various workers under the compromise could not be got back by them, but that does not mean that the petitioner would, in any way be estopped from claiming that the industrial dispute should be settled in accordance with law, particularly when they had received the payment of bonus without prejudice to their rights.

But the main difficulty in the present case is the procedure to be adopted. As I have indicated above the Tribunal has not validly disposed of the industrial dispute by passing an award in accordance with law. It follows that the Industrial dispute still remains undisposed of. The Tribunal which passed the impugned award was one appointed under section 7 of the Industrial Disputes Act prior to its amendment by Act XXXVI of 1956. By that enactment section 7 of the Industrial Disputes Act of 1947 was repealed. The functions thereto-before entrusted to Industrial Tribunals were divided between two or three sets of Tribunals, namely, Labour Courts, the Industrial Tribunals, and the National Tribunals. We are not concerned in the present case with the National Tribunal. So far as we are concerned industrial dispute like the present one will have to be referred after the amendment of the Industrial Disputes Act of 1947 by the Amending Act of 1956 either to the Labour Court or to the Industrial Tribunal. Section 7-A, which is introduced by the Amending Act, (XXXVI of 1956) empowers the Government to constitute one or more Industrial Tribunals. Its jurisdiction is defined by section 10, namely, that it can decide disputes referred to it by the Government under that provision in regard to the matters specified in Schedules II and III of the Act. Section 7 enacts the constitution of Labour Courts. These Tribunals will have jurisdiction under section 10 to decide or adjudicate upon matters specified in the Act in Schedule II. The result of the amendment is that in the place of the Industrial Tribunals constituted under section 7 of the Industrial Disputes Act of 1947 the Labour Court and the Industrial Tribunal constituted under sections 7 and 7-A of the amended Act will have to function in the respective spheres, specified in the two schedules referred to above.

Mr. M.R. Narayanaswami, learned counsel for the management contends that as the Industrial Tribunal which passed the award had been abolished by virtue of the repeal of section 7 of the Industrial Disputes Act of 1947, the successor Tribunals would have no jurisdiction to re-entertain the undecided disputes except in cases provided in section 30 of the Act and that therefore this Court should not issue the writ of *certiorari* which in the circumstances would be futile. The learned counsel referred me in this connection to the provisions of the original section 7 and the new sections 7, 7-A and 10 in support of the contention that the Tribunals acting under the unamended Act were not the same as those appointed under the

amended Act. Learned counsel also relied upon the provisions of section 30 of Act XXXVI of 1956 which states thus :

> "*Savings as to the proceedings* : If, immediately before the commencement of this Act, there is pending any proceeding in relation to an industrial dispute before a Tribunal constituted under the Industrial Disputes Act, 1947, as in force before such commencement, the dispute may be adjudicated and the proceeding disposed of by that Tribunal after such commencement, as if this Act had not been passed."

That section gives a power to the old Tribunal constituted under section 7 of the unamended Act to complete the work that was pending before it. The learned counsel is certainly right when he contended that that Tribunal having been abolished by the repeal of the old section 7 could no longer be reconstituted so as to re-entertain the dispute which had been disposed of by it. But that contention cannot lead to the conclusion that there is no authority under the amended enactment to deal with the matter in case this Court were to hold that the industrial dispute had not been validly disposed of. It must be remembered that Act XXXVI of 1956 is only an amending Act. The provisions of section 7 and 7-A empower the Government to constitute Tribunals to adjudicate upon disputes referred to under section 10. In the place of the Industrial Tribunal constituted under the old Act, two Tribunals (or three as the case may be) took its place, their jurisdiction being defined. While the Industrial Tribunal has under section 10 power to decide all disputes, that is those coming under Schedules II and III like the Industrial Tribunal under unamended section 7, the Labour Court has been given power to decide a limited class of disputes. That does not mean that the Tribunals constituted under the new Acts are in any way different from the old. I am of opinion that on a fair construction of the various provisions of the Act the industrial disputes referred for determination before the amendment of the Act in 1956 could be decided by the appropriate Tribunal constituted under sections 7, 7-A or 7-B of the Act as the case may be. I am supported in my opinion by a recent unreported judgment in Writ Appeal No. 102 of 1956 where though this point was not discussed by the learned Judges, they have remitted the case, which was originally disposed by an Indutsrial Tribunal under the unamended Act, to the Tribunal constituted after the amendment.

Mr. Mohan Kumaramangalam, learned counsel for the workers invited my attention to two decisions of the Supreme Court rendered under the Representation of the People Act, *Sangram Singh* v. *Election Tribunal, Kotah*[1], and *Bhikaji Keshao* v. *Brijlal Nandlal*[2], in support of his contention that even if the Tribunal which actually decided the case had been abolished or become *functus officio* it would be open to this Court to direct the Government to constitute appropriate Tribunal and refer the dispute to the appropriate Tribunal for adjudication. It is however unnecessary to consider that question in the view I am taking of the provisions of this case.

The result is that the order of the Industrial Tribunal in so far as it purported to decide on the basis of an agreement between certain of the parties is without jurisdiction. A dispute of this nature involving as it does more than 100 workers will admittedly have to go before the Industrial Tribunal, Madras. The result will be that the Industrial dispute will have to be taken on file by the Industrial Tribunal at Madras and disposed of in accordance with law. When the matter is taken up for final hearing it would be certainly open for the management to plead that the compromise arrangement of 23rd March, 1957, is so just and fair that it should be accepted as the basis of the ultimate award by the Tribunal. The rule *nisi* is made absolute. There will be no order as to costs.

R.M. *Rule nisi made absolute.*

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1. 1955 S.C.J. 431 : A.I.R. 1955 S.C. 425.
2. 1955 S.C.J. 658 : A.I.R. 1955 S.C. 610.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE KUNHAMED KUTTI.

Bibijan *alias* Karimunnissa Bi and another .. *Appellants**

v.

The Collector of North Arcot, Vellore and others .. *Respondents.*

Income-tax Act (XI of 1922), section 46 (2)—Certificate under—If could be executed by a civil Court as a decree.

A certificate of the Income-tax Officer issued under section 46 (2) of the Income-tax Act to the Collector is not a decree of a civil Court and the Collector has no power to apply for execution of the same to the civil Court. The fact that the Collector can recover the amount by adopting the process of an execution in a civil Court does not mean that the certificate is as such executable by a civil Court.

Appeal against the Order of the Court of the Subordinate Judge, Vellore, dated 19th February, 1958 and made in E.P. No. 325 of 1956, in Income-tax No. 54-A of 1947-48, Income-tax Order.

M. Ramachandran and *T. V. Balakrishnan*, for Appellants.

The Government Pleader (*A. Alagiriswami*), for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—One Kaniyambadi Abdul Shukkur Saheb was assessed to income-tax in a sum of Rs. 21,900. Acting under the provisions of section 46 (2) of the Indian Income-tax Act, the Income-tax Officer forwarded a certificate to the Collector specifying the amount of arrears due from the assessee for taking steps to recover the amount. Under section 46 (2) of the Act, it was open to the Collector to recover the amount due by way of income-tax as if it were an arrear of land revenue. But this is not what he did. He applied to the Subordinate Judge of Vellore for levying execution by attachment and sale of immovable properties belonging to the assessee. Pending the execution petition, the assessee died and his legal representatives have been brought on record. They opposed the grant of the petition on the ground that it was not open to the Collector to apply to a civil Court for execution, when there had been no decree making the assessee liable for the amount of tax. The learned Subordinate Judge overruled the objection and directed execution to proceed. The assessee's legal representatives are challenging the order by this appeal. It is admitted that there is no fund in Court which can be paid out to the Income-tax Officer on the ground that the Government have a priority in respect of their claim against the assessee. What the Collector applied for was the levy of execution under the Code of Civil Procedure. There is no decree by a civil Court in favour of the Collector for the amount due by way of tax. What is stated is, that as the amount of arrears mentioned in the certificate issued by the Income-tax Officer could be collected by the Collector, who has powers under the Code of Civil Procedure, it would be open to him to apply for execution of the assessment order in the civil Court as if it was a decree of that Court. Reliance is placed in support of the contention upon a Full Bench decision of this Court in *Manickam Chettiar* v. *Income-tax Officer, Madura South*[1]. In that case, a sum of money was received in Court. The Crown applied for payment out of the money in Court in preference to the execution creditor at whose instance there was a sale in execution. It was held that the Crown having a priority over all unsecured creditors would be entitled to apply to the Court for an order directing its debt to be paid out of moneys in Court belonging to the debtor without having to file a suit. But that decision is not an authority for the proposition that, where there is no fund in Court, it would be open to the Collector to apply for execution, as if the certificate issued by the

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* A.A.O. No. 325 of 1958. 14th December, 1960.
(23rd Agrahayana, 1882, Saka).

1. (1938) 1 M.L.J. 351 : I.L.R. (1938) Mad. 744 (F.B.).

Income-tax Officer is a decree of that Court. There is nothing in section 46 (2) of the Income-tax Act to warrant any such a position being taken up. That provision only enables the Collector to recover the amount of tax as if it was an arrear of land revenue. In so recovering, the Collector is given powers of a civil Court under the Code of Civil Procedure. There is nothing in the section to justify a petition to a civil Court of directing attachment and sale of the property of the assessee. The Collector can certainly file a suit in respect of the amount mentioned in the certificate and if he obtains a decree, he can recover the amount due by adopting the ordinary process of an execution in a civil Court. But in the present case, the only question is whether, there being no decree of a civil Court, it will be open to the Collector to apply to the Court for execution as if the certificate issued by the Income-tax Officer is a decree of that Court. We are of the opinion that it would not be open to him to do so.

The order of the lower Court levying execution cannot therefore be sustained. The appeal is allowed but there will be no order as to costs in the circumstances of the case.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Azeez Bivi .. *Petitioner**

v.

Masilamani Chettiar .. *Respondent.*

Madras Cultivating Tenants' (Payment of Fair Rent) Act (XXIV of 1956), section 14 (2)—Crucial time for surrendering excess lands to avail of the benefits under the Act—Remand by the Rent Tribunal—Conditions necessary for.

Under section 14 (2) of the Cultivating Tenants (Payment of Fair Rent) Act a tenant in order to get the benefit of fixation of fair rent should surrender the excess land before the ending of the agricultural year 1957. It will not be open to him to surrender at any time the excess holding and apply for fixation of fair rent.

An order of remand made by the Rent Tribunal without ascertaining whether the order of the Rent Court was correct or not and without setting aside that order would not be justified.

Petition under section 11 of the Madras Act XXIV of 1956 and section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Rent Tribunal (District Munsif), Chidambaram, dated 14th March, 1960 and made in R.A. No. 12 of 1959 (O.S. No. 194 of 1959, Rent Court, Chidambaram).

T. V. Balakrishnan and *N. Vanchinathan*, for Petitioner.

K. N. Subramanian, for Respondent.

The Court delivered the following

JUDGMENT.—This Revision Petition which is filed by the landlord arises out of an order in certain proceedings initiated by the respondent for the fixation of fair rent. The lease in favour of the respondent admittedly covered a larger extent of land than 6.66 acres. The benefit of fixation of fair rent under Act XXIV of 1956 is given only to tenants who cultivate less than that extent. Under section 14 (2) of the Act any cultivating tenant who owns or cultivates either as a tenant or as owner or as both an extent of land exceeding 6⅔ acres but not exceeding 10 acres may by notice in writing addressed to the land owner relinquish at the end of the agricultural year ending 1957 the tenancy in respect of such portion of the land aforesaid as may be necessary to entitle him to all such benefits as a cultivating tenant under the Act. The respondent who had possession of more than 6.66 acres of land did not renounce or surrender possession of any land covered by the lease in excess of that extent within the agricultural year ending in 1957. It was only on 4th May,

* C.R.P. No. 738 of 1960. 30th November, 1960. (9th Agrahayana, 1882, Saka)

1959, that the tenant intimated to the landlord setting out that he was surrendering then the excess lands. That would show that on the crucial date, namely, the ending of the agricultural year 1957 the tenant was in possession of more than 6.66 acres of land. That will not entitle him to apply for the fixation of fair rent. This was the view taken by the Rent Court of Chidambaram who dismissed his application for fixing a fair rent.

The matter was taken up in appeal to the District Munsif (Rent Tribunal) of Chidambaram. The argument before the Appellate Authority was that notwithstanding the provisions of section 14 (2) it will be open to the tenant to surrender the excess land at any time and claim the benefits of the Act. In answer to that argument the landlord stated that even factually there was no surrender and that the notice Exhibit P-1 was only a make believe.

I am not satisfied that the Tribunal ever applied his mind to the case at all. It has simply set aside the order of the Rent Court and remanded the petition. It was the duty of the Tribunal first to ascertain whether the order of the Rent Court was right or not. It has been held that the power to remand cannot be exercised unless the order of the first Court has been first set aside. This the Rent Tribunal never attempted to do. On the other hand the Officer presiding over the Tribunal appears to have assumed that there can be surrender by a tenant applying for the fixation of fair rent at any time and in that view he has sent back the case to the Rent Court for investigation as to whether factually there was surrender or not. There was no warrant for the remand. It is plain on a reading of section 14 (2) that a tenant who has not surrendered the excess land before the ending of the agricultural year 1957 would not be entitled to apply for fixation of fair rent. The order of remand cannot be justified. In the circumstances of the case, I do not consider it necessary to send the case back to the Rent Tribunal. I am of opinion that the application by the tenant for fixation of fair rent was rightly rejected by the Rent Court. That order will be affirmed and that of the Appellate Authority set aside. The respondent will pay the costs of the petitioner.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

Messrs. Ashok Motors, Limited .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent*

Income-tax Act, (XI of 1922), section 15-C—Exemption of profits to the extent of 6 per cent. of the capital employed in the industrial undertaking—Assessee also deriving income under contract of agency apart from industrial undertaking—If exemption could be claimed in such a case.

The exemption provided under section 15-C of the Income-tax Act cannot operate in respect of any profit derived by the assessee from any trade or business other than the industrial undertaking. It is the assessee that is granted the exemption on the profits derived by him. It is not the industrial undertaking which is granted the exemption contained in the section treating such industrial undertaking as a separate unit of assessment. This is reinforced by sub-section (6) to section 15-C.

The object of granting exemption is to encourage the establishment of new industrial undertakings. That would be wholly defeated if the exemption is to be granted in respect of the profits derived from businesses of other kinds, even though the same assessee conducts such businesses side by side with the industrial undertaking. Even in the case of composite business carried on by the assessee, it is only the profits of the industrial undertaking that would be eligible for exemption.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act (XI of 1922), in R.A. Nos 958 and 960 of 1955-1956 (I.T.A. Nos. 1039 and 1041 of 1955-1956 Assessment Years 1951-52 and 1953-54) on its file for decision on the following questions of law, *viz* :—

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* Case Referred No. 95 of 1956. 4th October, 1960.
(12th Asvina, 1882, Saka).

" (1) The Assessee trading in imported motor vehicles as also in such vehicles assembled in India out of imported parts in an industrial undertaking, whether the whole of its total income for assessment years 1951-1952 and 1953-1954 being less than six per cent. of its capital is exempt under the provisions of section 15-C ?

(2) If the answer to the above question is in the negative, whether the carry-forward of Rs. 2,48,483 for assessment year 1950-1951 is not a deduction only against the profits of the succeeding year 1951-1952 identifiable as from the industrial undertaking section ?

S. Swaminathan and *K. Ramagopal*, for Applicant.

C. S. Ramarao Sahib and *S. Ranganathan*, Special Counsel for Income-tax, on behalf of the Respondent.

The Judgment of the Court was delivered by

Srinivasan, J.—Messrs. Ashok Motors, Ltd., Madras, is a public limited company which commenced its business as a dealer in Austin Cars and trucks and spares. Early in 1949, it commenced to import parts from abroad and assembled cars at its factory. In respect of the assessment year 1951-52, for which the account year ended on 31st December, 1950, an amount of Rs. 2,48,483 was carried forward as depreciation allowance. It was claimed before the Income-tax Officer that this allowance should be set off against the total income of Rs. 4,44,462 and that the balance should be wholly exempted from tax under section 15-C of the Act. In a similar manner, for the assessment year 1953-54, the claim was made by the assessee that out of the total business income of Rs.6,81,549 exemption should be granted under section 15-C of the Act to the extent of 6 per cent. of the capital employed in the industrial undertaking, though the above said income was not entirely derived from the industrial undertaking. It may be mentioned that the Department proceeded on the basis that the assessee did not derive the income solely from the industrial undertaking but that it was in part derived also from activities such as trade in purchase and sale of cars and spare parts and certain commission received from foreign companies who also supplied the goods to the assessee under the contract of agency. The assessee did not however maintain separate accounts for the industrial undertaking, and its non-industrial activity. But certain figures were furnished by the assessee which were accepted by the Department as correctly representing the profits under the two heads.

Appeals to the Assistant Commissioner and to the Tribunal failed. On the application of the assessee, the following questions have been referred to us :—

" (1) The assessee trading in imported motor vehicles as also in such vehicles assembled in India out of imported parts in an industrial undertaking, whether the whole of its total income for assessment years 1951-1952 and 1953-1954 being less than 6 per cent. of its capital is exempt under the provisions of section 15-C ?

(2) If the answer to the above question is in the negative, whether the carry-forward of Rs. 2,48,483 for assessment year 1950-1951 is not a deduction only against the profits of the succeeding year 1951-1952 identifiable as from the industrial undertaking section ?"

It would be desirable at the outset to determine exactly the scope of exemption provided under section 15-C before dealing with the contentions of the assessee. Under section 15-C of the Act, which is headed " Exemption from Tax of Newly Established Industrial Undertakings ", the tax shall not be payable by an assessee on so much of the profits or gains derived from any industrial undertaking to which this section applies as do not exceed 6 per cent. per annum on the capital employed in the undertakings. Sub-section (2) defines the nature of the industrial undertaking to which the section will apply. It contains a proviso enabling the Central Government to direct by notification that the exemption shall not apply to any particular undertaking. The other parts of the section are not immediately relevant. The object of this section is obvious to encourage new industrial undertakings by providing that a certain part of the income should be exempt from tax. This exemption is made available by sub-section (6) for a period of five years from the commencement of the working of the industrial undertaking. The scope of the exemption appears to be perfectly clear ; the section states that where any profits or gains are derived from any industrial undertaking, that portion of it to the extent

of 6 per cent. on the capital employed in the undertaking shall be exempt from tax. Firstly, the profit in question must be derived from the industrial undertaking, and secondly, the maximum limit of the exemption is also provided. It is clear that before an assessee can be eligible for any exemption, there should be profits. If there are no profits, no question of granting the exemption arises. It is equally clear that the profit in respect of which any exemption is available should be derived from the undertaking. The exemption cannot operate in respect of any profit derived by the assessee from any trade or business other than the industrial undertaking.

The principal ground that has been advanced before us is (which also appears to have been advanced before the Department though not with such clearness) that the industrial undertaking is the unit of assessment for the purpose of the Act and that being so, the section does not call for any distinction being made between the various parts of the business that might be carried on by the industrial undertaking or for the separation of that portion of the profits or gains referable to the industrial operations. In short, the learned counsel on behalf of the assessee contends that so long as there is an industrial undertaking which comes within the description contained in section 15-C (2) of the Act, it is not open to the Department to question the source of the profits or gains, whether such profits or gains are derived from the industrial part or from other parts of the business carried on. On the question whether an industrial undertaking *per se* is the unit of assessment, there can hardly be any room for two opinions. It is not. Section 14 and the following sections of the Act deal with different classes of exemptions. Each one of these sections starts somewhat in this manner:

"The tax shall not be payable by an assessee in respect of any sum which he receives. . . . ." (*Section* 14 (1).)

"The tax shall not be payable in respect of any sums paid by an assessee to effect an insurance. . . . ." (*Section* 15.)

"The tax shall not be payable by an assessee in respect of any sums paid by him. . . . . as bonus." (*Section* 15-A.)

In precisely the same manner, section 15-C lays down:

" . . . . . the tax shall not be payable by an assessee on so much of the profits or gains derived from any industrial undertaking. . . . . . ."

Clearly therefore a distinction is made between an assessee and the industrial undertaking. It is the assessee that is granted the exemption on the profits or gains derived by him. It is not the industrial undertaking which is granted the exemption contained in the section treating such industrial undertaking as a separate unit of assessment. This conclusion is reinforced by sub-section (6) which reads:

"The provisions of this section shall apply to the assessment for the financial year next following the previous year in which the assessee begins to manufacture or produce articles and for the four assessment years immediately succeeding."

It is clearly seen that it is the assessee that is treated as the unit of assessment and it is his commencing of the manufacture or the production of the articles that is referred to here as marking the point of time for the application of this exemption. The argument that the industrial undertaking should be regarded as the unit for assessment fails on a proper construction of this and other provisions in which also other classes of exemption are envisaged.

It is indeed difficult in principle to accept the argument that an industrial undertaking must be entitled to the exemption contained in section 15-C of the Act, whether or not its profits are wholly derived from the industrial undertaking. We have already stated that upon the clear language of the section, the exemption must be confined to the profits or gains derived from the undertaking. To hold otherwise and to agree with the assessee that where an assessee who has commenced an industrial undertaking and also engages in other kinds of business yielding income, section 15-C of the Act extends to granting exemption in respect of profits or gains derived from sources other than the industrial undertaking would not only be against the clear intendment of the section but would also be opposed to any principle that

we can conceive. We have pointed out that the object of granting this exemption is to encourage the establishment of new industrial undertakings. That would be wholly defeated if the exemption is to be granted in respect of the profits derived from businesses of other kinds even though the same assessee conducts such business side by side with the industrial undertaking. When questioned further on this aspect of the matter, the learned counsel was compelled to concede that the argument he advances cannot be applied in its full amplitude. For instance, suppose an assessee who assembles cars, as in the present case, which business is an industrial undertaking, also buys and sells shares, and derives profits or gains from such business as well, a business which is wholly disassociated and has indeed no concern whatsoever with the business of the industrial undertaking, and assuming further that there is a loss in the industrial undertaking, while a profit accrues in respect of the other business, the learned counsel was compelled to agree that it would be too much to apply his argument in a case where the assosiated business is not an allied business to the industrial undertaking. But he would contend that in the present case what the assessee has been doing is to import and sell spare parts. He argues that the business of the industrial undertaking itself would not be advanced unless it trades in spare parts as well. He would suggest therefore that since this business is intimately connected with the industrial undertaking, the advancement of which cannot be secured except by its engaging in this additional business, the two should be treated as forming part and parcel of the same industrial undertaking. We are not satisfied that this argument is correct. Even conceding it for argument's sake, it is obvious that there should be certain limits set to such an allied undertaking. It would be anomalous to concede the full effect of such an argument in a case where an assessee has the minimum requirements of an industrial undertaking as required by section 15-C (2) but conducts a very large business in the so-called allied business of buying and selling spare parts. In other words, assuming that he assembles and sells 1,000 cars of a particular make in the course of a year in the functioning of his industrial undertaking, but he purchases and sells spare parts needed for 10,000 or more cars, his main business would really be that of buying and selling spare parts, rather than the pursuit of the industrial undertaking. In such an event, the argument that the industrial undertaking could not be carried on successfully except by engaging in the buying and selling of spare parts loses much of its point. More than all, as we have pointed out, the exemption cannot in the terms of the section be available in respect of any profits or gains derived from sources other than the industrial undertaking. The conclusion is irresistible that in the case of even such composite business carried on by the assessee, it is only the profits of the industrial undertaking that would be eligible for the exemption.

The first question that has been referred to us which in general terms deals with this aspect must be answered accordingly and against the assessee.

The second question involves the examination of what may be called the mechanics of the section. It raises the question of how the unabsorbed depreciation of the previous year should be dealt with. It is admitted that in the previous assessment year a sum of Rs. 2,48,483 was left over as unabsorbed depreciation to be carried forward. In the next assessment year 1951-1952, the total profit of the composite business of the assessee came to Rs. 4,44,462. It is undeniable that this depreciation has to be set off against the profits of the later year in computing the profits and gains of business under section 10 of the Act. What has been done by the Income-tax Officer is to apply this unabsorbed depreciation, which it is admitted relates to the industrial undertaking, against the profits from the industrial undertaking which was computed at Rs. 2,53,198. That left a balance of profits of Rs. 4,715, which being less than 6 per cent. of the capital employed in the industrial undertaking, was exempted from tax. The other portion of the profit of the business of the assessee, that is, from the non-industrial and other activities, was computed at Rs. 1,91,264 which was brought to tax in its entirety. Now it is seen from section 15-C itself, sub-section (3) thereof, that the profits or gains of an industrial under-

taking to which this section applies shall be computed in accordance with the provisions of section 10. This provision accordingly contemplates the determination of the profits or gains of the industrial undertaking as a separate part of the business and the computation of such profits and gains by the application of section 10. If we take the total profits of the composite business, the unabsorbed depreciation allowance has to be deducted therefrom in order to arrive at the taxable profits. Once again, in computing the profits or gains of the industrial undertaking, section 10 has to be applied and the taxable profits and gains have to be computed by deducting the unabsorbed depreciation referrable to the industrial undertaking from the total profits and gains of the undertaking. After arriving at this figure, that portion of it which does not exceed 6 per cent. of the capital employed will have to be exempted from tax. It accordingly involves the notional deduction of the unabsorbed depreciation more than once but in effect such deduction is effected only once in ascertaining the taxable profits of the composite business. When once the principle is settled that only that portion of the profits and gains derived from the industrial undertaking is eligible for the exemption to the maximum limit provided in the section, the procedure adopted is in conformity with the section. What the assessee demanded of the Department was that the entire sum of Rs. 1,95,979 (that is the total profits of Rs. 4,44,462 minus the unabsorbed depreciation Rs. 2,48,483 being less than 6 per cent. of the capital employed in the industrial undertaking should be exempted from tax. That point we have already decided against the assessee. It follows that the exemption granted to the limit of Rs. 4,715 alone is in order. Question 2 is also answered against the assessee.

The assessee will pay the costs of the Department. Counsel's fee Rs. 250.

K.L.B. ——— *Reference answered against the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE BASHEER AHMED SAYEED.

Minor Medai Dalavoi R. Ranganatha Mudaliar adopted son of Medai Dalavoi T. Ranganatha Mudaliar through his father and next friend P. N. Sivasubramania Mudaliar .. *Appellant.**

v.

M. D. T. Kumaraswami Mudaliar (died) and others. .. *Respondents.*

Hindu Law—Joint Family—Partition—Divided sons succeeding to share of the father—Whether joint tenants or tenants in common.

Where there has been a disruption of a Hindu joint family and the property has been divided and the father has no undivided son living with him after the partition, the divided sons will take his (father's) share got at the partition, as tenants in common and not as joint tenants.

Jadav Bai v. *Multan Chand*, (1924) 27 Bom.L.R. 426.

Harikishan Das v. *Rajeswar Prasad*, A.I.R. 1952 Punj. 165 ; *Ragho Sambaji* v. *Shanta Bai*, A.I.R. 1957 Bom. 274, followed.

Appeal and Memorandum of Objections against the Decree of the Court of the Subordinate Judge of Tirunelveli in O.S. No. 31 of 1954.

K. Rajah Ayyar and *T. P. Gopalakrishnan*, for Appellant.

P. N. Appuswami, T. R. Sundaram, K. V. Venkatasubramania Ayyar, A. Ramachandran for Messrs. *Row and Reddy, V. Meenakshisundaram* and *R. Ramamurthi Ayyar*, for Respondents.

The Court delivered the following Judgments :—

Panchapakesa Ayyar, J.—The appeal has been filed by minor Dalavoi Ranganatha Mudaliar, plaintiff in O.S. No. 31 of 1954 on the

*Appeal No. 775 of 1954 and Memoranda of Objections. 24th September, 1958. (2nd Asvina, 1880—Saka.)

file of the Subordinate Judge of Tirunelveli against the Decree and Judgment in so far as they went against him. He had filed the suit for partition and separate possession, as the adopted son of Ranganatha Mudaliar who died on 11th January, 1950. He had claimed a half share in the plaint properties comprised in Schedules 1-A to 1-H on the ground that in those divided properties got by Tirumalaippa Mudaliar, the father of Ranganatha Mudaliar, Kumaraswami Mudaliar and Shanmugakumaraswami Mudaliar at a partition with his three sons on 18th June, 1930, succession opened only on the death of his widow, the life-estate holder on 12th May, 1954, when there were only two heirs. Tirumalayappa died on 22nd November, 1930, after executing a will, dated 14th September, 1930, bequeathing his divided and undivided shares of the properties, got at the partition, to his wife Ulagammal Anni, to be enjoyed by her for her lifetime, but without making any further provision. Ulagammal died on 12th May, 1954. The plaintiff contended that Tirumalaiappa's one-fourth share (at partition) would be inherited only by his adoptive father Ranganatha Mudaliar, in whose place he stood. and Kumaraswami Mudaliar, the 1st defendant, alone were alive on that date. Alternatively, he also contended that the one-fourth share of Tirumalaiappa Mudaliar in the ancestral family properties, got by him at the 1930 partition, continued to be joint family properties with joint tenancy, and survivorship, and as Ulagammal Anni died only in 1954 and till that date there was no partition of that one-fourth share between the three sons and he and Kumaraswami Mudaliar, were the only two persons then alive and were therefore entitled to that joint estate by survivorship. Regarding the undivided properties comprised in Schedule II he claimed a one-eighth share ($\frac{1}{2}\times\frac{1}{4}$), just as he had claimed a half share in the divided properties comprised in Schedules 1-A to 1-H.

The first defendant, Kumaraswami Mudaliar, was a son of Tirumalaiappa Mudaliar, and defendants 2 to 4 were the first defendant's sons. Defendant 5 was the widow of Shanmugakumaraswami Mudaliar, another son of Tirumalaiappa. Defendant 6 was a wife of Ranganatha Mudaliar, the adoptive father of the plaintiff. Defendant 7 was another wife of Ranganatha Mudaliar whose status as wife was disputed by some of the defendants though asserted by the plaintiff. Defendant 8 was the daughter of defendant 7.

The plaintiff by invoking the theory of joint tenancy of survivorship wanted to ignore the severance of the coparcenary effected by the partition of 1930, and also to deny the rights of the widows of Ranganatha Mudaliar to any share under the Hindu Women's Right to Property Act, 1937. The lower Court, after exhaustively discussing the evidence and the law, held that, as regards the divided properties in Schedules 1-A to 1-H, the plaintiff would be entitled only to a one-sixth share and only to one twenty-fourth share in the undivided Second Schedule properties ($\frac{1}{4}\times\frac{1}{6}$). It recognised the right of the widow, defendant 6. It directed partition on these lines, and directed all the parties to bear their own costs since the parties could not amicably partition the properties, and the status of defendant 7 was in dispute, and it had been agreed by the parties to be left open for decision in O.S. No. 19 of 1950 on its file, which suit is still pending. The plaintiff has felt aggrieved at his not getting a half share in the properties in Schedules 1-A to 1-H, and a $\frac{1}{8}$ share in the properties in Schedule II, and has filed the appeal.

The first respondent, Kumaraswami Mudaliar, filed a memorandum of cross-objections regarding the refusal of his suit costs amounting to Rs. 300. He died pending the appeal, and his legal representatives have been brought on record. Another memorandum of cross-objections has been filed by the fifth respondent, Chellammal Anni, the widow of Shanmugakumaraswami Mudaliar, regarding the refusal by the lower Court to decree her costs amounting to Rs. 2,100.

We have perused the records, and heard the learned counsel on all sides. Mr. K. Rajah Ayyar, learned counsel for the appellant, and Mr. K. V. Venkatasubramania Ayyar, learned counsel for the contesting respondents in the appeal and for the cross-objector in one memorandum of cross-objections, and Mr. R.

Ramamurthy Ayyar, learned counsel for the cross-objector in another memorandum of cross-objections, have argued the case fully and fairly. Mr. Rajah Ayyar did not press before us the wholly unsustainable argument that the succession opened only on 12th May, 1954. He, however, contended that the lower Court had gone grievously wrong in holding that Tirumalaiappa Mudaliar's $\frac{1}{4}$ share in the ancestral properties, got by him at partition in 1930, would not be covered by the theories of joint tenancy and survivorship, and that his divided sons would take not as joint tenants but as tenants-in-common, and further in holding that the widows of Ranganatha would get a share, under the Hindu Women's Right to Property Act, 1937, and thereby reducing the plaintiff's share from one half in the divided properties in Schedules 1-A to 1-H to one-sixth, and from one eighth share in the Second Schedule undivided properties to one-twenty-fourth. Mr. K. V. Venkatasubramania Ayyar strongly contested this. The question here is whether the divided sons of a father, who has no undivided son living with him after the partition, take his share of the ancestral properties, got at the partition, as joint tenants under the theory of right by birth and survivorship, or as heirs and tenants in common. There are three direct decisions, though not of this Court, on this very point, and all are directly against Mr. Rajah Ayyar's contention.

The first is that of a Bench of the Bombay High Court in *Jadav Bai* v. *Multan Chand*[1], where Macleod, C.J. and Crump, J., have categorically held that the divided sons of a Hindu father succeed to the property of the father received at partition only as tenants in common, and not as joint tenants, as the coparcenary relationship has ceased, and with it the joint tenancy and survivorship incidental to it. The second decision is that of a Bench of the Punjab High Court in *Hari Kishan Das* v. *Rajeswar Prasad*[2], where it has been held categorically that where a father dies leaving separated sons, the property which had come to him on partition with his sons does not become coparcenary property in the hands of the sons, and that after his death the sons take the property as tenants-in-common and not as joint tenants. The learned Judges have discussed the various decisions relating to the point and have differed from the opinion given by Mulla in his Hindu Law to the contrary. The third is a decision of a single Judge of the Bombay High Court, in *Ragho Sambhaji* v. *Shanta Bai*[3], where too it was held that the separate property got by a Hindu father at partition of the joint family properties with his sons did not become coparcenary property in the hands of his divided sons, who had separated from him during his lifetime, and that therefore, after his death, each son takes the property as a tenant-in-common with the other divided sons and not as a joint tenant.

As against the three definite rulings against him on this very point involved in this appeal, Mr. Rajah Ayyar could not show a single ruling of any High Court in favour of his contention. He contented himself with arguing on general principles of Hindu Law enunciated in certain decisions relied on by him which, according to him, would lead to an inference that the property got by a father at partition with his sons would still be joint family property with the incidents of right by birth and joint tenancy and survivorship on his death as between his divided sons. We cannot agree with this proposition, which, in our opinion, is not supported by anything in the rulings relied on by him.

He first relied on the ruling in *Ramappa Naicken* v. *Sithammal*[4] and on the observation therein (and in the cases in *Raja Ram Narain Singh* v. *Pershotham Singh*[5] and *Lakshminarasimha* v. *Ramabrahmam*[6], that the son's right of inheritance under the Hindu Law is distinguished from that of all other heirs in that it is *apratibandha*, *i.e.*, not liable to obstruction, as opposed to *sapratibandha* (liable to obstruction) applied to the inheritance by collaterals. According to Mr. Rajah Ayyar, in coparcenary property of joint family property there are four main rights, arising from the right by birth, namely, the right to claim partition ; the right to interdict alienation except

1. (1924) 27 Bom.L.R. 426.
2. A.I.R. 1952 Punj. 165.
3. A.I.R. 1957 Bom 274.
4. (1879) I.L.R. 2 Mad. 182 (F.B.)
5. (1872) 20 W.R. 189.
6. (1950) 1 M.L.J. 350: I.L.R. (1950) Mad. 1084.

for necessity or benefit; the right to *apratibandha* succession; and the right of representation, (that is, sons of a deceased son representing their deceased father, and taking along with the surviving sons, though some of these rights, like the right to claim partition, and the right to interdict alienation, may be given up for the time being at partition, by the partitioning members. But the argument was that the property got by the father and the sons, by division of the ancestral properties at the partition, does not lose the character of joint family property, as would be evident by the fact that if the father or sons got sons thereafter those sons would acquire a right by birth to the property got by their father, and that, therefore the partition would only mean a temporary arrangement suspending the coparcenary which would revive on the death of the father, regarding his share in the ancestral properties got at the partition. He said that the same result may not occur regarding the sons *inter se* regarding the properties got by them, as succession, under the Hindu Law, is from father to son, and not the reverse way which is only rarely found. He urged therefore that the partition of 1930 must be practically ignored and the rights of joint tenancy and survivorship as between the divided sons recognised, at the father's death, in the portion of the ancestral properties got by him at the partition. He even went further, and said that this would apply not only to the father's share of the ancestral properties got by him at partition, but also to his own self-acquired properties, where, according to him there is a dormant coparcenary right in the sons, to be asserted at the father's death, subject to his right of alienation *inter vivos* or by will.

According to him, even succession by sons to self-acquired properties of the father would not be by way of inheritance but by right by birth and joint tenancy and survivorship and increased rights. But, here, he was confronted by the Full Bench ruling of this Court in *Vairavan Chettiar* v. *Srinivasachariar*[1], where it was held that even an undivided Hindu son has no joint tenancy in the self-acquired properties of his deceased father and acquires it at his death, by inheritance, and not by survivorship. He wanted to challenge the correctness of this Full Bench decision on the basis of stray not-to-the-point observations in subsequent decisions and wanted us to refer the matter of a Full Bench. We see no reason to do so. This Full Bench decision was delivered in 1921 and has never been dissented from by any decision of this Court or of any other High Court till now, much less overruled by the Supreme Court or the Privy Council. It has stood the test of 37 years, and we are satisfied that it does not deserve to be referred to a Fuller Bench, especially as we have absolutely no doubt regarding its correctness. Indeed a Bench of this Court has held in *Narasimhom* v. *Narasimham*[2] that on the death of a Hindu leaving self-acquired property, his undivided sons succeed to such property to the exclusion of divided sons. Mr. Rajah Ayyar conceded that regarding ancestral properties left by a father who has divided from some of his sons and is living undivided from some others of his sons, the undivided sons succeed to these properties to the exclusion of the divided sons. But he explained it away on the theory of survivorship enuring to the undivided sons who still form part of the coparcenary whereas the undivided sons have ceased to be coparceners. That very argument will show that in this case also the divided sons have ceased to be coparceners with their father and cannot claim joint tenancy and survivorship *inter se*. Regarding self-acquired properties, the position is even stronger as the self-acquired properties are strongly distinguished from the ancestral properties, as held by a Bench of this Court in *Lakshminarasamma* v. *Ramabrahmam*[3]. The following observations in that ruling are significant :—

> "To ascertain the extent of the son's right in and to a particular property belonging to the father, it is absolutely necessary to determine whether that property is paithamaha or swayarjita. This dichotomous division is fundamental. According to Hindu Law (and in this there is no difference between the Dayabhaga and the Mithakshara) property must be one or the other. This division is not only mutually exclusive. It must also be exhaustive. You cannot leave out a property as not falling in either category, because how then will you determine the extent of the son's right in such property ?"

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1. (1921) 40 M.L.J. 81 : I.L.R. 44 Mad. 499 (F.B.).
2. (1932) 62 M.L.J. 436 : I.L.R. 55 Mad. 577.
3. (1950) 1 M.L.J. 350 : I.L.R.(1950) Mad. 1084.

As there is no coparcenary in modern law between the Hindu father and his undivided sons regarding his self-acquired properties, as held in *Katamanachiar* v. *Rajah of Sivagaga*[1], it is of importance to note that even regarding such self-acquired property the undivided son, even though he may not be the eldest or next son, will take the entire self-acquired property to the exclusion of his father.

Mr. Rajah Ayyar urged that a great deal of confusion has arisen regarding these matters by the mistranslation of the Sanskrit term *daya* by Colbrooke who translated it as "inheritance whereas *daya* includes the taking of property during the life-time of the father and not merely to taking of his property after his death as his heir, and by the importation of English legal conceptions and phraseology. These two factors conducing to confusion have been noticed by the learned Chief Justice in *Lakshminarasamma* v. *Ramabrahmam*[2], but the learned Chief Justice has gone on to observe :

> " However deplorable this may be, we are at a stage when we are not free to go back to the law as enunciated and discussed in ancient books on Hindu Law untrammelled by judicial decisions. There can be no doubt that as between an original text and a decision of the Judicial Committee we cannot choose to follow the former and refuse to be bound by the latter."

Mr. Rajah Ayyar urged that *apratibandha* succession (by sons, sons' sons, sons' sons' sons) and the right of representation would necessarily involve joint tenancy and survivorship even in the separate share of the father in the ancestral properties got by him at partition, as the right by birth would otherwise be defeated. We do not see why *the right by birth* should be allowed to operate more than once. In our opinion, it exhausts itself by a complete partition of the ancestral and joint family properties. It cannot again be asserted for setting up joint tenancy and survivorship in the father's share of the ancestral properties got at partition, when obviously no such joint tenancy and survivorship will attach to the shares got at partition by the brothers *inter se*. In our opinion, the *apratibandha* succession is put an end to at *partition*, and the *sapratibandha* succession takes its place even regarding the joint family properties got by the father at partition. One incident of the obstructed inheritance is that no right in the properties can be affirmed by the successor during the lifetime of the owner (which is the main obstruction) whereas in the unobstructed inheritance the successor is already an owner in the property along with his father. No doubt, the translation of *daya* into " inheritance " by Colbrooke may not be quite correct, and may apply only to the Dayabaga system prevailing in Bengal, where Colbrooke worked. But this will not affect the present point at issue.

Mr. Rajah Ayyar had to concede that if the father, long after the partition, got a son, that son alone would take the father's entire properties, ancestral and self-acquired, by right by birth, to the exclusion of the divided sons, whose "right by birth" will be of no avail. He said that this was due to a special text of Hindu Law. We are of opinion that it is due also to the general principles of Hindu Law.

Mr. Venkatasubramania Ayyar rightly urged that joint tenancy and survivorship are unknown to Hindu Law except in the case of the joint property of an undivided Hindu family governed by the Mitakshara Law. He relied on the rulings of the Privy Council in *Jogeswara Narayan Deo* v. *Ramachandra Dutt*[3] and *Bahurani* v. *Rajendra Baksh Singh*[4] and *Lakshminarasamma* v. *Ramabrahmam*[2]. This will take the bottom out of the contention of Mr. Rajah Ayyar, who had to admit that the three sons were divided from Tirumalaiappa, and that the co-parcenary between them and their father had ceased. This, of course, involves cessation of the inevitable concomitant incident of joint tenancy and survivorship contended for by Mr. Rajah Ayyar.

Mr. Venkatasubramania Ayyar urged that the widow is excluded from succession to her husband's right of co-ownership only when the co-ownership involves

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1. (1863) 9 M.I.A. 539.
2. (1950) 1 M.L.J. 350 : I.L.R. 1950 Mad. 1084.
3. (1896) I.L.R. 23 Cal. 670 : 23 I.A. 37 (P.C.).
4. (1933) I.L.R. 8 Luck 121 (P.C.).

a joint tenancy governed by survivorship. He relied on the ruling in *Katama Natchiar* v. *Rajah of Shivagamga*[1], and the observations at pages 611 to 615 for this proposition. Mr. Rajah Ayyar was unable to meet this proposition and to deny the right of Ranganatha's widow under the Hindu Women's Right to Property Act to share equally with the plaintiff. So, the lower Court was undoubtedly right in rejecting the plaintiff's contention that the widow has no rights in the properties. Three Benches of this Court (to two of which both of us were parties and to the third of which one of us was a party) have upheld the widow's right.

The right of representation was the last thing on which Mr. Rajah Ayyar relied. According to him, in other cases of inheritance it is the nearest heir who will succeed to the properties, *excluding the remoter heirs*, whereas with regard to the father's properties, the son, the son's son, and the son's son's son will take *in a group* and *at the same time*, and not one after another, and that, therefore, it must be *aprathibandha* succession, and the incidents of joint tenancy and survivorship will remain in the father's share of the ancestral properties got by him at partition. We cannot agree. Hindu Law, like all other laws, is not always consistent or logical, and, sometimes, it is difficult to reconcile all the principles into one grand principle. Thus all the *widows* as also *daughters*, take *jointly* though none of them are coparceners. The line of succession even to the self-acquired properties of the father is, no doubt, in a group, by a son, son's son, and son's son's son, and the right of representation thus remains, the living sons not excluding their deceased brother's sons. But that will not show that *joint tenancy* and *survivorship* exist in the father's share of the ancestral properties any more than in his self-acquired properties. There is no logic or reason in contending that *divided sons* of the father, owning their properties *severally*, should take the divided ancestral properties of their father *jointly* with rights of *survivorship*. There is also no ruling holding to that effect.

In the end, therefore, we reject Mr. Rajah Ayyar's contention. It follows from this that the lower Court was right in giving the plaintiffs only $\frac{1}{8}$th share in the properties in Schedules 1-A to 1-H, and $\frac{1}{24}$th share in the properties in the Second Schedule.

The two memoranda of cross-objections do not deserve serious consideration. The lower Court has passed its order regarding costs after carefully considering the point, and we cannot say that it has exercised its discretion wrongly. Besides the reasons given by it for not giving costs to the 1st and 5th defendants, who have filed the memoranda of cross-objections, we may add another reason. The law had not been clarified by that time *in this State*, and there *was a great deal of doubt*. That is why the arguments in this case have gone on for two days before us. In such a case, where the law is settled for the first time, it is only proper that all the parties should be directed to bear their own costs. In the end, therefore, we dismissed the appeal and both the memoranda of cross-objections, and confirm the lower Court's decree and judgment. In this appeal and the memoranda of cross-objections we direct all the parties to bear their own costs.

Basheer Ahmed Sayeed, J.—I entirely agree with the reasoning and conclusions arrived at by my learned brother in the judgment which, he has just now delivered. I only wish to add a few words of my own on the point raised by Mr. Rajah Ayyar for decision in this appeal. The relevant facts have been set out exhaustively by my learned brother and it is not for me to traverse them over again in any great detail. I shall only be brief in regard to them.

Thirumalaiappa entered into a partition with his three sons, Ranganatha, Kumaraswami and Shanmugakumaraswami under Exhibit A-1 on the 18th June, 1930. After executing a will, Exhibit A-3, dated 14th of September, 1930, in favour of his wife, he died on the 22nd of November, 1930. At the time of his death all his three sons, amongst whom and himself there was a partition, were alive. The third son died earliest, that is, on the 4th of January, 1936, and the first son died on the 11th of January, 1950, whereas the donee under the will, in whose favour a life

1. (1863) 9 M.I.A. 539 (P.C.).

estate was created, died on the 12th of May, 1954. Ranganatha's widow, the 6th defendant, adopted the plaintiff-appellant to her deceased husband. The widow of the third son Shanmugakumaraswami figures as the 5th defendant. The 7th defendant is another wife of Ranganatha, whereas the 8th defendant is the daughter of Ranganatha. Defendants 1 to 4 are respectively surviving son of Thirumalaiappa namely, Kumaraswami and the latter's three sons. That there was a partition between the father and the three sons on the 18th of June, 1930, is not in dispute. Nor is the will executed by the said Thirumalai in favour of his wife in controversy. The life estate created in her favour is also beyond dispute.

The suit was laid by the present plaintiff-appellant after the death of the widow of Thirumalai, claiming a half-share in Schedule 1-A to 1-H and also a $\frac{1}{8}$th share in Schedule II. It is also not in dispute that the properties described in Schedule II were kept in common without a division by metes and bounds. In a very cleverly drafted plaint, on behalf of the plaintiff-appellant, it was claimed that on the death of the widow of Thirumaliappa the law returned the subjects of the bequest to the testator, and that there was and could be no anterior vesting. Therefore, it was averred that in the case of a " return " or " reversion " which arose by operation of law, there was and could be no vesting in interest apart from possession. It was contended that the reversion was to the persons who would on that date normally succeed as heirs to the testator, and in that case it is claimed that they were only his sons and sons' sons. It was also contended in the plaint that the testator must be deemed to have died intestate on the 22nd November, 1930, and that therefore, sections 4 and 5 of the Madras Adaptation of the Hindu Women's right to Property Act of 1937 did not have any operation on the estate. In another paragraph of the plaint it was contended that even assuming but without admitting that the reversion to the separate estate of Thirumalaippa on the death of his widow, Ulagammal, though an incorporeal right, vested on the 22nd of November, 1930, itself, under the law it devolved on all the three sons together as joint undivided property, and consequently, there would be a coparcenary of the three brothers with rights of survivorship *inter se* and there had been no subsequent partition between them of that coparcenary right. It was, therefore, further contended that on the death of Shanmugakumaraswamy, the third son, without male issue and before the Hindu Women's right to Property Act came into force with reference to agricultural lands in Madras, the said incorporeal right devolved on the surviving brothers, Ranganatha and Kumaraswamishanmuga, and Chellammal Ammal. The 5th defendant, got nothing. A further contention was put forward in that neither the 6th defendant nor the 7th defendant would be entitled to any right in the schedule properties for the reason that nothing vested in Shanmugakumaraswami on the 22nd of November, 1930. Therefore, the 5th defendant got no additional rights in the schedule properties in consequence of Ulagammal Anni's death. On these grounds the plaintiff claimed that he would be entitled to a half of Schedule 1-A to 1-H and $\frac{1}{8}$th share in Schedule II leaving an equal portion in both to defendants 1 to 4.

Defendants 1 to 4 contested the suit on various grounds *inter alia*. Their contention in the main was that on the death of Thirumalaiappa, the remainder after what had been given to his wife, Ulagammal Anni, descended to his three sons who were all alive then, as on intestacy. They were co-heirs or co-sharers in respect of the same. The two sons, Shanmugakumaraswami and Ranganatha, having died on the dates mentioned above, $\frac{1}{3}$rd share of Shammugakumaraswami descended to his widow, the 5th defendant, and the $\frac{1}{3}$rd share of Ranganatha descended to his wife the 6th defendant, and his adopted son, the plaintiff, as simultaneous heirs under Hindu Women's Property Act. Therefore, it was pleaded that the plaintiff-appellant would be entitled to only $\frac{1}{8}$th share and the 6th defendant to the other $\frac{1}{8}$th share and the first defendant to a third share as the heir of his father. The defendants contended that the claim of the plaintiff to a half-share was wholly untenable, though they admitted that the Second Schedule properties remained undivided between the sharers and that the *Evu Dittam Maniyam* was owned in common. They did not admit the legal position set out in the plaint as to the devolution of the property on the death of Thirumalaiappa, the original ancestor.

There was no question of reverter of any remainder as alleged by the plaintiff. As soon as the father died, it was their contention, succession to the remainder opened and the sons as co-heirs got a vested remainder each being entitled to a third. They also contested the suit on the point that it was not correct to work out the heirs to Thirumalaiappa as on 12th May, 1954, but that the estate should be taken to have opened on the death of Thirumalaiappa, namely, the 22nd of November, 1930.

The learned trial Judge, after framing the necessary issues, rejected the claim of the plaintiff to a half and ⅛th share in the concerned properties and upheld the claim of the defendants that the plaintiff would be entitled only to ⅛th share and $\frac{1}{24}$th share in the properties 1-A to 1-H of Schedule I and Schedule II respectively. The lower Court also held that the succession opened only on the death of Thirumalaiappa and not on the death of his widow.

In this appeal Mr. Rajah Ayyar has been at great pains to uphold the contention of the plaintiff, that on the death of Thirumalaiappa, which has been held to be the date on which succession opened, the three sons of Thirumalai would succeed, not as divided sons but as undivided sons, to the estate left by the said deceased, Thirumalai. His point was that whether the sons were divided or undivided, they would succeed to their father as joint tenants by right of birth and he also went further and argued that this would be the case whether the property was ancestral or otherwise. In support of his contention, that on the death of the father who had taken his share of the joint family property at a partition between himself and his sons, the property taken by the father will remain joint family property, though for certain purposes it is termed as separate property and that succession to that property on his death would be only according to what is known in Hindu Law as the rule of "*apratibandha*", that is, unobstructed succession, and not according to the rule of obstructed succession, namely, "*sapratibandha*", Mr. Rajah Ayyar relied on many decisions of this Court and other Courts in support of his contention that whether it be joint family property or self-acquired property the rule of succession by the sons on the death of their father was only by right of birth and that being so, it was only "*apratibandha*" succession and not "*sapratibandha*" succession. It will be seen presently that these decisions which Mr. Rajah Ayyar referred to at length and on which he laid great emphasis, did not directly deal with the point; and in fact, it is because of the absence of a direct decision of this Court on the point argued by Mr. Rajah Ayyar, that he had to labour hard in order to make us agree with his contention. There can be little doubt that the property taken by the father in a partition by metes and bounds with his sons becomes the separate property of the father, and that it does not lose the character of being joint family or ancestral property as long as it is in his hands. It is also beyond dispute that in regard to this property, which has been taken by the father at partition between himself and his sons, it is capable of being willed away or even gifted away; for, in respect of this property, a right to claim a partition has been lost once for all by reason of the partition which has already taken place. Even so, in regard to this property it is beyond question that the right of the erstwhile coparceners to interdict any alienation by the father had been taken away and put an end to once for all. But it is also a fact that for certain limited purposes, the property in the hands of the father, nevertheless remains joint and ancestral, though it does not become his self-acquired property. For instance, if a son is born to the father when he holds the property which he got at a partition, that son would be entitled to claim a right to partition in that property, though the remaining sons would not be so entitled. He would become a coparcener with the father and then he will have also right to interdict any alienation by the father except for legal necessity and any binding purpose. That is how the right by birth becomes operative in respect of the partitioned property in the hands of the father. Relying on the decisions in *Rajah Ram Narain Singh* v. *Pertum Singh*[1], *Ramappa Naicken* v. *Sithammal*[2], and *Marudayi* v. *Doraisami Karambian*[3], mainly, Mr. Rajah Ayyar contended that it has been recognised that the property obtained

1. (1872) 20 W.R. 189.
2. (1879) I.L.R. 2 Mad. 182 (F.B.).
3. (1907) 17 M.L.J. 275: I.L.R. 30 Mad. 348.

by the father at a partition among himself and his sons remains joint property, and therefore, whether the sons were divided or undivided at the time when the succession opened on the death of the father, the sons would take the property by right of birth, according to the rule of unobstructed heritage, that is to say, as joint tenants as if they were members of a coparcenary and not as if they were tenants-in-common in a divided family. In *Rajah Ram Narain Singh* v. *Pertum Singh*[1], the earliest decision which was brought to our notice by the learned counsel for the appellant, Mr. Rajah Ayyar, the following observations were relied on by the learned Counsel :

"The distinction between a joint property and separate property under the Mithakshara law appears to me to be simply of a temporary, not of an abiding, character. Property is joint when it belongs to all the members, who may be many, of a joint family. Property is separate when it belongs only to one member of a joint family alone, and not to the others jointly with him. As long as it is separate and in the condition of self-acquired property, the person who is the holder of it has no one to consult in regard to the disposal of it except himself. But the moment it passes from his hand by descent into the hands of some one in the next generation, it becomes joint family property the property of several persons united together as a joint family with regard to it the property of a new joint family springing from a new root. And it continues to go down by one rule of descent only ".

Having carefully considered this dictum of Phear, J., in the case cited, it is difficult to agree with Mr. Rajah Ayyar that it supports him to any extent. Mr. Rajah Ayyar misses the point that the case refers to the property "becoming joint family property the property of several persons united together as a joint family with regard to it, that is to say, the property becomes that of a new joint family springing from a new root." This decision does not in any way lay down the rule that once there is a partition and when the sons become divided from the father, on the death of the father the sons would be entitled to claim the property as members or coparceners of a joint family according to the rule of "*apratibandha*" or as joint tenants, whether the sons are divided or undivided. That is to say what in effect Mr. Rajah Ayyar wants us to hold is that the partition which had taken place between the father and his sons should be completely ignored and that on his death the *status quo ante* should be restored as if there was no prior partition for the simple reason that by a partition the filial relation between the father and the sons was not in any way cut off but continued, notwithstanding the fact that a partition had taken place between the father and the sons at an earlier stage. In support of this aspect of his argument, Mr. Rajah Ayyar invited our attention to a decision in *Ramappa Naicken* v. *Sithamma*[2]. In that decision a Full Bench of this Court observed that under the Mithakshara law a divided son (no undivided sons surviving) is entitled to succeed to his father's share in preference to his father's widow. It was held that the son's right to inheritance under Hindu Law is distinguished from that of all other heirs in that it is "*apratibandha*" not liable to obstruction, and the functions assigned to the son, and the character ascribed to him in the religious system of the Hindus, explain the preference in the succession accorded to him. Mr. Rajah Ayyar, in particular, invited our attention to the passage that occurs at page 184 which is to the following effect :

"The effect of partition is not to interfere with the right of inheritance, but to resolve joint rights into several rights. It frees so much of the estate as fails to the lot of his father from any present proprietary right on the part of the divided son, but it does not annul the filial relation nor the right of succession, which, in the absence of disqualification, is incidental to that relation ".

The proposition laid down is certainly unexceptionable. It does not however state in least manner that where the inheritance opened, the divided sons and the undivided sons would take in the same right and according to the same rule of succession as if there was no partition at all. In the case of the divided sons, it has been repeatedly held that the rule of succession is "*sapratibandha*", that is obstructed heritage, because in respect of the property held by the father, the death of the father has the effect of removing the obstruction. The dictum relied on by Mr. Rajah Ayyar merely says that the fact of partition does not interfere with the right of inheritance by the sons. Certainly it does not. But the case did not decide as to what

1. (1872) 20 W.R. 189. 2. (1879) I.L.R. 2 Mad. 182 (F.B.).

exactly was the rule of inheritance, whether it would be obstructed or unobstructed heritage. Surely, when once a partition is effected between the father and his sons, the filial relation between the father and the sons is not affected, and particularly the duties which the sons are called upon to perform in respect of the funeral ceremonies of the father are not in any way taken away, but that does not mean that the rule of succession in respect of the property left by him, whether joint or self-acquired, remained the same despite the fact of the coparcenary interest between the father and the sons having come to an end by means of the partition already effected. It is, therefore, impossible to hold that this decision is of any great assistance to Mr. Rajah Ayyar. The next decision on which Mr. Rajah Ayyar relied is one reported in *Marudayi* v. *Doraisami Karambian*[1]. This decision is on the same lines as the decision in *Ramappa Naicken* v. *Sithammal*[2], and holds that the right of divided sons, grandsons, and great grandsons of the last male owner to succeed to his divided property, is the same as in the case of undivided family property. The right of representation exists equally in the former as in the latter case, and the divided sons will not, on the principle of the exclusion of remoter by nearer sapinda, exclude the divided grandson in the succession to divided property of the ancestor. A careful reading of this decision and the observations made therein would however show that this decision will not help Mr. Rajah Ayyar even as the decision in *Ramappa Naicken* v. *Sithammal*[2]. This is a case of succession to divided property between divided sons, grandsons and great grandsons and not as between divided sons and undivided sons. In further support of his contention Mr. Rajah Ayyar relied upon *Bhairab* v. *Birendra*[3], and *Jatru Pahan* v. *Ambikajity Prasad*[4]. In *Bhairab* v. *Birendra*[3], a Bench of that Court held that in the matter of succession to the grandfather's property the claim of the separted grandson and his sons in the Mithila school was governed by the Mitakshara. As per Ramaswami, J., in that decision the principle of the Mitakshra was that the sons and grandson got unobstructed right (*apratibandha daya*) by mere birth to the separate property of the grandfather. He held that partition merely adjusted or resolved joint right into several rights, and that it freed the father's share from any present proprietary right on the part of the divided son, but it could not annul the filial relation nor the right of succession incidental to that relation. That being the position, partition cannot annul or destroy the right of the grandson or the great grandson to the grandfather's property. Once again it has to be noted that the observations of the learned Judges do not deal with the point we are called upon to decide in this case, namely, whether the succession is to be according to the rule of *apratibandha* or *sapratibandha*. There was no conflict in this case between divided and undivided sons, and the learned Judges were not called upon to decide any such issue. The whole point pressed for by Mr. Rajah Ayyar is to the effect that the distinction between the continuance of a coparcenary before partition and its non-existence after partition, should be ignored, when succession opens in respect of the property that became the separate, property of the father at the partition between himself and his sons. In doing so, he misses the distinction between the existence of the right of a son to claim a partition of the property by reason of birth to his father whereby he becomes a coparcener of the family and the right of the son to claim a share of the property of the father on his death. In the former case it cannot be disputed that the right of the father and son to the property of the family co-exist. The moment the son is born he becomes entitled to claim the property as a joint tenant and to have a partition thereof. His birth imposes a restriction on the power of the father to dispose of the property except in cases of legal necessity, etc. In the latter case, the rights of the son arise and are sought to be enforced only after the death of the father. It is this essential distinction between the two aspects of inheritance that the learned counsel for the appellants ignores and wants us to uphold that even though the sons became divided from the father when the father died leaving the properties which he got under the partition, the divided sons should inherit as if they were coparceners;

1. (1907) 17 M.L.J. 275 : I.L.R. 30 Mad. 348.
2. (1879) I.L.R. 2 Mad. 182 (F.B.).
3. (1948-49) I.L.R. 28 Pat. 123.
4. A.I.R. 1957 Pat. 570.

that is, by virtue of the right which co-existed in them along with the right of the father in the joint family properties. It is difficult for us to uphold such a contention in the light of the progress that a Hindu Law has made by reason of the several rulings of Courts in regard to "obstructed" and "unobstructed" heritage.

In the case of *Jatru Pahan* v. *Ambikajit Prasad*[1], also, the point that is now at issue did not arise directly and, it may be observed that this decision followed merely the decision in *Bhairab* v. *Birendra*[2]; and it is difficult to see how exactly this decision helps Mr. Rajah Ayyar on the point that he is urging before us.

In essence, Mr. Rajah Ayyar's argument amounts to this. The rule of inheritance should be with reference to the nature of the property or its character and not with reference to the status of the parties or the character of the recipients, who are to take the property on the death of the father, the last owner. It is true, as already stated, that the property retains for some limited purposes, the character of an ancestral property or joint family property but it does not become the self-acquired property of the father. But the ancestral or joint family property which remains so, for certain limited purposes, does it continue to be the same when it has to be succeeded to by the persons who are not any more members of the joint family or coparceners with the deceased father but are already divided ? This is the question to which Mr. Rajah Ayyar would like us to give an answer in the affirmative. But we do not find it possible to do so. We are unable to subscribe to this proposition of Mr. Rajah Ayyar that in regard to this property which retains to some limited extent the character of a joint family property, the succession thereto on the death of the father should be decided upon the status of the parties or the character of the recipients who are entitled to succeed to the same, ignoring the fact that these recipients had already ceased to be members of the coparcenary, under which alone such members could have claimed a right by birth in order to be entitled to claim succession under the rule of unobstructed heritage. When once there has been a division, though there has been still a continuation of filial relationship between the father and the sons, the divided sons have ceased, beyond any doubt, to be members of the coparcenary and they do not have any more right to the property by birth. That right by birth has been settled by the partition and in respect of that property which has fallen to the share of the father it is beyond comprehension as to how exactly the divided sons could still lay a claim co-extenstive with that of the father or any of his undivided sons. In the property which has fallen to the share of the father the right by birth has been lost by reason of the partition and even the right to interdict any alienation in respect of the property which became the separate property of the father has already been lost by reason of the same partition and how it is possible for the divided son to exercise or enforce these very rights in respect of the very same property passes beyond comprehension. That means, according to Mr. Rajah Ayyar, the right to claim by birth for a share jointly with the father as a coparcener in the property is never lost, even though a partition might have taken place.

Then it remains to be seen as to what exactly is the effect of the partition, if the partition is to be ignored as being of no consequence. Is it also to be assumed that the coparcenary never ceased to exist even though a partition might take place, between the coparceners, of the joint family property ? Or, is it to be postulated that at every stage the coparcenary continues whenever the succession opens upon the death of the divided coparcener? All these points make the situation rather very anomalous if the argument of Mr. Rajah Ayyar is to be accepted.

He would nevertheless assert that division between the father and the sons makes no difference, and, simply because the joint family property that fell to the share of the father continues to be joint family property for some limited purposes the right by birth continues to exist in the sons to succeed as if they were coparceners with the father, though he would concede that in resepect of that property in the hands of the father the sons could not exercise the power of interdicting alienation or claiming a partition, again by right of birth.

1. A.I.R. 1957 Pat. 570. 2. (1948-49) I.L.R. 28 Pat. 123.

Therefore, to argue that in respect of such separate property in the hands of the father the divided sons would succeed as if they were members of the coparcenary would lead to very strange results and would certainly nullify the effect of all partitions between joint family members and also the meaning and weight to be attached to the existence of a coparcenary, or even the re-union of coparceners would come to nought.

Mr. Rajah Ayyar, however, contended when faced with the decision in *Vairavan Chettiar* v. *Srinivasachariar*[1], and the decision in *Lakshminarasamma* v. *Rama Brahmam*[2], that so far as the self-acquired property was concerned, the undivided sons would take by inheritance as tenants-in-common and that under the Hindu Law there were only two types of succession, the unobstructed and the obstructed, and a third type of succession was unknown. He would however try to canvass against the correctness of the decision in *Vairavan Chettiar* v. *Srinivasachariar*[1], if the opportunity arises.

So far as the Full Bench decision is concerned, as my learned brother has pointed out, that decision is binding on this Bench, and, in so far as self-acquired property is concerned, the rule of succession would be "*sapratibandha*" and not "*apratibandah*" and, by no means could the self-acquired property be equated to the separate property held by the father on partition. For, Mr. Rajah Ayyar himself conceded more than once in the course of his arguments that this property in the hands of the father on partition could only be a separate property with some characteristics of a joint family property, at least for certain limited purposes.

The question that really has to be resolved then is as to whether on the death of the father holding property which fell to his share on partition the divided sons would succeed to it in the same manner as self-acquired property or in the manner pointed out by Mr. Rajah Ayyar. In the case of such property, if there are undivided sons, the divided sons would not get any priority over them, and, if there are divided sons, they cannot certainly succeed to that property as if the property was joint family property available to be taken by the divided sons in their right as joint tenants. They would, on the other hand, take it only as tenants-in-common. His sons on the death of the father, as has been pointed out by Mr. Venkatasubramania Ayyar appearing on behalf of the respondents, have only a heirship right in the property left by the father. They have no right to the property during his lifetime by right of birth; nor would it be right to say that their succession to it could be by the " unobstructed " rule of heritage. Mr. Venkatasubramania Ayyar has rightly pointed out that inheritance that is consequent upon the demise of one holder is always obstructed heritage under the Mitakshara law. When there is a right of birth the property vests jointly in all the persons who are entitled to it, the father and the sons, and the son's right by birth to such property held jointly and in common by all the sons cannot be "*sapratibandha*'. It is certainly '*apratibandha*', unobstructed heritage. My learned brother has pointed out how exactly the mistake has arisen with regard to the conception of the term " *daya* " in the Sanskrit books, and, I do not think I need repeat the same.

Mr. Venkatasubramania Ayyar, in the course of his arguments, brought to our notice the decisions in *Katama Natchiar* v. *The Rajah of Shivaganga*[3], *Jogeswar Narain Deo* v. *Ram Chandra Dutt*[4], *Bahu Rani and another* v. *Rajendra Baksha Singh*[5]; and *Lakshminarasamma* v. *Rama Brahmam*[2], from which the following propositions are deducible, *viz.*, that the widow is excluded from succession to her husband's right of co-ownership only when the co-ownership is joint tenancy governed by the rule of survivorship and that that the principle of joint tenancy and survivorship are

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1. (1921) 40 M.L.J. 481 : I.L.R. 44 Mad. 499 (F.B.).
2. (1950) 1 M.L.J. 350 : I.L.R. (1950) Mad. 1084.
3. (1863) 9 M.I.A. 539 (P.C.).
4. (1896) L.R. 23 I.A. 37 : I.L.R. 23 Cal. 670 (P.C.).
5. (1933) I.L.R. 8 Luck. 121.

unknown to Hindu law except in the case of joint family property of an undivided Hindu family governed by the Mitakshara law. These propositions postulate the existence of a joint Hindu family in that the principle of joint tenancy and survivorship may come into operation, either it be in regard to succession by the sons or in regard to succession by the widow. These propositions are well-established from the decisions of the Privy Council and the decisions of this Court.

A further proposition is also unexceptionable. As pointed out by Mr. Venkatasubramania Ayyar the co-ownership has the character of joint tenancy only when it is created by "*abratibandha*" by right of birth and that co-ownership never has the character of *apratibanda* when it is created by inheritance, that is, on the death of the last owner. The decisions in *Sri Raja Chelikani Venkataramana Jamma Garu* v. *Appa Rau Bahadur Garu*[1] and *Gossami Sri Gridhariji* v. *Romanlalji Gossami*[2], are ample authority for this position.

Mr. Rajah Ayyar however argued that the right of birth is always dormant even in the case of separate property in the hands of the father, and, therefore, a claim could be made on the basis of that dormant right by the divided sons after the death of the father. That again is, in other words, saying that the property remains joint for all purposes, notwithstanding the partition that has taken place and despite the fact that the sons had left the coparcenary and ceased to be members thereof. We are unable to agree with this contention of Mr. Rajah Ayyar. He seemed to argue that the right by birth could be liquidated by instalments as well, as when the properties come into the hands of the divided member and passes to the divided sons on the death of the divided member. Even this proposition seems to be rather too wide of the actual scope of the Hindu Law which is administered in this country.

Mr. Rajah Ayyar laid emphasis on the rule of representation in support of his contention that the divided sons could take as joint tenants instead of as tenant-in-common. This aspect of the case has been dealt with by my learned brother in detail and I do not think I need take up the time of this Court in adding to what he has stated.

In the end, Mr. Rajah Ayyar further relied upon a decision in *Suryaprakasa Rao* v. *Govindarajulu*[3]. A reading of this decision would clearly show that it is of no assistance on the point that is urged by Mr. Rajah Ayyar.

In the result, as I have already observed, I have no hesitation in agreeing with my learned brother in the conclusions he has arrived at, and, this appeal and the memorandum of objections have to be dismissed in the terms already stated by my learned brother.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

The Management of the Madras Pinjarapole, by its Honorary Secretary Sri T. Baghchand Galada .. *Petitioner**

v.

The Presiding Officer, Labour Court, Madras and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 2 (j)—Industry—What is Pinjrapole—If industry.

An institution, like the Madras Pinjarapole, which affords shelter and food to unserviceable animals till their natural death out of purely humanitarian objectives, cannot be held to be an industry within the meaning of section 2 (j) of the Industrial Disputes Act (XIV of 1947).

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1. (1897) 7 M.L.J. 143 : I.L.R. 20 Mad. 207.
2. (1899) I.L.R. 17 Cal. 3.
3. (1956) 69 L. W. (Andhra) 46 at 48.

* W.P. No. 3 of 1960. 31st August, 1960. (9th Bhadra, 1882, Saka.)

Two essential requirements to constitute an industry are (1) that there should be an operation in which capital and labour co-operate and (2) that such co-operation should be for the satisfaction of human wants or desires. Where there is no element of trade, but a mere service is done purely out of the instinct of pity or of religion, it cannot be an undertaking except when such service is to satisfy human needs. Though incidentally such activities may have a business tinge about them, it cannot be said that they have for their object any human need or material welfare, the objects are mainly religious and humanitarian.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of Prohibition, prohibiting the Presiding Officer, Labour Court, Madras, the 1st respondent herein from further proceeding with the enquiry in I.D. No. 103 of 1958 on his file.

K. Raja Ayyar, Kesavalal Tarwady and *K. Hariharan*, for Petitioner.

N. C. Raghavachari and *N S. Varadachari*, for Respondents.

The Court made the following

ORDER.—This is a petition under Article 226 of the Constitution for the issue of a writ of Prohibition or other appropriate writ, prohibiting the Presiding Officer, Labour Court, Madras, from proceeding with the enquiry in I.D. No. 103 of 1958 on his file. By G.O. No. 3621, Department of Industries, Labour and Co-operation dated 22nd September, 1958, the State Government referred for adjudication by the Labour Court, Madras, certain questions in a dispute between the Madras Pinjrapole and its workmen. The questions related to the fixation of scales of pay, dearness allowance, etc., for the various categories of workmen and whether the termination of services of the five workers mentioned in the reference was justified, and to what relief they were entitled. A preliminary objection was taken before the Labour Court to its jurisdiction to entertain the reference on the ground there had been no valid reference to it by the Government. The objection was that the Madras Pinjrapole was not an industry, and any dispute between the management of Pinjrapole and its workmen could not be held to be an industrial dispute, so as to entitle the State Government to refer the same for adjudication by the Labour Court. The Labour Court overruled the objection relying on the judgment of the Bombay High Court (which has since been affirmed by the Supreme Court) in *Hospital Mazdoor Sabha* v. *State of Bombay*[1]. That decision was concerned with the case of the workers in a hospital. The Labour Court hold that, although in the present case the Pinjrapole was only a charitable institution whose object was to maintain old and disabled animals, it should be held to be an industrial concern, as it employed workmen for carrying out its objects. The Labour Court posted the industrial dispute to a later date for adjudication on the questions referred to it. The management of the Pinjrapole has, thereupon, filed this writ petition for prohibiting the Tribunal from proceeding with the adjudication on the ground that it has no jurisdiction to entertain the reference.

The substantial point for consideration in this petition is whether the Madras Pinjrapole is an industry, so that a dispute between it and its workmen could be considered to be an industrial dispute. That question has got to be considered in its two aspects, namely, (1) whether under the memorandum of association, it could validly carry on an industry, and (2) whether even so it did actually carry on such an industry on the material date, namely, the date of the order of the State Government under section 10(1) (*c*) directing a reference of the dispute to the Labour Court.

When the petition came up for hearing on 26th July, 1960, it was found that the materials placed before the Labour Court were not sufficient to enable a satisfactory answer to the two questions referred to above. The learned counsel, appearing for both sides, themselves realised the defect and agreed to file further affidavits giving necessary details for proper adjudication of the questions. The petitioner, has, since then filed a further affidavit supported by two documents, (1) The Madras Pinjrapole Golden Jubilee Souvenir which gives an account of its origin and growth, and (2) a copy of the proceedings of the meeting of the committee held on the 13th

1. (1957) 1 L. L. J. 55.

April, 1958. There was no objections to the admission in evidence of these documents. On behalf of the workers, a detailed counter-affidavit has been filed, to which the petitioner has filed a further reply affidavit. On the materials now available, the following facts emerge.

The Madras Pinjrapole is a charitable society, registered under the Societies Registration Act on 20th December, 1906. The institution is situate within the City of Madras, and its premises occupy an area of about 12 acres of land, on which munificence of several donors had enabled the construction of shelters for animals as well as a sanctuary for birds. The objects of the society, as stated in the memorandum of association, are the protection, care and treatment of old, infirm and injured cows, calves, bullocks, etc., and affording freedom to such animals from being slaughtered unnecessarily and to guarantee old age relief to the old, infirm and unserviceable animals till they die of natural causes. To achieve those objects, the means envisaged to be adopted are (*a*) maintenance of a shelter house for aged and unserviceable animals, (*b*) the feeding and treatment of all animals entrusted to the care of the society either by the owners anxious to pension their old animals or rescued by philanthropic persons from the hands of butchers and the protection of animals remanded by Magistrates, (*c*) the breeding of bulls under ideal and sanitary conditions, (*d*) the maintenance of a dairy farm with special attention being paid to proper feeding, accommodation and water supply, the proceeds of which will go to the benefit of the other animals of the Pinjrapole, and (*e*) the bringing up of the calves of the young cows under healthy conditions.

It is not disputed that the aims and objects of the society are purely humanitarian. The starting of the Pinjrapole was inspired by another charitable institution namely the Society for the Prevention of Cruelty to Animals. Mr. Justice Boddam, in his welcome speech at the time of laying of the foundation stone of the Madras Pinjrapole, stated :

> " It may seem anomalous that the S.P.C.A. should take the initiative in starting such an institution but there are many reasons for our doing so. It unfortunately often happens that in pursuance of their duties the Inspectors of the Society find animals being driven which are quite unfit for further work, either from old age or from other causes. On conviction being obtained, these animals are sent to the Raja Venugopal Bahadur Hospital which is the S.P.C.A.'s headquarters for treatment and sometimes it is found that an animal is hopelessly incurable either from old age or from some other cause and the S.P.C.A. is confronted with the difficult question of what is to be done with the animal. The owner is probably too poor to be able to afford to keep a useless animal and if it is returned to him it will either be starved to death or be used again in spite of its unfitness or sold and used by the purchaser. What is the S.P.C.A. to do with it ? In the absence of the Pinjrapole the only thing that the S.P.C.A. could do is to destroy it. To do so in this country is to run counter to the religious principles of all Indians who are members of the Society and so naturally to alienate their sympathies.......... In these circumstances the S.P.C.A. has for the last few years been endeavouring to get a Pinjrapole established in Madras, a place where all non-carnivorous animals may be taken in and kept to live out to remainder of their lives in peace and without labour until in the natural order of things they die a natural death."

The Madras Pinjrapole could be said to be an improvement upon the humanitarian activities of the S.P.C.A. in two substantial matters :—(1) the S.P.C.A. had no means of providing shelters for the injured or discarded animals, whereas the Pinjrapole has provided such shelters ; and (2) merciful killing would not be objectionable from the point of view of the S.P.C.A. if that could relieve the animal of its distress, whereas the Pinjrapole being (as it has been stated) a purely "an oriental institution", there would be an objection to the killing of the animals. Its objects and aims envisage the support and care of the animals till they die a natural death.

It was realised in the year 1912 that the progress of the institution was hampered by want of funds. Leading members of the Sowcar community, most of them being Jains, came forward to help the institution with necessary funds on condition of their being given a preponderating voice in the management of its affairs. They formed themselves into a committee called the Madras Pinjrapole Mahajan Committee, and out of 12 members who managed the Pinjrapole, 8 members were agreed to be elected from the Mahajan Committee. In the following year, the Provincial Government declared the Madras Pinjrapole an infirmary under the

Prevention of Cruelty to Animals Act XI of 1890. The activities of the Pinjrapole were gradually increased, and in the year 1937 the aims and objects of the institution were enlarged. A resolution was passed that protection of dry cows which were not necessarily old and infirm should be included among the aims and objects of the society. It is a matter of common knowledge that a number of dry cows in the City of Madras are sold away to butchers by the poor milkmen who could not support them. Butchers themselves offer tempting prices for such cows, a temptation which the proverty of the milkman could not but lead him to succumb. Dry cows were admitted into the Pinjrapole to prevent them from going into the slaughter house. Maintenance of the dry cows called for stud bulls. Stud bulls were presented to the society by the Government. In course of time, the dry cows brought forth their progeny and began to yield milk. The Pinjrapole was, therefore, in a position to sell milk yielded by the cows which were received by it with a view to protect them from the slaughter house. The 2nd respondent has given details of the sale amounts in respect of the milk produced by the Pinjrapole from the year 1936 up to the year 1958 as an annexure to the counter-affidavit. That shows that the institution had been receiving substantial sums every year by sale of milk.

As I stated already the ideals of the S.P.C.A. and of the Madras Pinjrapole were different in some respects. It was but natural that the latter should, in course of time, desire to stand on its own legs and develop.

A separation was effected between the S.P.C.A. and the Madras Pinjrapole in the year 1948 : the immoveable property and funds belonging to the institution which were till then in the name of S.P C A. were transferred to the name of the Pinjrapole. A fillip to the activities of the institution was given in the year 1950 when the Madras Pinjrapole and the Mahajan Gowsala were amalgamated. At the end of 1957 there were 458 animals and in the following year they increased to 523. The animals included cows, calves, bullocks, buffaloes, horses, asses and stud bulls.

It is apparent from the foregoing statement of the progress of the Pinjrapole that its object is purely humanitarian. There is no element of trade or business involved in the various activities of the society. It cannot even be said that the activities in question are in any way analogous to a trade or business though I will have to refer to certain features which existed for some years which may be said to partake of such a character. According to the 2nd respondent, the Pinjrapole had been doing business in the purchase and sale of milk. The society is also stated to have purchased cows as economic asset for the purpose of assisting them in the industry relating to the dairy farm. It is conceded that stud bulls earn monies when they are employed for breeding dry cows of the public. Detailed figures are given for the sale of the milk since the year 1939. It is also stated that the Pinjrapole has been selling dry cow dung cakes and also manure. It is contended that, as the object of the society themselves envisage the adoption of means for acquring monies for the maintenance of the animals, its activities should be held to be commercial in nature, and, therefore, an industry. I shall consider seriatim the factual basis for the several points mentioned above.

(1) Purchase and sale of milk :—The Honorary Secretary of the Pinjrapole has stated that the activities of the society after 1st April, 1958 were confined only to the following matters :—(*a*) the maintenance of shelter house for aged and unserviceable animals ; (*b*) the feeding and treatment of all animals entrusted to its care either by owners anxious to pension their old animals or rescued by philanthropic persons from the hands of butchers and the protection of animals remanded by Magistrates ; and (*c*) the saving of old and infirm cows, bullocks, horses, dogs etc. The Honorary Secretary has categorically stated that a dairy farm was started in 1936 as an experimental measure, but that it was abandoned long ago. He has also stated that the management purchased outside milk and sold it along with their own, but that even that stopped from 1st April, 1958. This statement is not accepted by the workers. But I have no hesitation in accepting the affidavit filed

on behalf of the petitioner. That statement is further corroborated by resolution at the meeting of the committee of the Pinjrapole held on the 30th of April, 1958. That resolution specifically states that steps should be taken to stop the purchase of outside milk within three months thereof. As regards the stud bulls, the Honorary Secretary has stated that the services were rendered by the Pinjarapole only to dry cows in the Pinjrapole, though occasionally some dry cows belonging to the donors had the benefit. But it is said that the latter practice had been stopped since 1st April, 1958. In view of that statement, I am of opinion that the presence of stud bulls in an institution like the Pinjrapole would not justify the inference that they were employed for commercial purposes. It may be that charges had been collected when cows from outside were sent to the Pinjrapole for breeding. Those instances were of a casual nature and even that has been stopped. The mere fact that occasionally the stud bulls in the Pinjrapole were utilised for the cows not being inmates thereof, could not alter the essential character of the institution, namely the care of derelict cows and animals. Service, even if done to cows owned by outsiders, would still be service to animals, though incidentally it might benefit the owners as well.

(2) Periodical sales by the society of the following : (1) milk, (2) cow dung cakes and manure and (3) calves born of the cows in Pinjrapole and after they reach proper age and after the mother cows go dry. It is admitted that, for some years past, the Pinjrapole had been selling milk. During certain years, it even went a step further. The Pinjrapole purchased cows, maintained a dairy farm and supplemented their own production of milk with outside milk and sold them. These activities would certainly partake the character of a business, though the profits of such business might have gone to the humanitarian activites undertaken by the society. But the activities have long ago ceased. What the society is now having is the milk yielded by its own cows. Those cows are admittedly kept by the Pinjrapole till their lives. They are not sold. They are the property of the Pinjrapole. The milk yielded bv those cows could only be considered as an incidental product in the maintenance of the cows. The sale of cow dung cakes and manure and of the calves after the mother cows become dry are also incidental. It cannot be held that a trade or business is conducted by the institution. A private owner of a cow who sells surplus milk or its products cannot be said to be doing business without futher evidence that he intended it as a commercial venture. Similarly sales of the yield of the inmates of the institution cannot in any way change its character which is essentially one for the benefit of the voiceless animals who would otherwise be starved or marched to the slaughter house.

To sum up, the main objects and activities of the Madras Pinjrapole are for affording shelter for all unserviceable animals, including dry cows, till the end of their lives. During their stay in the Pinjrapole, which is till they die a natural death, they are looked after by properly feeding them ; medical attention is also provided for them. The means adopted and existing on the material date do not contemplate any trade or business. The sales of milk and manure, etc., are the natural and incidental result of the maintenance of the animals and cannot by themselves be regarded as changing the main object of the institution, namely, the care and preservation of the animals.

The question then is whether, under those circumstances, it can be said that the Madras Pinjrapole is engaged in any industry within the meaning of section 2 (*j*) of the Industrial Disputes Act. That section defines an industry as meaning.

"any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."

I have already pointed out that there is no business or trade by the Pinjrapole. Nor is there a manufacture or calling of the employers. It has only to be considered whether the activities of the society aforesaid would amount to an "undertaking" by the society so as to come within the definition of that section. In *State of Bombay* v.

Hospital Mazdoor Sabha[1], the Supreme Court considered the scope of the definition referrd to above and enunciated the attributes which would make an activity an undertaking within the meaning of section 2 (*j*) of the Act. That case was concerned with the decision of the question whether a group of hospitals run and managed by the State Government could be held to be an industry within the meaning of the Act. The Supreme Court held that an activity would be an industry, though in carrying it out there was no profit motive. It was held that the presence of investment of capital would have no bearing on the question, and that it was the character of the activity which would be decisive as to whether it would come under section 2 (*j*). Considering the attributes, the presence of which would make an activity an undertaking within the meaning of the section, the Supreme Court observed at page 686 :

" It is difficult to state these possible attributes definitely or exhaustively ; as a working principle it may be stated that an activity systematically or habitually undertaken for the production or distribution of goods or for the rendering of *material services* to the community at large or a part of such community with the help of the employees is an undertaking. Such an activity generally involves the co-operation of the employer and the employees and its object is the satisfaction of *material human* needs. It must be organised or arranged in a manner in which trade or business is generally organised or arranged. It must not be casual nor must it be for oneself nor for pleasure. Thus the manner in which the activity in question is organised or arranged, the condition of the co-operation between employer and the employee necessary for its success and its object to render *material service* to the community can be regarded as some of the features which are distinctive of activities to which section 2 (*j*) applies." (Italics mine).

I have already considered the circumstances prevailing in the Madras Pinjrapole on the date of the reference by the Government, and indicated that there is nothing in them to suggest that there was any activity of the society analogous to a trade or business. But such activity as the society is having cannot however be stated to be casual though it could be said to have been inspired by the humanitarian instinct in man.

Two further aspects have however to be considered (1) whether the activity involves the co-operation of the employer and the employee, and (2) whether it is one for rendering of material service to the community at large. On the first question, there can be no difficulty, as co-operation is essential for proper functioning of the society. But can the activity undertaken by the society be said to be one for the satisfaction of human wants and desires ? It is no doubt true that, in certain cases, an owner, unwilling to maintain his dry or old or infirm animal, might send it to the Pinjrapole. But the object with which the Pinjrapole receives the animal is not for doing service to the owner, but to the animal by affording its protection till death. Essentially, therefore, the service rendered is not for human wants and desires, but for sake of the voiceless animals, themselves. In *State of Bombay* v. *Hospital Mazdoor Sabha*[1], Gajendragadkar, J. referred with approval to the decision of Isaacs, J. in *The Federated State School Teachers' Association of Australia* v. *The State of Victoria and others*[2]. I shall presently refer to the relevant passage in that case. Before doing so it will be useful to refer to the earlier case, i.e. in *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation*[3], where Isaacs and Rich, JJ., while considering the meaning of the phrase " industrial dispute " observed at page 554 :

"Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation."

Again at page 561, the learned Judges stated :

" Some of these will be particularised, but in the meantime it should be said that they will show in themselves and from the character of the disputants this will be confirmed, that so long as the operations are of capital and labour in co-operation for the *satisfaction of material human* needs, the objects and demands of labour are the same whether the result of the operations *be money or money's worth*." (Italics mine).

1. (1960) S.C.J. 679.
2. 41 C.L.R. 569.
3. 26 C.L.R. 508.

In *Federated States School Teachers' Association of Australia* v. *State of Victoria*[1], Isaacs, J., observed at page 581 :

> " The next feature to observe is that it has reference to the co-operation of the two groups " for the satisfaction of *human wants and desires* ". As appears from the *Municipal Employees' case*[2] the wants and desires referred to are " material " that is, not spiritual. It is not that the objects by which they are satisfied are material, that is to say, corpuscular."

Therefore the two essential requirements to constitute an industry are (1) that there should be an operation in which capital and labour co-operate, and (2) that such co-operation should be for the satisfaction of human wants or desires.

The decisions in *D. N. Banerji* v. *P. R. Mukherjee*[3], *Employers of the Osmania University* v. *Industrial Tribunal*[4] and *N. Union of Commercial Employees* v. *M. R. Maher*[5], were concerned with first of the two requisites mentioned above, namely, whether there was a co-operation between labour and management for the purpose of fulfilling human needs or desires. There was no controversy in those cases whether the activities were with the object of satisfying human needs. I am not, however, to be understood as saying that whenever service is done to animals, it will not be to satisfy human needs. For example, a person may manufacture and sell food for animals : maintain a breeding station for profit or as a business : keep a dairy farm for sale of milk and its products. In all those cases, there is an intention to trade or do business. Where there is no element of trade, but a mere service is done purely out of the instinct of pity or of religion, it cannot be an undertaking except when such service is to satisfy human needs. In the present case, the activities of the Pinjrapole have nothing to do with human needs. They are solely devoted for the needs of helpless animals. Though incidentally such activities may have a business tinge about them, it cannot be said that they have for their object any human need or material welfare ; the objects are mainly religious and humanitarian. It would follow that the tests laid down by the Supreme Court in the *Hospital Case*,[6] could not be held to be satisfied in that the activities of the Pinjrapole have not been directed to the satisfaction of human needs. I am, therefore, of opinion that there is no industrial dispute to empower the State Government to refer to the Labour Court for adjudication. There is, however, an order by the Labour Court holding that it has jurisdiction. It is but appropriate that the order should be quashed. A writ of *certiorari* will issue.. There will be no order as to costs.

K.L.B. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JAGADISAN.

Thimmakkal .. *Appellant**

v.

N. Kamakshi Ammal and another .. *Respondents.*

Transfer of Property Act (IV of 1882) section 56—Marshalling—Scope of.

Where the owner of two or more properties mortagaged sells one of them to another, the purchaser has under section 56 of the Transfer of Property Ac , the statutory right to insist on the mortgage debt being saatisfied out of the property or properties not sold to him. But this right of the purchaser cannot prejudice the rights of the mortgagee or persons claiming under him. Nor could this right be enforced if there is a contract to the contrary. Section 56 does not operate to curtail or restrict the rights of the mortgagee to recover the mortgage amount from all or any of the items mortgaged in any manner he likes.

Appeal against the Decree of the Court of the Subordinate Judge of Cuddalore in Appeal Suit No. 92 of 1956 preferred against the Decree of the Court of the District Munsif of Kallakurichi in Original suit No. 264 of 1955.

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1. 41 C.L.R. 569.
2. 26 C.L.R. 561.
3. (1953) S.C.J. 19 : (1953) 1 M.L.J. 195 : A.I.R. 1953 S.C. 58.
4. (1960) 1 An.W.R. 265.
5. A.I.R. 1950 Bom. 22.
6. (1960) S.C.J. 679.

*S.A. No. 795 of 1958.

11th November, 1960.
(20th Karthika, 1882, Saka).

T. V. Balakrishnan, for Appellant.

V. C. Viraraghavan, for 1st Respondent.

The Court delivered the following

JUDGMENT.—Rangan Chetti the owner of two items of properties mortgaged them under a mortgage deed, Exhibit A-1, dated 27th December, 1950 to secure a debt of Rs. 500 in favour of his sister Thimmakkal. On 4th April, 1951, he sold one of the items mortgaged to Kamakshi under a registered sale deed, Exhibit B-4. Rangan Chetti died sometime in 1951 or 1952 leaving behind him as his heirs his two sisters Thimmakkal the mortgagee under Exhibit A-1 and another Lakshmi Ammal. Thimmakkal filed O.S. No. 264 of 1955 on the file of the District Munsif's Court, Kallakurichi, seeking to enforce the mortgage in her favour, Exhibit A-1, by bringing to sale the hypotheca. The first defendant in the suit is her sister, Lakshmi Ammal who is jointly entitled along with her to succeed to the estate of Rangan Chetti. The second defendant in the suit was impleaded on the footing that he was a purchaser under the registered sale deed, Exhibit B-3, dated 19th February, 1951 of another item of hypotheca from Rangan Chetti, The third defendant was the purchaser under Exhibit B-4, Kamakshi, referred to above. The first defendant remained *ex parte* and defendants 2 and 3 contested the suit. The plaintiff subsequently gave up the second defendant and the third defendant therefore became the only contestant. She contended that the mortgage sued upon was not supported by consideration, and that in any event the plaintiff was disentitled to sue, as her rights as a mortgagee became merged with the rights of the mortgagor inherited by her along with her sister the first defendant.

The learned District Munsif of Kallakurichi who tried the suit found that the mortgage was fully supported by consideration and that the plaintiff was entitled to sue upon the mortgage, and accordingly granted a preliminary mortgage decree in favour of the plaintiff as prayed for.

The third defendant preferred an appeal, A.S. No. 92 of 1956 on the file of the Court of the Subordinate Judge of Cuddalore against the said Judgment and Decree of the learned District Munsif, and the learned Subordinate Judge reversed the decree and judgment of the trial Court, and non-suited the plaintiff. He found that the suit mortgage was supported by consideration only to the extent of Rs. 250 and that the plaintiff was disentitled to sue by reason of the merger of the rights of mortgagee and mortgagor in herself.

This Second Appeal has been preferred by the plaintiff. When the Second Appeal was heard by me in the first instance I called for a finding from the trial Court on the following two questions :—(i) Whether item 1 of the suit mortgage was sold by Rangan Chetti to the second defendant in the suit under Exhibit B-3 and if not who was in possession of that item on the date of the suit and (ii) what was the market value of items 1 and 2 of the suit properties on the date of the suit and on the date of the mortgage. Parties were given liberty to adduce fresh evidence.

The learned District Munsif of Kallakurichi has now given a finding that item 1 of the suit mortgage was not sold by Rangan Chetti to the second defendant and that it was in the possession of the plaintiff. He has further found the market value of the items 1 and 2 of the suit properties on the date of the suit was Rs. 400 and Rs. 150 and on the date of the mortgage Rs. 350 and Rs. 250 respectively. This finding has not been challenged before me by the parties to the appeal. The learned counsel on both sides were heard after the return of the finding.

On behalf of the appellant it was conceded that the finding of the learned Subordinate Judge holding that the suit mortgage was supported by consideration only to the extent of Rs. 250 was correct. The only question that arises for consideration is whether the appellant is entitled to any relief in this suit and if so to what extent. The learned counsel for the respondent frankly submitted that he could not support the dismissal of the suit by the lower appellate Court. He submitted

that he was entitled to the statutory right of marshalling as embodied in section 56 of the Transfer of Property Act. Section 56 of the Transfer of Property Act is as follows :—

"If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties."

This section in its present form was substituted for the original section by the amending Act of 1929. Before the amendment the section read as follows :

"Where two properties are subject to a common charge and one of the properties is sold the buyer is as against the seller in the absence of a contract to the contrary entitled to have the charge satisfied out of the other property so far as such property will extend."

The words 'as against the seller' which occurred in the original section have been omitted by reason of the amendment. This section provides for the right of marshalling to a subsequent purchaser. Section 81 of the Transfer of Property Act provides for the right of marshalling by a subsequent mortgagee. Where the owner of two or more properties having mortgaged them to one person, subsequently sells one or more of such items to another person the purchaser has the statutory right under section 56 of the Transfer of Property Act, called marshalling, to insist upon the mortgage debt being satisfied out of the property or properties not sold to him. But the exercise of this right is subject to the condition that it must not prejudice the rights of the mortgagee or of persons claiming under him, and that there should be no contract to the contrary.

The principle of the doctrine of marshalling is thus explained by Lord Hardwick in *Lenoy* v. *The Duke and Duchess of Athol*[1].

"It is the constant equity of this Court that if a creditor has two funds he shall take his satisfaction out of that fund upon which another creditor has no lien."

The third defendant in the present case being the purchaser of one of the items of the hypotheca, item 2 of the plaint schedule, is certainly a person entitled to claim the right of marshalling under section 56 of the Transfer of Property Act in view of the finding that the other item of hypotheca namely item 1 was not sold by Rangan Chetti to the second defendant. If Rangan Chetti had been alive and had been impleaded in this suit as the mortgagor there cannot be any defence to the right claimed by the third defendant that the mortgage should be satisfied out of the properties not sold to him as far as possible.

It must, however be borne in mind that a mortgagee has an undoubted right to recover the entire mortgage debt due and payable from every item of the mortgaged property and he can choose the particular item of the hypotheca from which he can recover the mortgage amount. The mortgagee has an absolute right to give up or release any portion of the mortgaged property from the mortgage and can enforce his claim against the other properties.

In *Perumal Pillai* v *Raman Chettiar*[2], a Full Bench of this Court held that a mortgagee voluntarily releasing from the suit a portion of the mortgage property is not bound to abate a proportionate part of the debt and is entitled to recover the whole of the mortgage amount from any portion of the mortgaged property.

In *Kuminert Appayya* v *Mengala Rangayya*[3], it was held that a *bona fide* purchaser who purchased for value a portion of the mortgaged property without notice of such mortgage had no right in a suit by the mortgagee to enforce his mortgage, to insist that the portion not sold to him must be proceeded against first and that the portion purchased by him must be sold only for the balance if any due It was pointed out in that decision that under sections 67 and 68 of the Transfer of Property Act

1. (1742) II Atkyns Reports page 445 : 26 E.R. 668.
2. (1917) 33 M.L.J. 211 : I.L.R. 40 Mad. 968 (F.B.).
3. (1908) 18 M.L.J. 229: I.L.R. 31 Mad. 419.

the mortgagee is entitled to an order that the mortgaged property or a sufficient part thereof should be sold on default of payment of the mortgage amount. This decision was given before the amendment of section 56 of the Transfer of Property Act by the 1929 amendment Act. The Division Bench pointed out that a purchaser cannot claim a right under section 81 or section 56 of the Transfer of Property Act as the former applied only to a second mortgagee and the latter conferred such rights only 'as against the seller.'

The question for consideration is whether section 56 of the Transfer of Property Act, as it now stands, can prevent the mortgagee from releasing the items of hypotheca not sold away by the mortgagor and stand in the way of his enforcing the mortgage as against the item sold by the mortgagor. I am of opinion that section 56 of the Transfer of Property Act does not operate to curtail and restrict the rights of the mortgagee to recover the mortgage amount from all or any of the items mortgaged in any manner he likes. Section 56 of the Act can come into play only where there are items of properties not sold away by the mortgagor available to the mortgagee to be proceeded against and not where the mortgagee has given up his rights with regard to all the items of property except the properties sold away or where the mortgagee for other reasons is unable to proceed against any item other than the property sold away by the mortgagor.

Reference may be made to the decision of this Court in In re *Muthammal*[1], in which Pandrang Rao, J., observed as follows :

"Marshalling implies the existence of two sets of properties one of which is subject to both the mortgages and the other is subject only to the earlier mortgage. At the time when the doctrine was sought to be invoked in the present suit there were no two items of properties liable to be sold but only one item that is to say Schedule I property. It is impossible for the plaintiff in the present suit to ask for sale of Schedule II properties and it follows therefore that it is not open to the appellants to ask that they should be sold before Schedule I properties are sold."

In the present case the mortgagee, namely, the plaintiff and the first defendant have jointly inherited the equity of redemption in respect of item 1 of the plaint schedule. The plaintiff and the first defendant are therefore co-owners in respect of this equity of redemption. The plaintiff is clearly disentitled to the extent of half the property comprised in item 1 to recover her mortgage money. She cannot sue herself and her own property to recover what is due to her under the mortgage. By reason of this circumstance the third defendant cannot put forward his rights of marshalling under section 56 of the Transfer of Property Act so as to compel the plaintiff to sell her half share in item 1 of the hypotheca. Under the very terms of that section the right of marshalling cannot be availed of if the exercise of that right will prejudice the rights of the mortgagee. The utmost that the third defendant will be entitled to by virtue of section 56 of the Act is to claim a right of marshalling so as to oblige the plaintiff to proceed against half of item 1 in the first instance to recover the mortgage amount due to her leaving her to recover the balance, if any, after such proceeding from and out of item 2 of the property purchased by her.

The learned counsel for the Respondent relied upon the decision in *Viswanatha Iyer* v. *Vengama Naidu*[2] as authority for his contention that section 56 of the Transfer of Property Act will bar the plaintiff from proceeding against item 2 of the hypotheca. In that case it was held that where an assignment of part of the mortgage security is made free from encumbrance the assignee is not liable to contribute as against the assignor to the payment of the mortgage debt. Venkatasubba Rao, J. referred to the following passage in the judgment of Christian, L.J., in *Ker* v. *Ker.*[3]

"The conclusions which I gather from *Herbert's case*[4] are the following. First that the original principle of the common Law was equalised, that is to say, contribution in the ratio of value wholly irrespective of priority of dates of purchase. Second that the case of the debtor himself and his heir-at-law in respect of retained lands was an exception to that principle by reason solely of his personal

1. (1938) 1 M.L.J. 310 : A.I.R. 1938 Mad. 503.
2. (1923) 19 L. W. 567.
3. (1869) Irish Rep. 4 Eq. 15.
4. (1585) 3 Rep. 116.

liability and that to such exception it mattered not whether the purchasers were such, with consideration or without it."

Venkatasubba Rao, J., then observed as follows :—

"The Transfer of Property Act enacts a rule in section 82 and the exception in section 56."

I am unable to see how this decision can help the respondents to sustain his contention.

The Second Appeal is allowed and the Judgment and Decree of the lower appellate Court are set aside. There will be a preliminary mortgage decree in favour of the plaintiff for the sum of Rs 250 with interest thereon at 5 per cent. throughout. The plaintiff is directed to proceed against the half of item 1 of the plaint schedule in the first instance to recover the decree amount. She will be entitled to proceed against the third defendant and item 2 purchased by him only for the balance that may remain due to her after proceeding against half of item 1 as aforesaid. The third defendant will be entitled to contribution in the event of item 2 being ultimately made to bear more than the proportionate share of the mortgage liability. This will have to be worked out in a separate suit. The parties will bear their respective costs throughout. No leave. Time for redemption 6 months.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

Ceylon Thowfeck Hotel by its Managing Partner, K. M. K. Mohamed Salai Maraikayar, Madura .. *Petitioner**

v.

The State of Madras represented by the Dy. Commercial Tax Officer, Town I, Madurai .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), section 3 (1) and Amending Act XV of 1956, and Madras General Sales Tax Rules, rules 17 (3) and 18 (1) —Order of the Tribunal fixing the rate of levy on the turnover of the hotel business and refunding excess to the assessee—Amending Act fixing a higher rate retrospectively—Demand on the assessee on the amended Act—Rules 17 (3) and 18 (1)—Scope—Rules cannot enable the assessing authority to revise or rectify orders of Appellate or Revising Authority.

The Tribunal following the ruling of the High Court that the levy of 4½ pies in the rupee on the turnover of the hotel business under section 3 (1) of Madras Act IX of 1939 as it stood before the Amending Act XV of 1956, was unconstitutional, refunded the excess amount over and above the levy at the rate of 3 pies in the rupee, to the assessee. The Amending Act came into force immediately and it validated the prior assessments at 4½ pies in the rupee and levied tax on the turnover at 4½ pies in the rupee with retrospective effect. The excess amount refunded to the assessee was demanded under the Amending Act.

Held : Though the effect of the Amending Act was that the levy at the rate of 4½ pies in the rupee was deemed to be the levy from 1st August, 1949, it did not provide the machinery for giving effect to that amendment to the Proviso to section 3 (1) of the Act.

The assessing authority cannot under Rule 18 (1) of the General Sales Tax Rules, 1939, which permits rectification of mistakes, revise or rectify the final order of the Tribunal fixing the rate of levy at three pies in the rupee.

Though the original assessment was at too low a rate within the meaning of rule 17 (3) of the Sales Tax Rules, 1939, interpreting the apparently wide words in the rule consistent with the scheme of the Act and the rules, Rule 17 (3) will not enable the assessing authority to revise the order of the appellate authority or the revising authority.

The power of rectification under rule 18 (1) was not factually availed of by the Tribunal in the instant case.

Petition under section 12-B (1) of Act IX of 1939 praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 25th February, 1958 and made in T.A. No. 786 of 1957 preferred against the Order of the Commer-

* Tax Case No. 41 of 1958. (Revision Case No. 22 of 1958). — 2nd November, 1960. (11th Kartika, 1882—Saka).

cial Tax Officer, Madurai (South) dated 15th July, 1957 in Appeal No. 333/56-57 (A-2342/53-54 on the file of the Deputy Commercial Tax Officer, Town I, Madurai.)

A. Shanmugavel, for Petitioner.

The Government Pleader (*A. Alagiriswami*) on behalf of the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—For the assessment year 1953-54 the petitioner was assessed to sales tax on the turnover of his hotel business at $4\frac{1}{2}$ pies in the rupee under the Proviso to section 3 (1-*b*) as it stood then of the Madras General Sales Tax Act (IX of 1939), to which we shall hereafter refer to as the Act. The Tribunal applied the law laid down by this Court in W.P. No. 313 of 1954, that the statutory provision authorising the levy of tax at $4\frac{1}{2}$ pies in the rupee was unconstitutional and unenforceable and held that the tax should be assessed only at 3 pies per rupee. That decision of the Tribunal was rendered on 28th May, 1956. The excess amount of Rs. 936-1-2 that had been collected from the petitioner was refunded to him by adjustment on 30th September, 1956. The Madras General Sales Tax (Third Amendment) Act (XV of 1956), to which we shall refer hereafter as the Amending Act, received the assent of the President on 1st October, 1956 and was published in the Gazette on 8th October, 1956. Section 17 of the Amending Act validated assessments under the provisions of the Proviso to section 3 (1) of the Act before it was amended. In addition the Amending Act amended the Proviso to section 3 (1) of the Act with retrospective effect from 1st August, 1949 and the amended Proviso authorised levy of tax on the turnover of hotels at $4\frac{1}{2}$ pies in the rupee.

After the Amending Act XV of 1956 came into force, the Deputy Commercial Tax Officer, the assessing authority, issued a notice to the petitioner on 8th January, 1957, asking him to show cause why the assessment should not be revised at the rate sanctioned by the amended Act, that is, at $4\frac{1}{2}$ pies per rupee. The objections of the petitioner were overruled and by his order dated 7th February, 1957 the Deputy Commercial Tax Officer held that the petitioner was liable to be assessed to a tax of Rs. 2,808-3-5 on his turnover, and a demand notice was issued to the petitioner to pay up the balance still due, Rs.936-1-2, which represented the difference between the tax originally assessed at 3 pies and the tax subsequently assessed at $4\frac{1}{2}$ pies in the rupee. The Commercial Tax Officer, to whom the petitioner appealed against the revised assessment, dated 7th February, 1957, dismissed the appeal on the basis, that there had been no assessment on 7th February, 1957 and that therefore no appeal lay. The petitioner appealed to the Tribunal. The Tribunal held that section 17 of the Amending Act XV of 1956 validated the demand made of the petitioner and dismissed the appeal.

The petitioner applied to this Court under section 12-B of the Act to revise the order of the Tribunal.

The view taken by the Tribunal was erroneous. Section 17 of the Amending Act (XV of 1956) could not validate the order of the Deputy Commercial Tax Officer dated 7th February, 1957. The finality of the original assessment for 1953-54 was under the order of the Tribunal dated 28th May, 1956, and that order directed assessment to tax not at the rate of $4\frac{1}{2}$ pies but at the rate of 3 pies per rupee. Section 17 of the Amending Act did not operate to set aside that order of the Tribunal or to revive the original assessment which the Tribunal had modified. The statutory finality of the assessment which flowed from the order of the Tribunal, dated 28th May, 1956 was left untouched by section 17 of the Amending Act. The learned Government Pleader did not seek to support either the view taken by the Tribunal or that taken by the first appellate authority, the Commercial Tax Officer.

The learned Government Pleader contended that the validity of the revised assessment ordered by the Deputy Commercial Tax Officer on 7th February, 1957 could be rested either on rule 17 (3) or rule 18 (1) of the Madras General Sales Tax Rules, 1939, though the order of the assessing authority did not *ex facie* refer to any provision under which the original assessment was revised.

Rule 18 (1), which permits rectification of mistakes, could not have been invoked by the assessing authority, the Deputy Commercial Tax Officer, to revise or rectify an order of the Tribunal. We have pointed out that in this case the final order of the original assessment was that of the Tribunal, dated 28th May, 1956. Whether the Tribunal could have exercised its power to revise that order under rule 18 (1) and whether the principle laid down by the Supreme Court in *Income-tax Officer, Bombay* v. *Bombay Dyeing and Manufacturing Co.*[1], would justify such a rectification did not arise for consideration in this case. Factually the Tribunal did not exercise any such power, and the Deputy Commercial Tax Officer had no jurisdiction under rule 18 (1) to rectify any mistake in the order of the Tribunal which finalised the assessment for 1953-54.

The effect of section 3 of the Amending Act XV of 1956 read with section 1 (2) thereof was that the amended Proviso to section 3 (1) of the Act authorising a levy at 4½ pies per rupee was the statutory provision in force in the year of assessment 1953-54. That provision should be deemed to have been in force from 1st August, 1949. But the Amending Act did not provide the machinery for giving effect to that amendment to the Proviso to section 3 (1). The machinery to give effect to the amendment had to be sought only in the provisions of the Act of 1939 and the Rules thereunder. The question is whether rule 17 (3) vested a jurisdiction in the Deputy Commercial Tax Officer to revise the original assessment which, as we have pointed out more than once, became final only with the order of the Tribunal on 28th May, 1956.

The relevant portion of rule 17 (3) runs :

> " If for any reason any tax has been assessed at too low a rate in any year the assessing authority . . . . . may at any time within 5 years next succeeding that to which the tax . . . . . relates, revise the assessment . . . . . after issuing a notice to the dealer . . . . . . and after making such enquiry as he considers necessary."

Rule 17 (3-A) provided :

> " The powers conferred by sub-rules (1) and (3) on the assessing authoirty or licensing authority may also be exercised by the appellate authority referred to in section 11 or as the case may be by the revising authority referred to in section 12 at any time within a period of 5 years next succeeding that to which the tax or as the case may be the license fee relates provided that such authority shall give the dealer concerned a reasonable opportunity of being heard before passing orders under this sub-rule."

One of the requirements of rule 17 (3) that the tax had been assessed at too low a rate, was satisfied in this case. On 28th May, 1956 when the assessment was finalised the law as it stood then authorised a levy only at 3 pies per rupee, and the assessment was at that rate. But that law was amended and with retrospective effect by the Amending Act XV of 1956, with the result that the lawful rate applicable to the turnover of hotels in the assessment year 1953-54 was 4½ pies in the rupee. Thus the original assessment was at too low a rate within the meaning of rule 17 (3).

No doubt rule 17 (3) clothes the assessing authority with jurisdiction to revise the assessment if for any reason the original assessment was at too low a rate. The words " if for any reason " appear very wide. The question is, are they wide enough to enable the assessing authority to revise not his assessment but an assessment made final by an order of a higher authority, in this case the Tribunal.

If we examine the scheme that appears to underlie sub-rules (1), (1-A), (3) and (3-A) of rule 17—it should be remembered that sub-rule (3-A) takes in both sub-rules (1) and (3)—it seems clear to us that rule 17 (3) does not authorise the assessing authority to revise the assessment ordered or finalised by a higher authority. In our opinion, under rule 17 (3) the assessing authority can revise only his own orders of assessment. Under rule 17 (3-A) the Commercial Tax Officer as the appellate authority under section 11 can revise his order, and the revising authority specified in section 12 can revise his order. The assessing authority cannot revise the order of the appellate authority or that of the revising authority.

1. (1958) S.C.J. 1054 : (1958) 2 M.L.J. (S.C.) 182 : (1958) 2 An.W.R. (S.C.) 182.

We shall illustrate our point by some examples. Suppose the proper rate applicable to the turnover of an assessee was in issue, as it was in this case. Let us further assume that the Commercial Tax Officer, as the appellate authority, differed from the assessing authority on the lawful rate applicable. The assessing authority cannot revise that order of the Commercial Tax Officer on the ground, that in the opinion of the assessing authority the view taken by the Commercial Tax Officer was erroneous; and that therefore the turnover had been assessed at too low a rate. Let us pursue that example a step further. In the case of assessee *A* a Commercial Tax Officer differs from the assessing authority on the lawful rate to be applied in assessing the turnover. If subsequent to that decision the Tribunal in the case of another assessee *B* overrules a similar view taken by the Commercial Tax Officer, can the assessing authority revise the order of the Commercial Tax Officer with reference to assessee *A* under rule 17 (3)? Similarly, if the lawful rate applicable to the turnover is decided in the case of *A* by the High Court, and in a subsequent case with reference to another assessee *B* the view of the High Court is overruled by the Supreme Court, can the assessing authority revise the assessment of assessee *A*, disturbing under rule 17 (3) the finality that had attached to the assessment of *A* under the order of the High Court. In such cases it should be remembered the Tribunal and the Courts only declare what the law has always been. The amendment of the law by the Legislature with retrospective effect can make no difference in principle. Legislation by recourse to a statutory fiction says that that was the law in the relevant period, though factually it was not.

While rule 17 permits revision by the Departmental authorities, it should be noted that neither the Tribunal nor the High Court can revise its orders under rule 17. Rule 18 (1) gives a power of rectification to the Departmental authorities as also to the Tribunal, but not to the High Court. We have referred to these features only to emphasise what we have said above, that the apparently wide words of rule 17 (3) have to be interpreted consistent with the scheme of the Act and the Sales Tax Rules, principally sub-rules (1), (1-*a*) and (3-*a*) of rule 17.

The learned Government Pleader relied on *B. T. Halder & Sons*, In re,[1] which was a decision under section 34 of the Income-tax Act. The learned Judges held that the assessing authority, the Income-tax Officer, can issue a notice under section 34 of the Income-tax Act even after the assessment had become final under the order of an appellate authority. But the scheme of section 34 of the Income-tax Act and the rest of that Act is not analogous to that of rule 17 of the Madras General Sales Tax Rules. Under section 34 of the Income-tax Act only the Income-tax Officer, the assessing authority, can take the initiative to direct a reassessment. The scope of rule 17 (3) cannot be determined on the basis of the analogy of a different statutory provision the language of which is not even in *pari materia*.

In *M. M. Muthukaruppan Chettiar* v. *Deputy Commercial Tax Officer, Trichy*[2], the principle laid down in which was approved of and extended by a Division Bench of this Court in *Sundaram Ayyangar & Sons* v. *Deputy Commercial Tax Officer*[3], Rajagopala Ayyangar, J., pointed out that there was no machinery to demand a payment of the sales-tax refunded to an assessee under similar circumstances. Neither the Act nor the Amending Act provided a machinery for effecting recovery of the amount refunded without a revision of assessment. Rule 18 (1) provided for rectification, but that machinery was not availed of in this case, and it could not have been availed of by the Deputy Commercial Tax Officer. The machinery provided for revision of assessment in rule 17 (3) could not have been availed of in this case by the assessing authority to revise not his order of assessment but that of the Tribunal.

In our opinion the order passed by the Depury Commercial Tax Officer and ultimately confirmed by the Tribunal was without jurisdiction and has therefore to be set aside. This petition is allowed and the order of the Tribunal confirming

1. (1942) 10 I.T.R. 79.
2. (1960) 2 M.L.J. 20 : 11 S.T.C. 220.
3. (1960) 11 S.T.C. 443.

the order of the Deputy Commercial Tax Officer dated 7th February, 1957, will stand set aside. The petitioner will be entitled to his costs. Counsel's fee Rs. 100.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE RAJAGOPALAN.

P. Vd. Vr. Vr. M. Vinaitheerthan Chettiar and another .. *Petitioners**

v.

The State of Madras represented by the Collector of Thanjavur .. *Respondent.*

Madras Estates (Abolition and Conversion into Royotwari) Act (XXVI of 1948), *section* 54-*F,—Scope—Compensation paid in excess—Recovery of excess—When can be made—Sections* 50 *and* 68—*Statutory obligation to deposit interim payments*—Mandamus—*If can issue.*

If on a final computation it is found that what has already been paid towards compensation is in excess of the compensation payable, obviously there can be no statutory liability to pay any more towards compensation. Equally obviously the land-holder cannot retain anything more than what he is lawfully entitled to as compensation and is liable to return the amount paid in excess. That liability can be enforced under section 54-F of Madras Act XXVI of 1948.

Section 54-F is comprehensive enough to empower the Government if the Government finds that it has paid in excess of what is due to recover at any of the following stages, i.e., (1) payment of advance compensation under section 54-A, (2) the determination of final compensation under section 39 and the payment of what is still due as compensation and (3) the determination and payment of the further and additional compensation under section 54-B.

There is nothing in section 50 or in any other section of the Act which entitles the Government to withhold interim payments. The statutory obligation is to deposit interim payments till the final compensation is determined under section 39 and deposited. Section 68 does not clothe the Government with any delegated legislative authority to amend or abrogate any of the statutory provisions with reference to any given estate.

No writ of *mandamus* can issue to the Government to restrain it from collecting in accordance with the law what has been paid in excess as compensation. No mandamus to enforce the statutory obligation is to issue in the instant case because the Government can deposit and still prevent the amount being withdrawn by immediate recourse to section 54-F.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the State of Madras to pay the Petitioners all collections made by the Government under section 55 of the Madras Estates Abolition Act inclusive of the sum of Rs. 3,116 which has been withheld for adjustment for alleged excess payment under section 54-A less the deduction provided under the said section 55 in respect of Athivetti Pichinikadu Estate in the Pattukottai Taluk of Thanjavur District.

V. Vedantachari, for Petitioners.

R. G. Rajan, for the Additional Government Pleader (*M. M. Ismail*) on behalf of the Respondent

The Court made the following

ORDER :—The petitioners were the holders of Athivetti estate, which was notified and taken over by the Government under the provisions of Madras Act XXVI of 1948 (hereinafter referred to as the Act) on 3rd January, 1951. Earlier than that, a notification under the Rent Reduction Act was issued on 25th April, 1950, which enabled the Government to reduce the rents payable before 3rd January, 1951, and to collect those rents. On 30th June, 1951 the Government deposited Rs 31,641 out of Rs 32,682 as the net advance compensation for the estate under

* W.P. Nos. 333 and 334 of 1958.

2nd December, 1960.
(11th Agrahayana, 1882, Saka)

section 54-A of the Act. Under section 50 of the Act interim payments were deposited from time to time for faslis 1360, 1361 and 1362. All these amounts were duly disbursed.

The Government subsequently discovered that by mistake Vairavanathapuram had been taken over along with Athivetti, and that advance compensation and interim payments had been calculated on that basis. Vairavanathapuram, an inam village, was subsequently ordered to be returned to the landholders. The Government also decided that the district average rate which had been adopted earlier was not the correct basis for computing the compensation, and that the probable rents in Athivetti had to be calculated with reference to the weighted average rates. On the fresh data that was collected the advance compensation payable to the petitioners was recomputed and fixed at Rs. 11,418 as against the original computation of Rs. 32,682. The Government decided further that the petitioners were not entitled to any interim payments, because what had been deposited on 30th June, 1951 as advance compensation was more than what the petitioners would be entitled to on a final computation under section 39 of the Act.

Meanwhile the interim payment for fasli 1363 had been deposited, but the payment of that amount was withheld at the instance of the Government.

On 15th June, 1956 the Government directed that what had been paid in excess to the petitioners should be recovered. The interim payment for fasli 1363 which had been deposited with the Tribunal was withdrawn. The petitioners were informed that no further interim payments would be deposited. Some sums were recovered by attachment of the rents which were payable to the petitioners before the estate was notified. The Government claimed that a balance of Rs. 735 was still to be recovered as against the interim payments paid by mistake to the petitioners, and that Rs 9,848 was recoverable as the excess advance compensation paid to the petitioners.

To complete the narrative I can set out even at this stage that the compensation payable to the petitioners was computed under section 39 of the Act on 21st July, 1960, and the amount payable as compensation to the petitioners was determined as Rs. 26,988-30 nP.

The petitioners claimed that the Government had no statutory power to withhold the interim payments or to recover anything from them from out of the advance compensation or the interim payments already paid. In W.P. No. 333 of 1958 the relief asked for was a writ of *mandamus* to direct the Government to refund to the petitioners what the Government had already recovered. In W.P. No. 334 of 1958 the petitioners sought a writ of *mandamas* to direct the Government to deposit interim payments subsequent to fasli 1362.

The questions that arise are (1) whether the Government can recover any portion of what was paid under section 54-A as advance compensation, and (2) whether the Government can recover the entirety of what was paid towards the interim payments under the provisions of section 50 or any portion of that amount. The further question that arises is, whether the Government are under a statutory obligation to deposit interim payments from fasli 1363 onwards till the payment of final compensation computed under section 39 of the Act.

It is really unnecessary to examine the statutory provisions for the recovery of excess amount paid as advance compensation, if recovery is to be effected before the determination of the final compensation computed under section 39 of the Act. What was originally determined as advance compensation in this case was Rs. 32,682, with the assumption that the final compensation would be about double that amount. What was computed finally as the compensation payable for the estate under section 39 of the Act was only Rs. 26,988, which was less than what had already been paid as advance compensation. Unlike the interim payments, whatever is paid as advance compensation is a payment towards the final compensation, which has to be computed under section 39 of the Act, after the resettlement operations

have been completed, to the payment of which the landholder is entitled under the Act. If on a final computation it is found that what has already been paid towards that compensation is in excess of the compensation payable, obviously there can be no statutory liability to pay any more towards compensation. Equally obviously the landholder cannot retain anything more than what he is lawfully entitled to as compensation. He is liable to return the amount paid in excess. That liability can be enforced under section 54-F. In this case the final compensation payable has been computed under section 39.

If I understood the learned counsel for the petitioners aright, his contention was not that the petitioners were entitled to keep everything that had been paid towards compensation. Nor did he contend that what was paid in excess of what was lawfully due as compensation could not be recovered. His contention was that such a recovery should be postponed till the further amount due to the landholder under section 54-B had been determined. The learned counsel urged that what can be recovered under section 54-F is what was paid in excess of what was *due* to him. The amount payable under section 54-B is also *due* to him. Until that is ascertained it would not be possible to determine what was due to him, and until that was fixed it was not possible to hold that any portion of what had been paid to him was in excess of what was due to him.

Plausible as the argument sounds, it is not consistent with the general scheme of the Act. What is payable under section 39 is after a final determination of the compensation payable for the notified estate. Even section 54-B refers to that as "final determination". What section 54-B secures is an additional sum, and the determination of that additional sum is dependent on the total compensation paid for all the estates in the State falling below the specified sum. Computation of the compensation under section 39, computation of the advance payments towards compensation, and the provisions for recomputation and adjustments till the final determination under section 39 are all with reference to the notified estate and the basic annual sum of that estate. It is with reference to that estate that the provisions for recovery have to be considered. There are at least three stages: (1) payment of advance compensation under section 54-A, which is one half of the estimated compensation; (2) the determination of the final compensation under section 39 and the payment of what is still due as compensation; (3) the determination and payment of the further and additional compensation under section 54-B. If at any stage the Government find that the landholder has been paid in excess of what is due to him at that stage, the excess can be recovered, without waiting till the completion of all operations, either those under section 39 or those under section 54-B. Section 54-F is comprehensive enough for that. I shall illustrate my point. Sub-sections (5) to (7) of section 39 provide for a review of the quantum of compensation. If the compensation has been "determind", can it be said that the amount is not due because of the possibility of a recomputation either by way of appeal or by way of revision. In the present case it must be remembered that the remedies open to the petitioners under section 39 have not been exhausted. Subject to the result of the appeal or revision under section 39, and at this stage, Rs. 26,988 is the amount of compensation *due* to the petitioner within the meaning of section 54-F. That is the amount due under section 39. If he has been paid in excess of that as compensation, the excess is recoverable under section 54-F.

The position now is that no writ of *mandamus* can issue to the Government to refrain from collecting in accordance with the law—section 54-F is only one of the provisions of law enabling recovery—what has been paid in excess as compensation. Nor can there be a writ of *mandamus* directing repayment of what has already been recovered. The rights of the petitioners have now to be worked out, not with reference to the advance compensation or to the further recomputation of that advance compensation, but with reference to the final compensation computed under section 39 of the Act.

The further relief the petitioners sought was a direction to the Government to deposit the interin payments due to the petitioners. The liability to make in-

terim payments can be enforced only till the final compensation is determined under section 39, and whatever is still due, after taking into account the amounts already paid as compensation, is deposited with the Tribunal for disbursement. In this case the amount payable as compensation was determined on 21st July, 1960, and the statutory liability to make interim payments ceased, because on that date nothing more was payable to the petitioners towards compensation. In fact they had been paid in excess of what was due to them as compensation. The real question is, whether the Government should be directed to deposit interim payments for faslis 1363 to 1369. What was deposited for fasli 1363 was withdrawn and nothing was deposited for any of the subsequent faslis.

Section 50 which provides for the interim payments also provides for their periodical revision and adjustments. Section 50 (7) provides for the final adjustment after the determination of the final compensation, that is, compensation computed under section 39. The Government has to make good any shortage, and the Government is entitled to recover any excess paid towards the interim payments. While section 50 (8) makes it clear that the interim payments is no part of the compensation which has to be computed under section 39, sub-section (4-A) of section 50 makes interim payments also available to the Government for effecting recovery of what has been paid in excess as advance compensation. The Proviso to sub-section (4-A) of section 50 however limits such availability to one half of the interim payment that has to be deposited in any fasli. The Government are thus under a statutory obligation to deposit at least one half of the computed interim payment each year, even if amounts are due to the Government under sub-section (4-A). If it is found that in any year the landholder has been paid anything in excess of what was due to him as interim payment the adjustments have to be made under section 50 (7).

In the case of the petitioners, since what was deposited towards compensation on 30th June, 1951—it is true it was deposited only as advance compensation—was in excess of what was payable as final compensation computed under section 39, the claim of the Government was that the statutory liability to deposit interim payments really ceased on 30th June, 1951, and everything paid to the petitioners as an interim payment after that date was a payment to which they were not entitled in law. The Act did not provide for such a contingency in express terms. Neither sub-section (4-A) nor sub-section (7) of section 50 could cover such a case. Two questions arise: can the interim payments to which the petitioners were not entitled be recovered?; is the Government bound to deposit the interim payments up to the date of the factual ascertainment of the final compensation in cases, where no further amount need be deposited towards compensation? The questions are independent of each other.

The learned Government Pleader was, in my opinion, well founded in his contention, that section 54-F is comprehensive enough to clothe the Government with statutory authority to recover even interim payments if they were not lawfully due. The Proviso to section 54 (4-A) is limited in its scope, and it does not confer absolute immunity on one half of the interim payments from being proceeded against, for instance under the provisions of the Revenue Recovery Act, after the amount has been deposited.

There is however nothing in section 50 or in any other section of the Act which entitles the Government to withhold interim payments. The Government relied on G.O. Ms. No. 1543 dated 16th November, 1955, issued in exercise of the power vested in the Government by section 68 of the Act, which ran:

> " If any difficulty arises in giving effect to the provisions of this Act, the Government may, as occasion may require, do anything which appears to them necessary for the purpose of removing the difficulty."

The Governmentr order provided:

> " Now, therefore, in exercise of the powers conferred by section 68 of the said Act, the Government of Madras hereby directs that no interim payment under section 50 need be made if it is found that

the initial deposit of advance compensation made for the estate under section 54-A by itself exceeds the total compensation which is likely to be payable."

In my opinion the Government could relieve themselves of the statutory obligation cast on them by sub-sections (2) and (4) of section 50, only if there is legislative sanction. The statutory obligation is to deposit interim payments till the final compensation is determined under section 39 and deposited. Anticipation is not enough. There must be a factual determination under section 39 of the Act for the statutory obligation to deposit interim payments to cease. A statutory obligation cannot be got over as a "difficulty" and avoided on that basis by recourse to section 68. Section 68 did not clothe the Government with any delegated legislative authority to amend or abrogate any of the statutory provisions with reference to any given estate. I may point out that no legislative sanction was sought even in 1956, when the Act was amended, to clothe the Government with the statutory authority to withhold interim payments in anticipation of a determination of the compensation under section 39.

Still the question remains, should a writ of *mandamus* issue in this case : should, in effect, the Government be compelled now to deposit interim payments and then proceed against the amounts immediately by recourse to section 54-F? I can see no useful purpose which can be served by adopting such a procedure. The position now is that what was paid towards compensation on 30th June, 1951, was itself in excess of what was payable as compensation on a computation under section 39. Though till 21st July, 1960, the Government was under a statutory obligation to deposit interim payments, that statutory obligation need not be enforced now, when it can, as I have pointed out earlier, lead to no practical results The Government can deposit and still prevent the petitioners from getting at the money deposited by immediate recourse to section 54-F of the Act. It is in these circumstances that I have decided in the exercise of my discretion to refuse a writ of *mandamus* in W.P. No. 334 of 1958.

The rule *nisi* is discharged in each of these petitions and the petitions are dismissed. No order as to costs.

These petitions having been set down to be spoken to this day in the presence of the said Advocates the Court made the following

ORDER : Learned counsel for the petitioner wants the deletion of the two sentences in the penultimate paragraph of my judgment: "Nothing was therefore due as interim payment after 1st July, 1951. But that position emerged only on 27th January, 1960, during the pendency of these proceedings". These two sentences will stand deleted. In the context in the paragraph that may appear to be in conflict with what I stated earlier, that there was a liability to deposit, because, G.O. 1543 dated 16th November, 1955, was not valid. The deletion of these two sentences, in view of what I have stated earlier in the judgment, will leave the rights and liabilities of the petitioner and the Government otherwise intact. There was a liability to deposit with a right to recover. It was because of that I stated that in the exercise of my discretion I must decline to issue a writ of *mandamus*. Corrections have been carried out on this basis and I have added this only to explain the basis of the correction.

V.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

The Ajax Products Ltd., (in voluntary liquidation), Madras .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 10 (2) (vii) and Second Proviso as amended by Act XLVII of 1949—Scope and applicability—Sale of machinery and buildings—No business done in the account year of sale—'Deemed profits'—Liability to assessment.

Neither the right conferred by section 10 (2) (*vii*) of the Income-tax Act nor the liability imposed by the Second Proviso comes into play, if the machinery and buildings sold had not been used by the assessee for any business of his during any portion of the year of account, in which the sale is effected. The amended Proviso applied only if the assessee had carried on his business during at least a portion of the year in which the sale took place and once that condition was satisfied, the amended Proviso enabled the Revenue to bring to tax the deemed profits of the sale, even if the sale was effected after the assessee had ceased to carry on his business. Despite the express reference to the cessation of the business in the amended Proviso, it does not enact a further fiction that the assessee shall be deemed to carry on the business in the year of sale. That he should have carried on the business in the year of sale is a factual requirement of the Proviso. All that the amended Proviso in effect dispenses with is the further continuity of the business upto the date of the sale.

The contention that the word 'profits' in the Second Proviso should not be confined to the profits of a business, etc., but should be given the normal meaning of any profit arising out of a transaction like a sale and the assessment may be sustained by reading the Proviso with section 12, was not allowed to be raised for the first time, and was left open.

Liquidators of Pursa Ltd. v. *Commissioner of Income-tax,* (1954) S.C.J. 294 : (1954) S.C.R. 767=25 I.T.R. 265 and *Commissioner of Income-tax* v. *Express Newspapers Ltd.,* (1960) 40 I.T.R. 38: (1961) 1 M.L.J. 116 referred.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), in R.A. Nos. 241 and 242 of 1958-59 on its file (I.T.A. Nos. 9976 and 9977 of 1958-59 assessment years 1956-57) for decision on the following questions of law, *viz* :—

(1) "Whether the assessee was properly assessed on Rs.4,25,050 as profit under the Proviso to section 10 (2) (*vii*) of the Act ?

(2) Whether there were materials for the Tribunal estimating the sale value of the buildings at Rs.2,32,973 ?"

R. Venkataram, for Applicant.

S. Ranganathan and *C. S. Rama Rao Sahib,* Special Counsel for Income-tax on behalf of the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The assessee, a public company, adopted the calendar year as its year of account for the business it carried on. The Company resolved on 30th October, 1954, to liquidate itself voluntarily, and the business of the Company which was carried on for a little longer was completely stopped by about the middle of December, 1954. In 1955, during no portion of which did the Company carry on any manufacture or business, the Liquidator sold its factory premises and machinery to Carborandum Universal Ltd., which was also a public company. The agreement of sale on 10th February, 1955, was followed up by the deed of sale on 10th March, 1955. The sale price of Rs. 10 lakhs was made up of (1) Rs 1,00,000 the value of the land, (2) Rs. 1,31,732 which was taken as the value of the buildings, and (3) Rs. 7,68,268 which was taken as the value of the machinery. The valuation of the buildings and machinery was on the basis of reports of experts in such valuation —*see* Annexure C and D. The books of the assessee company showed that the original cost of the building was Rs. 3,46,034 and that its written down value was Rs 1,08,221. The cost of the machinery was Rs. 3,90,148 and its written down value was Rs. 90,098.

*Tax Case No. 74 of 1959.
(Reference No. 28 of 1959).

7th December, 1960.
(16th Agrahayana, 1882—Saka).

The total amount of the depreciation allowed in the past for both the buildings and the machinery amounted to Rs. 5,36,034. The sale thus resulted in an excess realisation of Rs. 23,411 over the written down value of the buildings. In the case of the machinery, the sale price exceeded the difference between the cost and the written down value, and that excess was Rs. 3,00,050.

The Department claimed that the profits of the sale should be brought to tax in the assessment year 1956-57 under the Second Proviso to section 10 (2) (*vii*) of the Income-tax Act. The assessee's contentions were overruled, and the Tribunal ultimately sustained the claim of the Department.

The quantum of the profits to be taxed was also a point in controversy between the assessee and the Department. The Income-tax Officer declined to accept the valuation on the basis of which the vendor and the vendee entered into the transaction of sale, which, in the opinion of the Income-tax Officer, was tainted with collusion and manipulation. He held that the assessee had realised in full the original cost of both the buildings and the machinery, and that the entire amount of Rs. 5,36,034 which had been allowed as depreciation in the past fell to be taxed. The Appellate Assistant Commissioner accepted the assessee's contention under this head and held that the valuation was genuine, and there was no taint of collusion or manipulation, and that the quantum of the profits to be taxed was only Rs 3,23,461, which represented the total of Rs. 23,411 and Rs. 3,00,050 which we have referred to above. The Tribunal allowed the appeal of the Department in part and held that the profits realised by the sale of the buildings should be estimated at Rs. 1,25,000. That, with Rs. 3,00,050 the computation of which was never in issue, yielded Rs. 4,25,050 as the quantum of the profits assessable inder the Second Proviso to section 10 (2) (*vii*).

At the instance of the assessee the Tribunal referred both the questions at issue. The questions referred under section 66 (1) of the Act were :

"(1) Whether the assessee was properly assessed on Rs.4,25,050 as profit under the Proviso to section 10 (2) (*vii*) of the Act ?

(2) Whether there were materials for the Tribunal estimating the sale value of the buildings at Rs. 2,32,973 ?"

The second question is easier of answer. The Appellate Assistant Commissioner differed from the Income-tax Officer and held that there was no collusion, fraud or manipulation, and that the valuation of the experts as disclosed by Annexures C and D was genuine. That in effect meant that he accepted their reports as disclosing the true market value of the buildings and the machinery on the date of the sale. The Tribunal did not differ from the Appellate Assistant Commissioner on the question of the genuineness of the valuation of the experts The Tribunal recorded :

" . . . . . . the valuation, certificates of the buildings and machinery must have been obtained by the vendee company in connection with its floatation for purpose of its prospectus or statements in lieu of prospectus. This point of view is certainly not the point of view that is required for the purpose of determination of the profit of the assessee under section 10 (2) (*vii*) . . . . the value that is to be adopted is the replacement cost of all the buildings that the assessee owned as at the date of sale. The Engineer's report is therefore no guide."

After pointing out the buildings in question had been put up on and after 1939 and that the cost of construction had since then gone up, the Tribunal proceeded :

"The written down value of all these buildings at Rs. 1,08,321 cannot, therefore, represent the true value at the time of sale. The value given in the agreement being only for the part handed over also can be no basis. The value has therefore necessarily to be estimated. Having due regard to all these facts, in our opinion, on the materials available, the sale price of buildings can reasonably be estimated at Rs. 2,32,963 so as to give a profit on sale of Rs. 1,25,000 . . . ."

We presume that when the Tribunal referred to the "replacement cost" what it had in view was the real market value on the date of the sale, allowing for the rise in prices and also for the depreciation of the buildings which had been constructed some time back. There was however no basis for the finding of the Tribunal, that the assessee should have made a profit of Rs. 1,25,000 by the sale of the buildings.

The position was that the Tribunal did not reject the genuineness of the valuation made by the experts, and it had no material either for the estimates it purported to make, the estimate either of the sale value or of the profits realised by the sale of the buildings As we said, the value fixed by the experts represented the real market value of the buildings as also that of the machinery. There was no evidence contra.

We answer the second question in the negative. The sale value of the buildings was that disclosed by the assessee and accepted by the Appellate Assistant Commissioner, Rs. 1,31,732.

As a result of our answer to the second question, the figure Rs. 4,25,050 mentioned by the Tribunal in the first question needs revision. In other words, even if the assessee is liable to be taxed under the Second Proviso to section 10 (2) (*vii*), the quantum of the " deemed profits " on which the assessee could be taxed should be that fixed by the Appellate Assistant Commissioner, Rs. 3,23,461,—Rs. 23,411 being the deemed profits by the sale of the buildings and Rs. 3,00,050 being the deemed profits realised by the sale of the machinery.

The relevant portion of section 10 as it was amended by Act XLVII of 1949 ran :

" 10 (1) The tax shall be payable by an assessee under the head profits and gains of business, profession or vocation in respect of the profits or gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely,—

* * * * * *

(vii) in respect of any such building, machinery or plant which has been sold. . . . . the amount by which the written down value thereof exceeds the amount for which the machinery or plant as the case may be is actually sold. . . . . . .

* * * * * *

Provided further that where the amount for which any such machinery or plant is sold whether during the continuance of the business or after the cessation thereof, exceeds the written down value, so much of the excess as does not exceed the difference between the original cost and the written down value shall be deemed to be profits of the previous year in which the sale took place."

The Second Proviso was amended in 1949. Before it was amended the Second Proviso ran :

"Provided further that where the amount for which any such machinery or plant is sold exceeds the written down value, the excess shall be deemed to be the profits of the previous year in which the sale took place."

It is a fiction that the Second Proviso to section 10 (2) (*vii*) enacted. The profits made by the sale of such capital assets as machinery and buildings, which would not otherwise be assessable as trading profits, are deemed by the Proviso to be profits assessable to tax, within the limits specified in the Proviso. What is the content of that statutory fiction is what we have to consider.

The scope of the Second Proviso before it was amended in 1949 was examined by the Supreme Court in *Liquidators of Pursa Ltd.* v. *Commissioner of Income-tax*[1]. In that case the sale of the machinery was effected on 7th December, 1943 in the accounting year of Pursa Ltd., the vendor company, which commenced on 1st October, 1943. It was established that even before the commencement of that year of account, even in August, 1943, the vendor company ceased to manufacture sugar and therefore ceased to employ the machinery for any business it carried on. Negotiations commenced then to sell the factory and the machinery culminated in the sale on 7th December, 1943. The Supreme Court held that the sale by the Company in the course of winding up its business was not an operation in furtherance of the business the company had carried on. The Supreme Court also held that, as the machinery and plant had not at all been used during any portion of the accounting year for any business carried on by the assessee, no allowance could be claimed under sec-

1. (1954) S.C.J. 294 : (1954) S.C.R. 767 : (1954) 25 I.T.R. 265.

tion 10 (2) (*vii*), and that the Second Proviso also did not come into play. After setting out the relevant provisions of section 10 their Lordships stated at page 272 :

" Under section 10 tax is payable by an assessee 'in respect of the profits or gains of any business, profession or vocation carried on by him '........the fundamental idea underlying each of these words is the continuous exercise of an activity and the same central idea is implicit in the words ' carried on by him ' occurring in section 10 (1) and those critical words are an essential constituent of that which is to produce the taxable income. Therefore, it is clear that the tax is payable only in respect of the profits or gains of the business which is carried on by the assessee. Sub-section (2) permits allowances to be made before the taxable profits are ascertained. Proviso (2) to clause (*vii*) of that sub-section on which the Income-tax authorities have relied makes the excess of sale proceeds over the written down value of ' any such machinery or plant ' to be deemed to be profits of the previous year in which the sale took place. Any such machinery or plant in the proviso clearly refers to the machinery or plant in respect of which the allowance is to be given under that clause. Although the word ' such ' was not used in the body of clause (*vii*), the scheme of sub-section (2) which is apparent from the other clauses of allowances, *e.g.*, clauses (*iv*), (*v*) and (*vi*), clearly indicates that the machinery or plant referred to in clause (*vii*) must be the same as those mentioned in the earlier clauses, *i.e.*, such machinery or plant as were, used for the purpose of the business, profession or vocation." Indeed, the position has been made clear and placed beyond any doubt by the subsequent amendment of 1946 which added the word ' such ' in clause (*vii*). The words ' used for the purposes of the business ' obviously mean used for the purpose of enabling the owner to carry on the business and earn profits in the business. In other words, the machinery or plant must be used for the purpose of that business which is actually carried on and the profits of which are assessable under section 10 (1)........It is however clear that in order to attract the operation of clauses (*v*), (*vi*) and (*vii*) the machinery and plant must be such as were used, in whatever sense that word is taken, at least for a part of the accounting year. If the machinery and plant have not at all been used at any time during the accounting year, no allowance can be claimed under clause (*vii*) in respect of them and the second proviso also does not come into operation."

At page 274 their Lordships held :

" . . . . . the machinery and plant which were sold had not at all been used for the purpose of the business carried on in the accounting year and consequently the second proviso to section 10 (2) (*vii*) could have no application to the sale proceeds of such machinery and plant . ."

After pointing out that the Company had ceased to carry on any business even before the commencement of the year of account in which the machinery was sold, the Supreme Court pointed out at pages 274-5 :

" If the profits on the sale of the machinery and plant are to be made assessable under the second proviso, as has been done by the Tribunal, then it must be conceded that these deemed profits were not in reality the profits of the business carried on by the Company, and, therefore, the sale transaction which brought in these profits was not in fact part of the Company's business. . . . "

The decision of the Supreme Court was, as we said, with reference to the Second Proviso as it stood before it was amended in 1949. To what extent has that position been altered by the amendment effected in 1949 is the next question. In express terms the amended proviso directs its application even if the sale was effected after the cessation of the business, that is, the business the assessee had carried on. The contention of the learned counsel for the assessee was that the other basic principle laid down in *Liquidators of Pursa Ltd.* v. *Commissioner of Income-tax*[1], was left unaffected by the amendment of 1949. Neither the right conferred by section 10 (2) (*vii*) nor the liability imposed by the Second Proviso comes into play, if the machinery and buildings sold had not been used by the assessee for any business of his during any portion of the year of account in which the sale is effected. The learned counsel urged that the amended Proviso applied only if the assessee had carried on his business during at least a portion of the year in which the sale took place, and that once that condition was satisfied the amended Proviso enabled Revenue to bring to tax the deemed profits of the sale, even if the sale was effected after the assessee had ceased to carry on his business. The learned counsel pointed out that in the present case the Tribunal accepted the factual position, that the assessee company had ceased to carry on any business after the middle of December, 1954. It did not carry on any business during any portion of 1955. 1955 would have been its year of account had it carried on any business. But it was not its previous year within the meaning of the Proviso, as it did not carry on any business in the context of section 10 read as a whole, or the context of even section 10 (2) (vii) and its Proviso.

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1. (1954) S.C.J 294 : (1954) S.C.R. 767 : (1954) 25 I.T.R. 265.

There could not be any "previous year" for taxing profits or the deemed profits of a business, if the assessee carried on no business at all during that period. If a person stopped his business in 1950 but sold in 1960 the machinery or buildings which he had used for that business which had ceased, the excess of the sale proceeds over the written down value of 1950 when he had carried on his business would not come within the scope of the Proviso. It was the cessation of business that was material not the interval between the cessation of the business and the sale, so long as the sale and the stoppage of the business were not both in the same year of account or in the same "previous year". That contention of the learned counsel for the assessee seems, in our opinion, well founded.

With reference to a business, to which we shall confine ourselves, the fiction enacted by the Second Proviso of section 10 (2) (*vii*) is : (1) what is not a trading profit is deemed to be a trading profit assessable to tax, and (2) that trading profit is deemed to accrue to the assessee in the year of sale. Despite the express reference to the cessation of the business in the amended Proviso, it does not, in our opinion, enact a further fiction, that the assessee shall be deemed to carry on the business in the year of sale. That he should have carried on his business in the year of sale is a factual requirement of the Proviso. No fiction comes into play. All that the amended Proviso, in effect, dispenses with is the further continuity of the business up to the date of the sale. These follow, in our opinion, the use of the qualifying word "such" in relation to the buildings and machinery and also the retention of the expression "previous year" in the Proviso even after the amendment. The significance of both these expressions was explained at length by the Supreme Court in *Liquidators of Pursa Ltd.* v. *Commissioner of Income-tax*[1].

In *Commissioner of Income-tax* v. *Express Newspapers Ltd.*[2], this Court said at page 62:

> "One contention on behalf of the assessee was that under the proviso of section 10 (2) (*vii*) the sale which resulted in the profit should have taken place while the company was carrying on business, and that condition was not satisfied in the present case, as the Free Press Company had ceased to carry on any business on 31st August, 1946. The sale effected on 1st November, 1946, being only one after cessation of the business, any profit obtained thereunder could not be said to be income from business or revenue profit, but a capital one. . . . . But in the present case the sale of the machinery took place during the year of account, and it was used by the Free Press Company for at least a part of the year. This would be sufficient to attract the liability."

But on another point the contention of the assessee was upheld :

> "The learned counsel for the assessee is on a firmer ground when he contended that the sale being made in the process of winding up of the company, section 10 (2) (*vii*) will not apply. The Second Proviso to section 10 (2) (*vii*) would be invoked only where the sale was one made in the course of business carried on by the predecessor. Where the sale is a closing down sale, that profit could not be brought to tax."

Reliance was placed for this on *Liquidators of Pursa Ltd.* v. *Commissioner of Income-tax*[1].

It was that second bar that the amended Proviso removed. The realisations are now taxable as 'deemed profits' even if the sale is after the business ceased, and even if the sale is in the course of liquidation after the cessation of business. But if the business ceased in a year of account anterior to the year of sale, the Proviso does not enact a fiction, that the assessee shall be deemed to have a business and a previous year therefor for the purpose of taxing the excess sale proceeds.

We are clearly of opinion that the amendment of 1949 did not remove one of the difficulties pointed out in *Liquidators of Pursa Ltd.* v. *Commissioner of Income-tax*[1], for the realisations of the sale of machinery and buildings to be taxable under the Proviso, these buildings and machinery must have been used for the purpose of the business of the assessee at least during some portion of the year of sale which constituted the accounting or the previous year of that assessee and for that business.

In *Income-tax Act* by Kanga and Phalkiwala, 4th Edition, at page 355 the learned authors stated thus :

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1. (1954) S.C.J. 294 : (1954) S.C.R. 767 : (1954) 25 I.T.R. 265.
2. (1961) 1 M.L.J. 116 : (1960) 40 I.T.R. 38.

"The amendment made by Act XLVII of 1949 makes this proviso applicable whether the sale of a building, machinery or plant takes place 'during the continuance of the business or after the cessation thereof." But if the sale is effected in any year subsequent to the year of the closure of the business this proviso cannot possibly apply ; for section 10 itself would have no application in such year to the defunct business. The Supreme Court held in *The Liquidators of Pursa Ltd.* v. *Commissioner of Income-tax*[1], that if the assets sold were not at all used for the purposes of the assessee's business at any time during the accounting year, neither clause (*vii*) nor the Second Proviso thereto would come into operation and therefore the excess realised on such sale over the written down value would not be liable to tax."

That, in our opinion, eorrectly sums up the position :

Though it was the calendar year that the assessee adopted as its accounting year and the previous year for purposes of assessment while it continued to carry on its business, since it did not carry on any business in the calendar year 1955 in which the liquidators effected the sale, that could not be the previous year for the assessment year 1956-57. The assessee company had no income to be computed under section 10 for the assessment year 1956-57. It had no 'deemed profits' either to be computed as the profits of any business in 1956-57. As we said, the existence of the business, profits of which could be computed under section 10, and the existence of a previous year for that business, had to be factual. They cannot be fictional. The Proviso to section 10 (2) (*vii*) did not enact any such fictions either in express terms or even by necessary intendment to give effect to the fictions specifically enacted.

Mr. Ranganathan, who presented the case for the Department with considerable ability and thoroughness, submitted an alternative line of argumet, that the word "profits" in the Second Proviso should not be confined to the profits of a business—we are not now concerned with the allied sources, profession or vocation—but it should be given the normal meaning of any profit arising out of a transaction like a sale. Such a profit or income, he contended, would still be taxable income, even if the computation of that profit or income could not be under section 10 on the ground that there was no business of which it could be deemed to be a profit ; it would be taxable under section 12 as income from other sources. The sale proceds in this case were assessed as the "deemed profits" of the assessee's business. The assessee had no business, and we have held in effect that the Proviso to section 10 (2) (*vii*) does not authorise taxation of the deemed profits of a deemed business. The question, whether the sale proceeds, deemed to constitute a profit of a transaction independent of any business, can be taxed under section 12 was never considered at any stage, and such a question cannot be said to arise on the order of the Tribunal. It would constitute a new claim by the Department, involving a fresh investigation of facts, including the question whether for purposes of computation under section 12 the date of sale was within the previous year relevant to the assessment year 1956-57. We must decline to allow the Department to put forward a new case for investigation at this stage in proceedings under section 66 (1), whether on the facts and in the circumstances established in this case, the assessment can be sustained by reading the Second Proviso to section 10 (2) (*vii*) with section 12 of the Act. That the Proviso is really a charging provision in computing the profits of a business under section 10, though it purports to be framed as a Proviso to section 10 (2) (*vii*), cannot admit of any doubt. But we express no opinion on the further contention of the learned counsel for the Department, that it is a general charging provision, whatever be the source of the income, business or other source. In effect the learned counsel for the Department wanted the "deemed profit" to be read as the "deemed income" for all purposes.

Our answer to the first question is that no portion of the sale proceeds realised by the assessee Company in 1955 was assessable to tax as income deemed, under the Second Proviso to section 10 (2) (*vii*), to be profits of any business of the assessee.

The assessee will be entitled to costs of this reference. Counsel's fee Rs 250

V.S. ——— *Reference answered in favour of the assessee.*

1. (1954) S.C.J. 294 : (1954) S.C.R. 767 : (1954) 25 I.T.R. 265.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR JUSTICE VEERASWAMI.

The Vanguard Fire & General Insurance Co , Ltd., 11/12, Second Line Beach, Madras-1. .. *Appellant**

v

Annamalai & Co ., Ltd , 13/14, Second Line Beach, Madras-1 and others .. *Respondents.*

Insurance Act (IV of 1938), *section* 31-*A (inserted by Act XLVII of* 1950)—*Employing as manager or officer any person whose remuneration takes the form of commission—Contract of employment in contravention of section* 31-*A—Effect.*

A contract to employ does not necessarily mean to find actual employment nor does it imply that the person employed has to follow a daily routine of work. Even a person who is retained to do any kind of service when the need or occasion for such service arises, (for instance "principal organisers" for insurance business of the employers) would be a person employed within the meaning of section 31-A of the Insurance Act and such employment cannot be on the basis of commission or bonus. A contract of employment contrary to section 31-A of the Act will be unenforceable, where even a part of the consideration has become rendered unlawful by section 31-A of the Act. The entire contract has become incapable of being enforced, because part of the consideration has been rendered unlawful by section 31-A of the Insurance Act.

Appeal against the Decree of the Sixth Assistant Judge of the City Civil Court, Madras, in Original Suit No. 1315 of 1955 (C.S. No. 279 of 1953, High Court, Madras).

R. Narasimhachari and *N. Varadarajan*, for Appelant.

Mohan Kumaramangalam, T. K. Subramania Pillai, Chockalingam and *S. Sethurathnam*, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C J.—This appeal arises out of a suit, C.S. No. 279 of 1953, instituted in this Court by the respondent, Annamalai & Co., Ltd , against the appellant, the Vanguard Fire & General Insurance Co., Ltd. After the issues were framed, the suit was transferred to the file of the City Civil Court at Madras, where it was numbered as O.S No. 1315 of 1955. The plaintiff is a private limited company registered under the Indian Companies Act and was represented by the Managing Director, S. RM. CT. A. Annamalai Chettiar. The defendant is a public limited company, registered under the Indian Companies Act and carrying on insurance business at Madras. On 24th September, 1941, an agreement was entered into between the plaintiff and the defendant. The material clauses of this agreement are the following :—

"1. That in consideration of the Agreement with the said Company hereinafter contained, the said Annamalai & Co., Ltd., do hereby promise and agree to act as principal organisers of the said company on the following terms and conditions.

"2. That the said principal organisers will faithfully and to the best of their ability perform the duties for the purpose of carrying on to the best advantage the business of the said company at the remuneration and upon the terms and subject to the conditions hereinafter mentioned and described.

"3. That the said Annamalai & Co., Ltd., shall be the principal organisers for a period of 25 years from the date hereof or until they shall resign by giving six months' notice to the said company in writing and during the said term shall be in charge of organising the entire business of the said company and they shall use their best endeavours to promote the interests of the said company and shall not divulge or make known any of the secrets or affairs of the said company.

"4. The said principal organisers shall not be held liable for any loss or damage that may result to the said company from the acts or deeds of the Chief Agents or Agents or any other persons appointed by the said principal organisers or by the Chief Agents.

"5. There shall be paid to the said principal organisers by way of remuneration five per cent of the total premia collected by the said company in respect of all its insurance business and 6¼ per cent. of the net profits, earned by the company every year.

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* C.C.C.A. No. 68 of 1957. 2nd December, 1960. (11th Agrahayana, 1882, Saka).

"7. The principal organisers shall be entitled to be paid all charges, expenses and allowances incurred by them for journeys undertaken by them for the business or in the interests of the said company.

"8. The said company shall indemnify the said principal organisers against all costs, losses, damages and expenses, to which they may be put in the discharge of their duties as principal organisers.

"9. This appointment of the principal organisers is irrevocable for a period of 25 years."

Further, clause (10) provided that, in the event of the defendant-company being wound up with the object of transferring the business to any other company, the defendant-company shall make it one of the terms and stipulation in the agreement of transfer that the transferee-company shall appoint the plaintiffs as the principal organisers of their company for the residue of the term of 25 years as may be outstanding at that time on the same terms and conditions as to remuneration, emoluments and otherwise as are contained in the agreement between the plaintiffs and the defendants. On 1st June, 1950, the Insurance (Amendment) Act (XLVII of 1950) came into force. That Act inserted a new section, namely, section 31-A, after section 31 of the original Act. Sub-section (1) of that section *inter alia* provided :

"Notwithstanding anything to the contrary contained in the Indian Companies Act, 1913, or in the articles of association of the insurer, of a company, or in any contract or agreement, no insurer shall after the expiry of one year from the commencement of the Insurance Amendment Act, 1950, ...be directed or managed by, or employ as manager or officer or in any capacity, any person whose remuneration or any part thereof takes the form of commission or bonus in respect of the general insurance business of the insurer."

On 21st September, 1950, the defendant-company addressed a letter (Exhibit A-16) to the plaintiffs, informing them that their agreement with the defendant-company had become inoperative from 1st September, 1950, on account of the restrictions imposed by the latest Insurance (Amendment) Act. On 20th August, 1953, nearly three years after the receipt of this letter, the plaintiffs, through their advocates, called upon the defendant-company to render an account of the total premia collected by them in respect of their insurance business and of the net profits earned by them from 1st January, 1950, and, on such rendition of accounts, to pay to them by way of remuneration 5 per cent. of the total premia collected and 6¼ per cent. of the net profits earned by them from 1st January, 1950. In the notice, it was alleged that the contention of the defendant-company that the agree ment between the parties had become inoperative from 1st September, 1950, was unsustainable. The defendant-company, refused to comply with the plaintiff's demand, and the suit, out of which this appeal arises, was filed on 1st September, 1953, for reliefs in terms of the demands made by the plaintiffs in their notice, dated 20th August, 1953.

The defendant-Company, in their written statement, pleaded that the plaintiffs had done no work for the defendants during the period for which they were seeking to claim remuneration, that the agreement between the parties became suspended and void on the coming int force of the Insurance (Amendment) Act, 1950, and that, consequently, the plaintiffs were not entitled to any remuneration for the period from and after 1st September, 1950 and prayed that the suit might be dismissed.

The learned Sixth Assistant Judge of the City Civil Court passed the following decree in favour of the plaintiffs :

"An account be taken from 1st January, 1950 upto 1st September, 1950, as per the terms of Exhibit A-1 and from 1st September, 1950, upto the date of suit, *viz*., 1st September, 1953, on the basis of 6¼ per cent. of the net profits earned by the defendant insurance-company every year, for which purpose a Commissioner shall be appointed."

The learned Judge held that section 31-A of the Insurance Act prohibited only that portion of the plaintiffs' remuneration which took the form of commission, but that the rest of the remuneration which took the form of a share in the net profits of the defendant-company was left intact and unaffected by that provision. A contention was raised on behalf of the defendants that, as a part of the consideration had become void, the entire contract ceased to be enforceable. The learned Judge overruled this objection, holding that section 31-A only restricted payment by way of remuneration to an officer or any person employed by the insurer, but it could not be said that a portion of the consideration had become void. The learned Judge also

overruled the plea of the defendant-company that the plaintiffs had not done any service to them during the period for which remuneration was claimed in the suit The defendants have filed the appeal from the decree passed against them. The plaintiffs, however, have not filed a cross-appeal or a memorandum of cross-objections, n so far as their claim had been disallowed.

The first question which arises in this appeal is whether the respondents fall within the mischief of sub-section (1) of section 31-A of the Insurance Act. They would, if they can be held to be employed as manager or officer or in any capacity by the appellants. Mr. R. Narasimhachari, learned counsel for the appellants, contended that, having regard to the terms of the contract between the parties, the respondents must be deemed to be in the employ of the appellants as principal organisers. The term "employ" is wide enough to cover a person whose duties are such as are mentioned in the agreement. It is not necessary that a person should be on the regular staff of a company before it can be said that he is employed by the company. He need not be a servant of the company in the popular sense. The respondents have to perform all the duties necessary for the purpose of carrying on the business of the appellant-company to the best advantage. They are in charge of organising the entire business of the company. They are under an obligation to use their best endeavours to promote the interests of the company. Clause (4) of the agreement contemplates the respondents choosing the chief agents or other agents. They are expected to undertake journeys for the business or in the inherests of the appellant-company; and clause (7) provides that they shall be entitled to be paid all charges and other expenses incurred by them for such journeys. Clause (8) expressly refers to the respondent's immunity from liability for actions done in discharge of their duties. Clause (9) refers to the "appointment of the principal organisers" for a period of 25 years. Even if the respondents were to be treated as independent contractors, they would, nevertheless, be employed by the appellant-company. So his argument ran. He referred us to Bouvier's Law Dictionary, Volume 1, at page 1011, in support of his argument that even an independent contractor could be a person employed.

On the other hand, Mr. Mohan Kumaramangalam for the respondents contended that the respondents could not be said to be in the employ of the appellant-company, because the appellant-company did not exercise power of control over their actions and they could not direct the respondents to do any work in a particular way. He relied on the following passage in Halsbury's Laws of England, Third Edition, Volue 25, Page 498 :

> "To distinguish between an independent contractor and a servant, the test is whether or not the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work."

This passage must be read with the opening passage relating to the topic "Master and Servant" at page 447, which runs thus :

> "Whether or not, in any given case, the relationship of master and servant exists in a question of fact; but, in general, the relationship imports the existence of power in the employer not ony to direct what work the servant is to do, but also the manner in which the work is to be done."

He further contended that, in any event, the employment must be *ejusdem generis* with that of a manager or an officer, though the words 'in any capacity' are general and wide.

We accept the contention of Mr. Narasimhachariar. Though it is not clear what exactly is conoted by the expression "principal organisers", it is clear from the terms of the agreement between the parties that the respondents are under an obligation to discharge certain duties and that the appellants are under the corresponding obligation to pay them remuneration. A contract to employ does not necessarily mean to find actual employment. It does not imply that the person employed has to follow a daily routine of work. Even a person who is retained to

do any kind of service when occasion for such service arises would be a person employed . As Parke, B., points out in *Elderton* v. *Emmens*[1], at page 309:

" Medical advisers may be employed at a salary to be ready in case of illness ; members of theatrical establishments in case their labours should be needed ; household servants in performance of their duty when their masters wish ; in these and other similar cases, the requirement of actual service is distinct from the employment by the party employing."

We know that almost every company has a legal adviser. He would certainly be a person employed by the company, though he may not be the company's servant; likewise, a doctor who is employed to look after the health of the company's servants. There are, again, persons who are called " Financial Advisers " whose duty is to render advice on occasions when such advice is sought. Nevertheless, they are retained by payment of fixed remuneration per month. It may be that, for several months, they might be never consulted. The test is whether they would be obliged to give their advice, when sought. Though we agree with Mr. Mohan Kumaramangalam that " in any capacity " should be construed *ejusdem generis* along with "a manager or an officer", we do not agree with him that the capacity in which the respondents were employed is not in a capacity similar to that of an officer of the company. We therefore hold that the respondents fall within the scope of the prohibition contained in section 31-A (1) of the Insurance Act.

We do not think it necessary to decide the question by resorting to an application of the well-known rule of construction of statutes, which is thus stated in Maxwell's Interpretation of Statutes, 10th Edition, page 19 :—

" To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope, and object of the whole Act ; to consider, according to Lord Coke : 1. What was the law before the Act was passed ; 2. What was the mischief or defect for which the law had not provided ; 3. What remedy Parliament has appointed ; and 4. The reason of the remedy."

Learned counsel referred to the Statement of Objects and Reasons published in connection with the introduction of the Insurance (Amendment) Act, 1950, to show that the object of the new provision (section 31-A) was to prohibit the payment of remuneration in the shape of commission in respect of the insurance business except to chief agents, principal agents and certain other agents. There is a great deal of force in the contention of Mr. Narasimhachariar that, having regard to the previous state of law, the mischief sought to be prevented and the remedy contemplated, section 31-A should be so construed as to strike down an agreement like the suit agreement. But, as we have already mentioned, wo do not rest our decision on this ground.

The next question is whether the agreement can be enforced, though a part of the consideration of the agreement has become illegal, that is to say, prohibited by statute. Mr. Narasimhachariar contended that the enitre agreement became void when a part of the consideration became unlawful. He founded his argument on section 24 of the Indian Contract Act, which says :

" If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration.—" *A*. promises to superintend, on behalf of *B*., a legal manufacture of indigo, and an illegal traffic in other articles. *B*. promises to pay to *A*. a salary of 10,000 rupees a year. The agreement is void, the object of *A*'s promise and the consideration for *B*'s promise being in part unlawful."

He cited to us the case of *Waito* v. *Jones*[2], in which Tindal, C. J., observed at page 1272 :

" It may be conceded that, if either part of the consideration be illegal, the whole falls to the ground ; for a party cannot enforce a contract where the consideration is illegal, either in the whole or part ; *Featherston* v. *Hutchinson*[3], is a direct authority on that point. There, a promise by defendant to pay a sherifff the debt of his prisoner, in consideration of the prisoner's being set at large, and paying the defendant 2*s*., was held void as to the whole."

Mr. Mohan Kumaramangalam was unable to support the view taken by the Court below. The learned City Civil Judge apparently thought that, though a part of the consideration has become unforceable because of section 31-A, there

1. 17 L.J.C.P. 307.
2. 131 E.R. 1270.
3. Co. Eliz. 199.

was the remaining part of the consideration which could be enforced. The fallacy in the reasoning is this. It may be that the respondents are willing to accept the balance of the considration as sufficient remuneration for their services. But, suppose they are not satisfied with that only ; can they be compelled by the appellants to perform their duties on payment of only a part of the remuneration agreed upon? Mr. Mohan Kumaramangalm could not say that the appellants would be entitled to do so. We hold that the entire contract has become incapable of being enforced, because part of the consideration has been rendered unlawful by section 31-A of the Insurance Act.

In view of our above conclusions, it is not necessary to deal with the question of fact whether the respondents did not perform their duties during the period for which the suit claim has been made.

In the result, we allow the appeal, set aside the decree passed by the Court below, and dismiss the suit with costs throughout.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VEERASWAMI.

N. Pattay Goundar .. *Appellant**

v.

P. L. Bapuswami .. *Respondent.*

Transfer of Property Act (IV of 1882), section 58 (c)—Mortgage by conditional sale—Sale with a covenant for re-purchase—Tests—Whether the covenant for re-purchase assignable—Time—If of the essence of the contract of re-purchase—Time fixed for exercise of option to re-purchase expiring when Court was closed—Cannot be extended to re-opening day.

The crux of the distinction between a mortgage by conditional sale and the sale with a condition of re-transfer lies in the fact that the former is a debt the payment of which is charged on the property conveyed, whereas in the latter no relationship of debtor and creditor subsists. The introduction of the proviso to section 58 (c) of the Transfer of Property Act, by amending Act XX of 1929 makes it explicit that one or other of the conditions contemplated in the definition of morgtgage by conditional sale should find a place in the document itself which effects or purports to effect the ostensible sale.

The Court has to look into the language of the deed as a whole and the cumulative effect of all the surrounding circumstances in order to determine the true nature of the document, namely whether it is a mortgage or sale. The question being one of intention it will depend on the particular facts and circumstances of each case.

Prima facie the rights and liabilities under a contract like an agreement for re-purchase are assignable, unless the contract involves a personal quality of party as a material ingredient or there is express stipulation in the contract forbidding assignment of the rights or obligations thereunder.

The period fixed in the document is a condition for the performance and after the expiry of the period, the right reserved is itself at an end. The period fixed in the deed is not the period of limitation prescribed for any suit and cannot be extended during period Court was closed.

In the instant case, on the question of intention and other evidence, it was held that the conveyance was an out and out sale with a covenant for re-purchase.

Bhaskar Waman Joshi v. *Shrinarayan Rambilas Agarwal*, (1960) S.C.J. 327 ; *Sakalakuna Naidu* v. *Chinna Munuswamy Nayakar*, (1928) 55 M.L.J. 198 : L.R. 55 I.A. 243 : I.L.R. 51 Mad. 533 (P.C.); *Shanmugan Pillai* v. *Annalaxhmi*, (1950) S.C.J. 1 : (1949) F.C.R. 441 : (1950) 1 M.L.J. 683 : A.I.R. 1950 F.C. 38 (F.C.), followed.

Appeal against the Decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 1 of 1958, preferred against the Decree of the Court of the District Munsif of Tiruppur in Original Suit No. 504 of 1956.

R. Gopalaswami Ayyangar, for Appellant.

K. S. Desikan and *K. Raman*, for Respondent.

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* S.A. No. 871 of 1958.

19th August 1960
(28th Sravana, 1882, Saka).

The Court delivered the following

JUDGMENT.—The main question to be decided in this Second Appeal filed by the first defendant from the judgment and decree of the learned Subordinate Judge of Coimbatore, in A.S. No. 1 of 1958 is whether the conveyance under Exhibit B-1, dated 28th May, 1946, is an out and out sale with a covenant for re-purchase or a mortgage by conditional sale. The trial Court with which the lower appellate Court agreed held that Exhibit B-1 was a mortgage by conditional sale and granted a decree for redemption. The aggrieved first defendant has preferred this Second Appeal.

The property in question originally belonged to one Palani Moopan. He executed Exhibit B-1 in favour of the first defendant for a consideration of Rs. 4,000. The document was styled as a sale-deed and purported to convey the property absolutely to the first defendant by way of sale. Out of the consideration, a sum of Rs. 2,000 was reserved with the vendee to pay off an earlier mortgage on the suit property and certain other properties. The balance of Rs. 2,000 was paid to the vendor in cash. The first defendant discharged the earlier mortgage in accordance with the directions in the sale-deed. The sale-deed recited that the property having been conveyed to the vendee absolutely, the vendee should thereafter enjoy the property with all rights of ownership. The Tamil recital was :

> "நீரே இனிமேல் சர்வ சுதந்திரமாய் ஆண்டனுபவித்து கொள்ளவும். இந்தச் சொத்துக்களைக் குறித்து இனிமேல் எனக்கும் என் வாரிசுகளுக்கும் யாதொரு பாத்தியமும் பின்துடர்ச்சியுமில்லை."

After the schedule to the sale-deed appeared a covenant that if after five years and before the expiry of seven years from the date of the sale-deed, the vendor paid to the vendee the sum of Rs. 4,000, the vendee should reconvey the property to the vendor. The Tamil recital ran thus :

> "மேற்படி கிரயத்துகை ரூபாய் நாலாயிரமும் இது முதல் ஐந்து வருஷத்திற்கு மேற்பட்டு ஏழு வருஷங்களுக்குள் எந்த வருஷம் பத்திரகாலாவதியில் நான் ரொக்கம் செலுத்தினாலும் பெற்றுக்கொண்டு இதே துகைக்கு எனக்கு மறு கிரயம் செய்து கொடுக்கவேண்டியது. மேற்படி கெடுவுக்கு மேல் இந்த கண்டிஷன் செல்லத்தக்கதல்ல."

After the death of Palani Moopan his sons executed in favour of the plaintiffs Exhibit A-1, dated 10th August, 1950, for a consideration of Rs. 1,500. The document is described as a deed of assignment of the right to re-purchase (மறு கிரய கண்டிஷன் பாத்திய மேடோவர் பத்திரம்........)

Exhibit A-1 refers to the condition for re-purchase in Exhibit B-1 and states that as the executants namely the sons of Palani Moopan were unable to find the necessary funds to get a reconveyance from the first defendant, they were conveying to the plaintiff their right to re-purchase the property from the first defendant. Basing his right under Exhibit A-1, the plaintiff instituted the suit out of which the Second Appeal arises for a decree directing the first defendant to reconvey to him the suit property for Rs. 4,000 or for such other sum as might be determined by the Court. The plaintiff claimed that Exhibit B-1 must be deemed in law to be a mortgage by conditional sale and that he was entitled to redeem as the assignee of the equity of redemption. On that basis, the plaintiff also claimed that himself and his predecessors-in-title being agriculturists, they were entitled to the benefits of Act IV of 1938 as amended from time to time. The plaintiff pleaded alternatively that if Exhibit B-1 was held to be an outright sale with a condition to repurchase, the first defendant was bound to reconvey the property to him on payment of a sum of Rs. 4,000. The plaintiff averred that he tendered the amount to the first defendant several times but the first defendant refused to accept the same. The first defendant of course denied that Exhibit B-1 was a mortgage by conditional sale and maintained that it was an out and out sale with a covenant for re-purchase and that inasmuch as no offer was made by the plaintiff or his assignors within the time stipulated in the document, the suit to enforce a reconveyance was barred by time.

The trial Court reached the conclusion that Exhibit B-1 was only a mortgage by conditional sale relying on the folllowing circumstances, namely : (1) There was a stipulation that on payment the vendee should re-transfer the property to the vendor absolutely ; (2) the covenant as to re-purchase is embodied in the same document; (3) the patta had not been transferred to the first defendant; (4) the amount agreed upon as the price for re-purchase was the same as the consideration for the original sale and (5) the sale price of Rs. 4,000 was much less than the real value of the property which fact was borne out by Exhibits A-4 and A-5. The trial Court also found that as it had held that Exhibit B-1 was a mortgage by conditional sale, the suit for redemption was within time. On these findings, a preliminary decree for redemption under Order 34, rule 7 of the Code of Civil Procedure for taking accounts and for a declaration of the amounts due to the first defendant under Exhibit B-1 was passed. The appeal by the first defendant against that decree was unsuccessful. The lower appellate Court took the same view as the trial Court as to the nature of Exhibit B-1. The circumstances relied on by the lower appellate Court for agreeing with the view of the trial Court were: (1) that a price below the true value indicated a mortgage, (2) that there was in Exhibit B-1 a clause for reconveyance on payment of the sale price within a certain date and that (3) the vendee did not apply for transfer of patta and the patta admittedly continued in the name of Palani Moopan even after Exhibit B-1. In the view of the lower appellate Court it was clear from those circumstances that the intention of the parties was to treat the transaction covered by Exhibit B-1 only as a mortgage by conditional sale. The suit was filed originally in the Court of the learned Subordinate Judge as O.S. No. 216 of 1953 on 26th June, 1953, when the Court reopened after summer vacation. Considered as a mortgage by conditional sale, the lower appellate Court held that the suit was within time. The lower appellate Court was also of the view that if the suit had been filed on 28th May, 1953, it would have been within time but as the Court remained closed on that day, the suit filed on the date when the Court reopened would still be within time. The first defendant having failed in both the Courts below has come to this Court in Second Appeal.

The crux of the distinction between a mortgage by conditional sale and the sale with a condition of re-transfer lies in the fact that the former is a debt the repayment of which is charged on the property conveyed, whereas in the latter no relationship of debtor and creditor subsists. In form the former is an ostensible sale but in reality a mortgage. The very definition of a mortgage by conditional sale postulates an element of sale. Often the problem, therefore, is to pierce through the form to reach the real intention of the parties to the document that what *prima facie* appears as price is money repayable for which the transfer is a security. The introduction of the Proviso by the amending Act XX of 1929 to section 58 (*c*) of the Transfer of Property Act makes it explicit that one or the other of the conditions contemplated in the definition of a mortgage by conditional sale should find a place in the document itself which effects or purports to effect the ostensible sale. The true intention has, therefore, to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The general principles which have to be borne in mind in interpreting the document have been laid down by their Lordships of the Supreme Court in *Bhaskar Wamam Joshi* v. *Shrinarayan Rambilas Agarwal*[1] in the following terms :

" But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale, a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account but the value to be attached thereto must vary with the degree of forma ity attending upon the transaction. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is

1. (1960) S.C.J. 327 at 329.

subjecte to an obligation to re-transfer the property within the period specified. What distingusihes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The definition of a mortgage by conditional sale itself contemplates an ostensible sale of the property......the circumstances that the transaction as phrased in the document is ostensibly a sale with a right of re-purchase in the vendor, the appearance being laboriously maintained by the words of conveyance needlessly iterating the description of an absolute interest or the right of re-purchase bearing the appearance of a right in relation to the exercise of which time was of the essence is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of surrounding circumstances. If the words are plain and unambigious they must in the light of the evidence of surrounding circumstances be given their true legal effect. It there is ambiguity in the langaugage employed, the intention may be ascertained from the contents or the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstace; but evidence as to subsequent conduct of the parties is inadmissible."

Apart from the terms appearing in the deed itself, the surounding circumstances such as (1) a price below the true market value on the date of the transfer, (2) the continuance of the transferor in possession of the property transferred and the like are regarded as suggestive of a mortgage. But none of such circumstances taken by itself or taken along with otheres may be conclusive on the real intention of the parties to the document. The Court has to look into the language of the deed as a whole and the cumulative effect of all the surrounding circumstances, in order to determine the true nature of the document, namely whether it is a mortgage or a sale. Except expounding the general considerations which should weigh in dealing with a question like this, the decided cases are not and cannot be of much assistance in determining the real intention of the parties to a particular document. The question being one of intention, it will depend on the particular facts and circumstances of each case. In *Bhaskar Waman* v. *Joshi* v. *Shrinarayan Rambilas Agarwal*[1], one of the conditions embodied in the deed of transfer there under consideration was that if within four years and six months from the date of the conveyance, the right of reconveyance in respect of the three houses or any of them was not exercised by the transferors and if the transferees did not desire to retain all or any of the houses, they had the right to recall from the transferors the amount of the consideration and to return all or any of the three houses in the condition in which they might be. Another condition, among others, contained in the deed was that in the event of failure on the part of the transferors to comply with the request to take back the houses, a breach of agreement, of reconveyance rendering the transferors liable to pay damages should be committed. It was also found that the consideration for the transfer of the properties was inadequate. On those facts and circumstances in the main, the Supreme Court held the document in that case to be a mortgage and not a sale.

In this case the language of the deed which has already been referred to in the earlier part of the judgment does not, in my opinion, suggest the existence of any relationahip of debtor and creditor. Throughout, the document proceeds on the basis that the transfer is an absolute sale except that at the concluding part of the document is found the condition for re-purchase within the stipulated period. The question is whether in view of this condition taken along with the surrounding circumstances, namely, (1) that there was no transfer of patta to the vendee, (2) that the consideration for re-purchase is of the same amount as the consideration for the transfer to the vendee and (3) that the consideration for the transfer was below the market value of the property transferred, it may be held that Exhibit B-1 is a mortgage and not a sale. Sri R. Gopalaswami Ayyangar, the learned counsel for the appellant, contends with force that the fact that the condition for re-purchase is embodied in the same document is not by itself conclusive on the question. As regards the alleged inadequacy of consideration, he argues that first of all there was no such plea at all in the plaint and that secondly the consideration for the transfer

1. (1960) S.C.J. 327.

under Exhibit B-1 has not been established to be so much below the market value as to point to the document being a mortgage and not a sale. It appears from Exhibit B-1 itself that the entirety of the property, and not merely the half share covered by Exhibit B-1, and other properties were mortgaged prior to Exhibit B-1 for a sum of Rs. 4,000. Further as the learned counsel contends, the consideration for Exhibit A-1 itself being only Rs. 1,500, at the most the property conveyed under Exhibit B-1 could only be valued at Rs. 5,500. Exhibits A-4 and A-5 justify the view that the consideration for Exhibit B-1 was not appreciably below the real market value. It appears to me, therefore, that the adequacy or otherwise of the consideration for Exhibit B-1, in the circumstances, is not of much assistance in determining whether Exhibit B-1 is a mortgage or a sale. The only other circumstance is that there was no transfer of patta in favour of the vendee at any time after Exhibit B-1. But this circumstance again is not decisive. It is true that the vendor and subsequently his sons and their assigns under Exhibit A-1 were in possession of the property covered by Exhibit A-1. But it is in evidence that the possession so held was under a lease granted by the 1st defendant, the vendee. The condition embodied in the document Exhibit B-1, though an important circumstance, is not by itself sufficient to conclude that Exhibit B-1 was intended to be a mortgage. Even regarding the language of the deed as a whole including the condition for reconveyance and taking into consideration all the surrounding circumstances, I am unable to hold that Exhibit B-1 is a mortgage. There is nothing in the deed and there are no surrounding circumstances which clearly point to the existence of a debt repayable under Exhibit B-1 for which a transfer is a security. In my opinion, Exhibit B-1 is an out and out sale but with a covenant for repurchase.

It is next argued by Sri R. Gopalaswami Ayyangar that the plaintiff cannot compel specific performance of the condition to reconvey for two reasons, namely, (1) that the covenant for repurchase was personal to the vendor and could not, therefore, be assigned and (2) that, in any case, the plaintiff or his assignor having not offered to repurchase within the specified time, the covenant for repurchase was no longer enforceable. As regards the first ground of the learned counsel, I have no hesitation in rejecting it. There is nothing in the covenant for repurchase embodied in Exhibit B-1 to suggest that it was personal to the vendor. It is true that the language which I have already extracted above in Tamil is that the vendor would tender the price within the stipulated time and that thereupon the vendee should reconvey the property to the vendor. But that does not mean that there was any personal element in the covenant. There is no condition in Exhibit B-1 that the covenant for repurchase was not assignable. *Prima facie* the rights and liabilities under a contract like an agreement for repurchase are, in my opinion, assignable. It is this principle that has been embodied in section 21 (*b*) and section 23 (*b*) of the Specific Relief Act, 1877. Under the former provision a contract dependent upon the personal qualification or volition of the parties cannot be specifically enforced. Section 23 (*b*) states—

> "23. Except as otherwise provided by this chapter, the specific performance of a contract may be obtained by
>
> (*a*)....................
>
> (*b*) the representatives in interest, or the principal, of any party thereto: provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed."

Unless the contract involves a personal quality of party as a material ingredient or there is an express stipulation in the contract forbidding assignment of the rights or obligations thereunder, specific performance of the contract has to be directed. This is what Fry on "Specific Performance of Contracts" (sixth edition) states in section 222 :

> "As a general rule, the benefit of a contract may be assigned in Equity, and the assign can enforce specific performance of it, making his assignor a party."

Again in section 225 Fry observes :

"It is an obvious principle, that where the learning, skill, solvency or any personal quality of one of the parties to the contract is a material ingredient in it, then the contract can be performed by him alone.

It may be a matter of indifference to *A*, whether *B* or *C* be the purchaser of the stock or paid-up shares he is selling ; but it is a matter of great moment whether a distinguished artist, or his nominee, is to paint a picture for which *A* may have agreed to pay a certain sum."

In *Chinna Munuswami Nayudu* v. *Sagalaguna Nayudu*[1] the covenant for repurchase read :

"............ I shall again convey to you the said village after a period of 30 years from this date, *i.e.*, in the Ani cultivation season of the 30th year in case you wish to have the village again, and on your paying the said sum of Rs. 10,000 to me."

It was argued that the emphasis was on the word "you" (தங்களுக்கே) and that, therefore, the benefit under the covenant was not assignable. The trial Judge was of the opinion that the word "தங்களுக்கே" should not in the context, where it occurred, be interpreted to mean that the purchaser undertook to reconvey the property to the particular vendee personally and not his heirs or assigns. Spencer and Ramesam, JJ. accepted that view and observed that *prima facie* a contract for repurchase was assignable and that the fact that the vendee had a period of 30 years to exercise his option to repurchase was indicative that the covenant was not intended to be personal. The matter went up in appeal to the Privy Council in *Sagalaguna Nayudu* v. *Chinna Munuswami Nayakar*[2] and the Privy Council in dismissing the appeal observed :

"A document executed by the parties to, and on the date of, a sale of immovable property providing that the purchaser shall reconvey the property to the vendor after a period of 30 years on the vendor paying the purchase price, constitutes a contract enforceable by the assignee of the vendor against the sons of the purchaser ; it is not merely an offer incapable of assignment until accepted by tender of the price."

Before the Privy Council it was not disputed, as seen from the judgment, that if the transaction in question amounted to a completed contract, the benefit of the contract might be assigned. In this case the words "நான்" and "எங்களுக்கு" which occurred in the covenant for repurchase, do not in the context, I think, keep in view any personal element as a material ingredient of the covenant. There is no reason to assume merely from the use of those words that the vendee alone could as for performance by executing a resale in his favour. I, therefore, hold that the covenant for repurchase in the instant case was assignable.

The second ground of Sri R. Gopalaswami Ayyangar, namely, that as no offer had been made by the purchaser or his assigns or their assignee to repurchase by tendering the required amount to the vendor within the specified time, the right to enforce the covenant was lost, has, however, much force and has to be accepted. The stipulation in Exhibit B-1 was that at any time after five years and within seven years of the execution of the deed the vendor could tender the sum of Rs. 4,000 to the purchaser and call upon him to reconvey the property to him. The deed expressly stated that this condition would be void after the expiry of the specified period. The right to purchaser must be exercised according to the strict terms of the power. That English doctrine referred to in Fisher on Mortgages has been accepted by Sadasiva Ayyar and Napier, JJ. In *Samarapuri Chettiar* v. *Sudarsanachariar*[3] to be applicable to this country as well. The learned Judges have held that the doctrine that time may not be of the essence of the contract which arises on the construction of contracts of sale of immovable property, is not applicable to contracts of resale of property conveyed. The same principle was applied by the Federal

1. (1926) 51 M.L.J. 229 : I.L.R. 49 Mad. 387.
2. (1928) 55 M.L.J. 198 : L.R. 55 I.A. 243 : I.L.R. 51 Mad. 533 (P.C.).
3. (1919) 37 M.L.J. 109 : I.L.R. 42 Mad. 802.

Court in *Shanmugam Pillai* v. *Annalakshmi* [1]. The Federal Court by a majority observed :

" The agreement reserved an option to *A* to repurchase the property and was in the nature of a concession or privilege on fulfilment of certain conditions with a proviso that in case of default the stipulation should be void. *A* not having paid the instalments puncutually according to the terms of the contract, the right to repurchase was lost and could not be specifically enforced. It was not in the nature of penalty and the Court had no power to afford relief against forfeiture for its breach.".

The lower appellate Court approached the question as one of limitation and formulated the point whether the suit was barred by limitation. Dealing with the point so formulated, it went on to say :

" The suit would be within time if filed on 28th May, 1953. But the Court was then closed on account of summer vacation. The suit was filed originally in the Sub-Court, Coimbatore, as O.S. No. 216 of 1953 on 26th June, 1953, the date when the Court reopened after summer vacation. Considered as a mortgage by conditional sale, it is admitted the suit is not barred. Thus either way the suit is not barred by limitation."

In my opinion, this is obviously a misdirection. Where the condition for repurchase has under the terms of the agreement to be performed within the stipulated time and the time limit has not been adhered to with the result that the right is lost, I fail to see what the Limitation Act has to do with it. Sri K. S. Desikan, the learned counsel for the plaintiff-respondent referred me to section 4 and Article 113 of the Limitation Act and contended that as the Court remained closed on 28th May, 1953, the suit filed on the date of the reopening should be considered to be within time. In my opinion the argument has only to be stated to be rejected. The period fixed in the document is a condition for the performance and after the expiry of the period, the right reserved is itself at an end. The period fixed in the deed is not the period of limitation prescribed for any suit. Section 4 of the Limitation Act can, therefore, have no application to the present case. No offer was made at any time within the stipulated period by tendering the required amount for repurchase. There is nothing in Exhibit A-8 to which my attention was drawn by Sri K. S. Desikan to show that any offer or tender was made by the plaintiff within the stipulated time to repurchase the property. That being the case, and the right to repurchase having been lost after the expiry of the period, by reason of the very terms of the covenant, it seems to me that Article 113 of the Limitation Act can have no application. The plainiff having defaulted and as a result lost the right to repurchase, he cannot resurrect and save the right by resort to the Limitation Act.

In the result, the Second Appeal is allowed. The judgment and decree of the lower Courts are set aside and the suit will stand dismissed. The appellant will have his costs throughout.

K.L.B. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

V. Baluswami Naidu & Sons and others .. *Petitioners**

v.

The State of Madras represented by the Secretary to Government, Revenue Department, Madras and others .. *Respondents.*

Madras General Sales Tax Act (IX of 1939), sections 3 and 19 and Turnover and Assessment Rules, Rules 15 and 16—Validity of the rules—Prescription under section 3 of Act IX of 1939—Must comply with double conditions, Previous publication and approval of the Assembly—General Clauses Act (I of 1891), section 7 (e)—Publication of the rule in the Gazette—Conclusive proof that it was duly made—Not applicable where Government never intended to comply with the provision in section 19 (4) of Act IX of 1939—Act I of 1957, section 9—Extent of validity—Interpretation of Statute—Mistaken assumptions in a statute—Effect.

The prescription under section 3 of the Act which is what rules 15 and 16 of the Turnover and Assessment Rules are, must comply with the doubt condition, namely, conformation to the provisions of section 19 (4) as to previous publication and receiving the approval of the Legislative Assembly.

1. (1950) S.C.J. 1 : (1949) F.C.R. 441 : (1950) 1 M.L.J. 683 : A.I.R. 1950 F.C. 38.

* W.P. Nos. 14 etc., of 1958. 1st October, 1959. (9th day of Asvina, 1881-Saka).

Section 19 (5) of the Act assumes that the rules are validly promulgated; and only such rules 'have effect as if enacted in the Act'. In other words section 19 (5) has reference to the content of the rule and not to the manner of promulgation or the formalities necessary to frame a rule.

Whether or not the publication in the Official Gazette should purport to have been made in exercise of the power to make rules it cannot certainly apply to a case where the Government never expressly intended to invoke or comply with the provisions of section 7 (*e*) of the General Clauses Act.

The fact that the Legislature mistakenly assumed that the only defect in the rules promulgated in the G.O. No. 2733, dated 3rd September, 1955, was the provision therein for their retrospective operation was really irrelevant and would not control the operation of the validating section if there was a positive provision effecting validation of the rules.

But section 9 of Act I of 1957 even if it can be read as omitting the wrong assumption containing in it, still there are no positive words effecting validation of the rule to enable a valid assessment to be made for any period other than (1955-1956) the reference to which period forms as it were the essential part of the validating provision.

It would not be interpretation but an act of legislation for the Court to say that notwithstanding that section 9 of Act I of 1957 in terms restricts the scope of the validity of the rules to the assessment year (1955-1956) and regularises the assessment for that year it has validated the rule for the subsequent years also.

The levy of sales tax for the years (1956-1957) and (1957-1958) under the Rules 15 and 16 of the Turnover and Assessment Rules is invalid.

E. H. Battat v. *The King*, L.R. (1951) A.C. 519, referred.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *mandamus* directing the Deputy Commercial Tax Officer, Coimbatore II (W.P. Nos. 14 and 15 of 1958) and the Deputy Commercial Tax Officer, Moore Market division, Madras (W.P. No. 20 of 1958) to forbear from enforcing the provisions and Rules mentioned below against the petitioners in each of these petitions after declaring them *ultra vires*, viz., Rules 15 and 16 of the Turnover and Assessment Rules promulgated on 17th June, 1956 and 3rd September, 1955, respectively in so far as they make it obligatory on the part of every dealer in hides and skins to submit returns and pay tax every month.

V. Thyagarajan for *Messrs. Sundararajan* and *Sivaswami, T. T Srinivasan, A. N. Rangaswami* and *R. S. Venkatachari*, for Petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Additional Government Pleader (*M M. Ismail*), for Respondents.

The Court made the following

ORDER:—This batch of 13 writ petitions have been filed by several dealers in hides and skins questioning the levy of sales tax on their transactions for the assessment years 1956-57 and 1957-58 Some of them seek the issue of a writ of *mandamus* directing the assessing authority not to proceed with the assessment, whereas in the case of others (save W.P. No. 500 of 1958) the relief sought is the issue of a writ of *certiorari* to quash the order of assessment. W P No. 500 of 1958 seeks the issue of a writ of prohibition directing the assesssing authority not to proceed further with the contemplated assessment The basis on which the reliefs are sought is however identical. The dealers involved in these petitions have not taken out licences and on the provisions and the rules as they stood until the recent amendment to which I shall presently advert, unlicensed dealers in untanned hides and skins were held not liable to pay tax on their turnover. The sales tax on hides and skins was under section 5 of the Madras General Sales Tax Act, 1939 to be only at such single point as may be prescribed. The " prescription " was originally contained in Rule 16 (2) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, which fixed the single point at which the tax on hides and skins could be levied and which ran :

" (2) No tax shall be levied on the sale of untanned hides or skins by *a licensed dealer* in hides or skins except at the stage at which such hides or skins are sold to a tanner in the State or are sold for export outside the State."

Based on this provision and other relevant provisions of the Sales Tax Act and the Rules a Bench of this Court in *Noor Mohammed and Co.* v *State of Madras*[1] held that an unlicensed dealer in untanned hides and skins was not liable to pay tax on the turnover under the provisions of the Madras General Sales Tax Act, 1939.

The result of this decision was that while unlicensed dealers in hides and skins escaped sales tax licensed dealers were liable to tax and the State Government undertook legislation to rectify this anomaly as it was the defect in the phrasing of the rules that led to this unintended escape from taxation. The relevant Sales Tax Rules were amended and two sets of provisions were introduced by amendments which were effected in June, 1955. The first was an amendment effected to the General Sales Tax Rules requiring every one dealing in hides and skins compulsorily to take out a licence and not leave it to their option as had been done under the previous rules. The second step taken was to amend Rule 16 of the Turnover and Assessment Rules (a portion of which I have quoted earlier) in which the use of the expression "licensed dealer" had led this Court to hold that unlicensed dealers were outside the taxation provision. By a notification G.O. No. 2733, Revenue, dated 3rd September, 1955, rule 16 was amended eliminating the words "licensed dealer" and prescribing the single point at which the tax would be levied from dealers of untanned hides and skins. It is unnecessary to set out this rule because it is common ground that if the rule applied the transactions of the petitioners would fall within its scope and render them liable to taxation. As the Government desired to give retrospective effect to the rule from the commencement of the financial year 1955-56 a specific provision was inserted in the rule itself rendering it retrospective and to have effect from 1st April, 1955. The validity of this retrospective provisions was challenged in *Guruviah Naidu* v *State of Madras.*[2] This objection was repelled primarily on account of the provisions contained in Madras Act I of 1957 confirming the retrospective operation of this rule. *Guruviah Naidu* v *State of Madras*[2], was concerned with the validity of the rule between 1st April, 1955 to 3rd September, 1955, on which the rule was promulgated.

The petitions now before me however call in question the validity of this amendment by which Rules 15 and 16 of the Turnover and Assessment Rules were amended by the notification dated 3rd September, 1955, on the ground that the rules had not been validly made by conforming to the statutory requirements by which a rule under the Madras General Sales Tax Act, 1939, could be framed. In other words, the attack now is on the ground that the procedural requirements by which the rules could be framed were not observed with the result that the amendment has not the force of a rule under the Madras General Sales Tax Act.

This being the point raised it is necessary to advert to the provisions of the Madras General Sales Tax Act relevant for the formalities prescribed in making rules. The rules whose validity is now impugned are the rules which have been included in the Turnover and Assessment Rules. Section 3 is the charging section, particularly sub-sections (1) and (2). Sub-section (4) of this section as it stood on the date relevant to the present petitions ran :

"3 (4) : For the purposes of this section and the other provisions of this Act, turnover shall be determined in accordance with such rules as may be prescribed :

Provided that no such rules shall come into force unless they are approved by a resolution of the Legislative Assembly.

(5) The taxes under sub-sections (1) and (2) shall be assessed, levied and collected in such manner and in such instalments, if any, as may be prescribed :

Provided that—

(i) in respect of same transaction of sale, the buyer or the seller, but not both, as determined by such rules as may be prescribed, shall be taxed ;

(ii) where a dealer has been taxed in respect of the purchase of any goods in accordance with the rules referred to in clause (i) of this proviso, he shall not be taxed again in respect of any sale of such goods effected by him."

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1. (1956) 2 M.L.J. 374 : (1956) 7 S.T.C. 729. 2. (1957) 2 M.L.J. 469 : (1957) 9 S.T.C. 145

The expression "prescribed" which is used in sub-section (4) was defined in section 2 (*f*) to mean "prescribed by rules made under this Act" Section 19 of the Act is the provision empowering the State Government to make rules to carry out the purposes of the Act and sub-section (2) of section 19 enacts :

"19 (2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) all matters expressly required or allowed by this Act to be prescribed."

Sub-sections (4) and (5) of section 19 are also of relevance and I shall therefore quote them:

"19 (4) The power to make rules conferred by this section shall be subject to the condition of the rules being made after previous publication for a period of not less than four weeks.

(5) All rules made under this section shall be published in the *Fort St. George Gazette,* and upon such publication shall have effect as if enacted in this Act."

I shall now set out the facts on the basis of which the point raised in these petitions has to be decided. The rules which were published as G.O. No. 2733 on 3rd September, 1955, were laid on the table of the Legislative Assembly and were approved by that House but prior thereto, the making of the rule did not conform to the requirements of section 19 (4)—previous publication for a period of not less than four weeks. Though the learned Advocate-General attempted to state that the impugned rules should be deemed to have complied with the formalities required by section 19 (4) of the Act when the same were published in the Fort St. George Gazette, it is clear that this was not factually correct as is clear even from the admission in the counter-affidavit that the Government took the view that a compliance with section 19 (4) was unnecessary in the case of the Turnover and Assessment Rules which had been approved by the Resolution of the Legislative Assembly under the proviso to section 3 (4) of the Act which I have already extracted.

The very short question that arises is as regards the interpretation of section 3 (4) of the Act, namely, whether when that sub-section uses the words "in accordance with such rules as may be prescribed", the reference is to the rules made by the State Government under the rule-making power under section 19 or whether it is a special type of rule which need not conform to the requirements of section 19 (4). In other words the point raised is whether the prescription by rule under section 3 (4) has to conform to the single requirement of being approved by a Resolution of the Legislative Assembly or whether when the expressions "prescribed" and "rules" are used in section 3 (4) and the proviso, the reference is to section 19 and to the terms of sub-section (2) (*a*) "all matters expressly required or allowed by this Act to be prescribed." This question is really not *res integra* but has been concluded in favour of the petitioners by a decision of a Bench of this Court in *Rangaswami Chettiar & Co.* v. *Government of Madras*[1]. I shall extract a short passage from this judgment to elucidate the position. At page 232 of the Report occurs this passage :

"The net result of these provisions, therefore, is that in regard to the rules under section 3 (2) (now sub-sections (3) and (4) of section 3 regarding the determination of turnover the procedure prescribed both by the proviso to that sub-section as well as that pointed out in section 19 (4) have to be followed. In making this observation we have in mind the procedure prescribed by section 19 (4) which is attracted to the rules made under section 3 (2) by reason of the inclusion in section 19 (2) (*a*) of 'all matters expressly required or allowed by this Act to be prescribed'."

I need only mention that a very similar view has been taken of these provisions by a Full Bench of the Andhra Pradesh High Court in *Sreeramulu Chetty* v. *State of Andhra*[2]. In the judgment of that High Court Jaganmohan Reddy, J., who answered the references observed at page 221 :

"Sub-section (4) as well as sub-section (5) of section 3 merely provide for the determination of the turnover and assessment, levy and collection of taxes in accordance with such rules as may be made under the Act. They do not specify the authority empowered to make rules prescribing the matters referred to therein. All that they do is to expressly specify the matters required or allowed

1. (1957) 2 M.L.J. 281 : 8 S.T.C. 222. 2. (1958) 1 An. W.R. 268 : 9 S.T.C. 215 (221).

to be prescribed by the rules. These provisions are not independent and self-contained. It cannot be said that any rules made under the said provisions by any authority not specified therein will have the statutory force merely on their being approved by a resolution of the Legislative Assembly. The authority empowered to make rules under sub-sections (4) and (5) of section 3 is the authority referred to in section 19, namely, the State Government. Sub-section (2) (*a*) of section 19, clearly empowers the State Government to make rules for all matters expressly required or allowed by the Act to be prescribed, one of such matters being those specified in sub-sections (4) and (6). In other words, a plain reading of the provisions of section 19 would itself show that the rules relating to all matters expressly required or allowed by the Act to be prescribed by the rules such as those under sub-sections (4) and (5) of section 3 as well as rules authorised to be made under the other provisions of sub-section (2) of section 19 . . . . . . can only be made after previous publication for a period not less than four weeks. The exercise of that power by the Government to make rules is itself subject to the condition that these rules are made only after previous publication and in so far as the rules relating to matters specified in sub-section (4) of section 3 are concerned, they must also be approved by a resolution of the Legislative Assembly. It is after complying with these pre-requisites that the rules have to be published in the Gazette under sub-section (5) of section 19 and upon such publication they will have effect as if enacted under that Act."

These are therefore clear authorities for the position that the prescription under section 3 which is what rules 15 and 16 of the Turnover and Assessment Rules are, must comply with the double condition, namely, conformation to the provisions of section 19 (4) and receiving the approval of the Legislative Assembly. As it is common ground that the rules 15 and 16 have not conformed to the requirements of section 19 (4) and if the interpretation placed upon section 3 (4) were applied, the rules would appear to be invalid.

On this part of the case, the learned Advocate-General who appeared for the State urged three points : (1) the decision of the Bench in *Rangaswami Chettiar & Co.* v. *Government of Madras*[1], requires reconsideration ; (2) when once a rule is published in the *Fort St. George Gazette* as a rule, there is an irrebuttable presumption that the provisions of section 19 (4) were complied with and that it is not permissible to go behind the statutory presumption ; (3) by reason of section 19 (5) the rules must be treated as part of the Act and their validity could not therefore be challenged.

So far as the first point is concerned, the decision of the Bench is binding upon me and I cannot therefore accede to the argument. In fact the learned Advocate-General wanted merely to have the contention noted so that he might be in a position to urge this point if the matter were taken up in appeal. Before considering the second of the points it will be convenient to dispose of the last. Without entering into the controversy that surrounds the interpretation of the words "shall have effect as if enacted in this Act" in section 19 (5), it is sufficient to point out that section 19 (5) assumes that the rules are validly promulgated and only such rules "have effect as if enacted in the Act". In other words, section 19 (5) has reference to the content of the rule and not to the manner of promulgation or the formalities necessary to frame a rule.

I shall now take up for consideration the second point urged by the learned Advocate-General. When section 19 (4) referred to the rules being made after previous publication, it was a reference to section 7 of the General Clauses Act (Act I of 1891) which enacts :

"Where, by an Act to which this Chapter applies, a power to make rules is expressed to be given subject to the conditions of the rules being made after previous publication, the following provisions shall apply, namely :

(*a*) the authority having the power to make the rules shall, before making them, publish a draft of the proposed rules ;

(*b*) the publication shall be made in such manner as that authority deems to be sufficient or if the condition with respect to previous publication so requires, in such manner as the Central Government or, as the case may be, the Provincial Government prescribes ;

(*c*) there shall be published with the draft a notice specifying a date at or after which the draft will be taken into consideration ;

(*d*) the authority having power to make the rules, and where the rules are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objec-

1. (1957) 2 M.L.J. 281 : 8 S.T.C. 222.

tion or suggestion which may be received by the authority having power to make the rules from any person with respect to the draft, before the date so specified ;

(e) the publication in the Official Gazette of a rule purporting to have been made in exercise of a power to make rules after previous publication, shall be conclusive proof that the rule has been duly made."

The argument of the learned Advocate General was based on the fact that the rule was published in the Official Gazette and that this publication attracted the terms of section 7 (e) of the General Clauses Act which I have extracted earlier. In my judgment his argument is wholly without force. Whether or not the publication should purport to have been made in exercise of the power to make rules it cannot certainly apply to a case where the Government never intended to invoke or comply with the provisions of section 7 of the General Clauses Act. I have already drawn attention to the fact that in paragraph 3 of the counter-affidavit filed by the State in this case it is admitted that the Government proceeded on the basis that for a rule to be made under section 3 (4) of the Act the only formality to be complied with was to have the Resolution approved by the Legislative Assembly and that they did not consider it essential to conform to the requirements of section 19 (4) of the Act. In these circumstances, I consider that the second point raised by the learned Advocate-General should also be rejected.

This however does not conclude the case in favour of the petitioners because the main argument of the learned Advocate-General was based on the validation of these rules by section 9 of the Madras General Sales Tax, Sales of Motor Spirit Taxation and Entertainments Tax (Amendment) Act, 1957. This section enacts :

Section 9. " Tax may be assessed or collected and licence fees levied or collected for the year 1955-56 notwithstanding the retrospective operation of the amendments to the Madras General Sales Tax Rules, 1939, and the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 and all assessments made, taxes collected and licence fees levied for the year 1955-56 shall be deemed to have been made, collected or levied, as the case may be, as if these rules as amended were in force at all relevant times :

Provided that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not been enacted."

It was on the basis of the validation effected by the provision that I upheld in *Guraviah Naidu* v. *State of Madras*[1], the retrospective operation of rules 15 and 16 of the Turnover and Assessment Rules so as to permit a valid assessment to sales tax for 1955-56. Based on the terms of section 9 and the statutory validation of these rules the argument of the learned Advocate-General was two-fold: (1) Though section 9 used the words " notwithstanding the retrospective operation of the amendments " the validation was not confined to the objection based upon the notification of the 3rd September, 1955, being retrospective in its operation but it had a more extended operation and the language employed was sufficient to effect a statutory confirmation of the rules and validate them whatever be the nature of the defects from which the rules suffered. (2) In *Guraviah Naidu* v. *State of Madras*[1], this Court has held that by reason of section 9 the rules were validly enacted to enable an assessment to be made on dealers for the year 1955-56. If the rules were valid and effective for 1955-56, then it logically followed that the rules would be valid and effective for the subsequent years also.

As regards the first point, the learned Advocate-General referred me to the decisions which have dealt with the effect of mistaken assumptions contained in statutes. Based on these decisions the point urged was that the fact that the Legislature mistakenly assumed that the only defect in the rules promulgated in the G.O. No. 2733 dated 3rd September, 1955, was the provision therein for their retrospective operation, was really irrelevant and would not control the operation of the validating section. In this connection he particularly relied on the decision of the Privy Council in *E.H. Battat* v. *The King*[2]. The question which the Privy Council was called

1. (1957) 2 M.L.J. 469 : (1957) 9 S.T.C. 145. 2. L.R. (1951) A.C. 519.

on to decide was the proper interpretation of section 5 of the Indemnity and Validating Ordinance (I of 1946) of the Singapore Colony. This section read (to quote only the relevant words) :

"All laws, proclamations, orders, rules, regulations and legislative acts whatsoever made or issued during the war period by or with the assent of any British or Allied military authority shall be deemed to have been validly made from the date of promulgation in the area concerned notwithstanding that any such law, proclamation, order, rule. . . . . may have repealed or amended or been inconsistent with any law previously in force".

The contention urged before the Privy Council and which was rejected by their Lordships was that the validity given by this provision "was limited to those promulgations" which would have been invalid only by reason of their having repealed or amended or been inconsistent with any law previously in force. The submission of counsel was that the law under which the appellant had been convicted had been validly enacted and that consequently it would not fall within the restricted validation which according to learned counsel section 5 was intended to effect. Lord Thaker delivering the judgment of the Privy Council repelled this contention saying (at page 530).

"The draftsmen here is clearly envisaging the possibility of existing proclamations *de facto* in force being invalid in law and is intending to give them the force of law. The fact that he enumerates certain specified defects which might otherwise have rendered such instruments invalid does not, their Lordships think, limit the generality of the earlier words, which are sufficient to validate all the enumerated instruments provided they have in fact been made or issued in the period in question by or with the assent of the appropriate British or Allied military authority."

Basing himself on this passage and the interpretation of the validating provision which found acceptance at the hands of the Privy Council, the learned Advocate-General wanted to read section 9 as if the words "notwithstanding the retrospective operation of the amendments to the Madras General Sales Tax Rules, 1939, etc.", were omitted. I agree with the learned Advocate-General so far, but the omission of these words however does not help him to the extent needed, because there are no positive words in section 9 of Act I of 1957 as were found in section 5 of the Indemnity and Validating Ordinance which the Privy Council had to deal with in the case just now referred to. In the latter section there was first a positive provision effecting validation of all rules made during a particular period and then followed the clause commencing with the word "notwithstanding" so that if the reasons set out following the word "notwithstanding" were omitted there would still remain the positive validation effected by the earlier portion of the section. But if section 9 of Madras Act, I of 1957, were read without reference to the retrospective operation, the section would read :

"Taxes may be assessed or collected and licence fee levied or collected for the year 1955-56. . . and all assessments made, taxes collected and licence fees levied for the year 1955-56 shall be deemed to have been made, collected or levied as the case may be, as if those rules as amended were in force at all relevant times."

Still it would be seen that even if section 9 were in this form which is the utmost assistance which the learned Advocate-General could derive from the decisions in *E. H. Battat* v. *The King*[1], there would be no statutory confirmation or validation of the rule to enable a valid assessment to be made for any other than 1955-56. The decision relied on by the learned Advocate-General does not in my judgment permit the Court so to read the section as to eliminate the reference to the assessment year 1955-56 which forms as it were the essential part of the validation provision. I therefore reject the first submission of the learned Advocate-General on this part of the case.

His second submission was as I stated earlier based upon the illogicality involved in the statute having confirmed the validity of the rule in regard to the assessment for the year 1955-56 leaving the validity of the rule open to challenge for subsequent years. The argument was that the Legislature could not have validated the rule only in so far as it related to the period upto 31st March, 1956 and

1. L.R. (1951) A.C. 519.

not confirm the validity of that rule for the later period. Here again I am unable to agree with the submission of the learned Advocate-General. The question is not one of logic but rather of interpretation of the words used. It was certainly open to the State Legislature to have effected a confirmation of a more extensive nature. But the Legislature did not do so, but expressly confined the validation of the rule so as to permit assessment being made for one particular year. It would not be interpretation but an act of legislation for the Court to say that notwithstanding that section 9 in terms restricts the scope of the validity of the rule to the assessment year 1955-56 and regularises the assessment for that year it has validated the rule for the subsequent years also. The language of section 9 precludes the argument advanced by the learned Advocate-General.

The result is that these writ petitions succeed and the rule *nisi* issued will be made absolute. There will be no order as to costs in any of these petitions.

V.S. ——— *Petition allowed : Rule* nisi *made absolute.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE GANAPATIA PILLAI AND MR. JUSTICE VEERASWAMI.

S. P. L. P. Narayanan Chettiar .. *Appellant**

v.

N. A. R. Annamalai Chettiar .. *Respondent.*

Madras Agriculturists Relief Act (IV of 1938), sections 7 and 19(2)—'A debt payable at the commencement of the Act—Meaning of the word 'payable'—Deposit before the Act—When a debt payable at the commencement.

The term 'debt payable by an agriculturist at the commencement of this Act' occurring in sections 7 and 19 (2) of the Madras Agriculturists Relief Act should, having regard to the object and policy behind the Act, be construed as a debt owing by an agriculturist on the concerned date irrespective of the fact whether the debt (as in the case of a deposit) had become exigible or not.

Ramanathan Chettiar v. *Ramanathan Chettiar*, (1960) 1 M.L.J. 1: I.L.R. (1960) Mad. 97, on this point held to be wrongly decided.

The expression 'a debt payable at such commencement' occurring in section 19 (2) of the Act, merely refers back to the category of debts indicated in section 7 and does not by itself introduce a new classification of debts.

Appeal against the Order of the Court of the Subordinate Judge of Devakottai, dated 23rd June, 1952 and made in I.A. No. 1187 of 1951 in O.S. No. 13 of 1944.

The Bench (Somasundaram and Ramaswami, JJ.) referred the questions to a Full Bench and the Reference came on for hearing before a Full Bench, (P. V. Rajamannar, *Chief Justice*, Ganapatia Pillai and Veeraswami, JJ.).

The Advocate-General (*V. K. Thiruvenkatachari*) and *V. V. Raghavan*, Advocate, for Petitioner.

R. Viswanathan for *S. Tyagaraja Ayyar*, Advocate, for Respondent.

The Opinion of the Full Bench was expressed by

Ganapatia Pillai, J.—The following three questions have been referred to this Full Bench by Somasundaram and Ramaswami, JJ.—

1. Whether a debt incurred before 1st October, 1937, is not a debt payable by an agriculturist at the commencement of this Act (22nd March, 1938) within the scope of section 7 of the Madras Agriculturists Relief Act (IV of 1938), if the due date for payment is later than 22nd March, 1938 ?

2. Whether a deposit or other sum payable on a demand is a "debt payable by an agriculturist at the commencement of this Act" notwithstanding that the creditor has not made the demand for payment on or before 22nd March, 1938?

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* A.A.O. No. 721 of 1952 and C.M.P. No. 6577 of 1952. 26th April, 1960.

3. Whether the conditions necessary for the application of section 19 (2) to a debt in respect of which a decree has been passed are the same or different from those applicable under section 7 of the Act ?

This reference came to be made under the following circumstances. One Arunachalam Chettiar was carrying on money-lending business in partnership with his two sisters and another Subramanian Chettiar, at Bogale in Burma prior to 1916. After Arunachala died in 1916 Subramania carried on the business with the remaining partners. The amount due to Arunachala was ascertained as Rs. 10,824-3-3 and it was credited in the *nadappu account* of the firm.

Subramania died in 1924 and thereafter the business was continued by his wife in partnership with one Palaniappa and others. Palaniappa in his turn died in 1930 and thereafter his sons who are defendants 1 and 2 in the suit out of which this litigation emanates were substituted in his place and the business was being carried on. In 1935 disputes arose among the partners. By this time the sum of Rs. 10,824 and odd invested in 1916 as due to Arunachala had swelled into Rs. 55,933-15-0. According to an award of the arbitrators passed on 31st July, 1935, this amount was apportioned between Arunachala (adopted son of Subramania) and his sister and defendants 1 and 2. Arunachala and his sister got Rs. 34,958-4-6 and defendants 1 and 2 got Rs. 20,975-3-6. O.S. No. 13 of 1944 on the file of the Sub-Court, Devakottai, was instituted by the adopted son of Arunachala against defendants 1 and 2 who are the sons of Palaniappa, one of the partners of the firm for recovery of Rs. 20,975-3-6, with interest thereon. That suit was dismissed. Against the dismissal of that suit A.S. No. 254 of 1946 was preferred in this Court in 1946 by the plaintiff. On 9th March, 1951, this appeal was allowed and the suit was decreed substantially as prayed for by the plaintiff. On 5th October, 1951, I.A. No. 1187 of 1951, was filed in the trial Court by defendants 1 and 2 for the scaling down of the decree-debt in accordance with the provisions of Madras Act (IV of 1938). That application was dismissed by the trial Court on 26th March, 1952. Against that order C.M.A. No. 721 of 1952 was filed to this Court on 4th July, 1952. C.M.P. No. 6577 of 1952 was also filed in this Court for the scaling down of the decree-debt in the view that if the trial Court had no jurisdiction to scale down the decree-debt this Court should do so. On 25th March, 1953, a Bench of this Court dismissed this Civil Miscellaneous Petition and the Supreme Court on appeal reversed that decision[1] and remanded the matter and the Civil Miscellaneous Appeal No. 721 of 1952 for disposal by this Court. Thereupon the Bench dealing with the matters in question called for findings from the trial Court on four points and accepted the findings submitted by the trial Court on the question that the petitioner in C.M.P. No. 6577 of 1952 was an agriculturist entitled to the benefits of the Madras Act IV of 1938.

The next question to be considered by the Bench was whether the debt had to be scaled down under sections 8 (2) or 8 (1) of the Act. On the strength of a decision of this Court in *Ramanathan Chettiar* v. *Ramanathan Chettiar*[2], it was contended before the referring Bench that the debt in the present case could not be scaled down under section 19 (2) of the Madras Act (IV of 1938) by reason of the fact that the debt in this case was not payable at the commencement of the Act and could not, therefore, fall within the definition of a "debt" contemplated under section 7 of the said Act. As the referring Bench felt a doubt as to the correctness of the ruling in *Ramanathan Chettiar* v. *Ramanathan Chettiar*[2] the questions mentioned at the beginning of this judgment have been referred to us for decision.

The salient facts may be stated in order to appreciate the contentions of the parties. The deposit was made in 1916 in a partnership firm. In 1935 this deposit was split up under an award of the arbitrators and the defendants in the suit became

1. *Narayanan Chettiar* v. *Annamalai Chettiar*, (1959) S.C.J. 788 : (1959) 2 M.L.J. (S.C.) 55 ; (1959) 2 An.W.R. (S.C.) 55.
2. (1960) 1 M.L.J. 1 : I.L.R. (1960) Mad. 97.

liable for the sum of Rs. 20,975 and odd as deposit. On 4th February, 1944, the suit was filed and it was dismissed on 18th February, 1946. On appeal the suit was decreed in full on 9th March, 1951, for the entire claim in the plaint. It is common ground that the transaction in this case was a deposit and that a demand for payment of the deposit as contemplated in Article 60 of the Limitation Act was made sometime in 1941, that is, after the Madras Act (IV of 1938) had come into force. Both the learned Advocate-General appearing for the applicant and Mr. Viswanathan appearing for the respondent agreed that Question No. 3 referred to us did not really arise separately for consideration. But the answer to Questions 1 and 2 depends upon the interpretation of the phrase "all debts payable by an agriculturist at the commencement of this Act" occurring in section 7 of the Act. Section 19 (2) of the Act was introduced by the Amending Act XXIII of 1948, which came into force on 25th January, 1949, for the specific purpose of enabling Courts to scale down decrees passed after Madras Act (IV of 1938) had come into force. The expression "a debt payable at such commencement" occurring in section 19 (2) of the Act, it is common ground, merely refers back to the category of debts indicated in section 7 of the Act and does not by itself introduce a new classification of debts.

Before we advert to the arguments addressed to us we may notice the relevant statutory provisions. Section 3 (iii) of the Act defines debt thus :—

"Debt" means any liability in cash or kind whether secured or unsecured due from an agriculturist, whether payable under a decree or order of a civil or revenue Court or otherwise but does not include rent as defined in clause (iv) or kanartham as defined in section 3 (1) (i) of the Malabar Tenancy Act, 1929."

Section 7 of the Act so far as is relevant for the purpose of the present case is in these terms :

"Notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of this Act shall be scaled down in accordance with the provisions of this Chapter. . . . . ."

In indicating the manner of scaling down the debts falling under section 7 of the Act, sections 8 and 9 fix the date of the incurring of the debt as the criterion. Section 8 deals with debts incurred before the 1st October, 1932, while section 9 deals with debts incurred on or after the 1st October, 1932. Section 13 of the Act provides for the rate of interest payable by an agriculturist on new loans. It enacts that all interest due on any debt incurred by an agriculturist after the commencement of the Act shall be scaled down so as not to exceed a sum calculated at 6¼ per cent. per annum simple interest . . . . or at such other rate of interest as may be notified by the State Government in the Official Gazette from time to time.

The learned Advocate-General for the applicant contends that the term "debt payable by an agriculturist at the commencement of this Act" (Act IV of 1938) should be construed as a debt owing by an agriculturist on the concerned date irrespective of the fact whether the debt had become exigible or not.

Mr. Viswanathan learned counsel for the respondent on the other hand contends that this phrase can only apply to debts which had become exigible at the commencement of the Act, that is, 22nd March, 1938 and he refers to the language of section 19 (2) of the Act in support of his contention that the phrase, "the debt payable at such commencement" could have no reference to liabilities which had not become accrued and in respect of which a cause of action had not arisen.

Before referring to the authorities cited on both sides we may at the outset mention that the term "payable" in connection with a debt has both a primary and a secondary meaning or in other words a basic and an extended meaning. The meaning of the word "payable" is thus given in the "Shorter Oxford Dictionary", "of a sum of money, bill, etc., that has to be paid ; due, falling due (usually at or on a specified date or to a specific person)."

In the Dictionary of English Law by Earl Jowitt the meaning of the word "payable" is thus rendered :—

> " a sum of money is said to be payable when a person is under an obligation to pay it. Payable may, therefore, signify an obligation to pay at a future time but when used without qualification, payable means that the debt is payable at once as opposed to owing."

These authorities confirm our opinion that the term " payable " has two meanings ; (1) owing and (2) payable at a particular point of time, and when this expression is used without any qualification it generally means payable at once. " Due and payable " is a common expression which we find in many of the statutes and the term " due " always connotes a debt being payable or owed. If the basic meaning of the word payable is attributable to the clause in question we must hold that all debts owing by an agriculturist at the commencement of the Act would be liable to be scaled down under section 7 of the Act but if we construe this term in the other sense of being payable, that is to say, exigible or enforceable at the commencement of the Act different results would follow. Where two meanings could be attributed to an expression or phrase occurring in a statute we should have recourse to an interpretation which would give the appropriate meaning in the context in which the phrase occurs. As early as *Heydon's case*,[1] the Court of Exchequer has laid down the following rules for interpretation of statutes and particularly statutes which are beneficial in character :

(1) what was the common law before the making of the Act ;

(2) what was the mischief and defect for which the common law did not provide ;

(3) what remedy the Parliament had resolved and appointed to cure the disease ; and

(4) the true reason of the remedy.

Occasions for the application of these rules had constantly come up before English Courts and it would therefore be pertinent to refer to a few of the English decisions wherein these rules have been explained. Sir John Nicholl, M.R., stated as follows in *Brett* v. *Brett*[2].

> "The key to the opening of every law is the reason and spirit of the law; it is the *auimus imponentis*; the intention of the law maker expressed in the law itself taken as a whole. Hence to arrive at the true meaning of any particular phrase in a statute the particular phrase is not to be viewed detached from its context in the statute. It is to be viewed in connection with its whole context ; meaning by this as well the title and preamble as the purview or the enacting part of the statute."

In *Rein* v. *Lane*[3], Blackburn, J., said :—

> " It is I apprehend in accordance with the general rule of construction that you are not only to look at the words but you are to look at the context, collocation and the object of such words relating to such matter and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under the circumstances."

In Re. *No. 12 Regent Street, Oxford*[4], Jenkins, J., stated thus :—

> " In the construction of a statute it is, of course, at all times and under all circumstances permissible to have regard to the state of things existing at the time the statute was passed, and to the evil which as appears from its provisions it was designed to remedy."

We hold that these principles are applicable to this case and in that view we can refer to the purpose of the legislation in question. Undoubtedly Act IV of 1938 was intended to give relief to indebted agriculturists and to restrict the rate of interest payable by them and the method adopted for achieving the object was to scale down the debts in most cases by giving relief against interest outstanding and in other cases even by wiping off the debt where re-payments had exceeded twice the principal sum borrowed.

For giving such relief the scheme of the Act created a dichotomy between the debts incurred before the commencement of the Act and those incurred thereafter. There was also a sub-division of the debts incurred before the commencement of the Act with reference to the date 1st October, 1932. Having regard to the various

1. (1584) 3 Co. Rep. 8.
2. (1826) 3 Addam 210-216.
3. (1867) 33 L.J. Ch. 372-375.
4. L.R.(1948) Ch. 735-746.

provisions of the Act the overriding intention of the Legislature is clearly discernible and that was to give relief to the agriculturist in respect of his debts, which were outstanding and unextinguished at the commencement of the Act, under the process of scaling down indicated in sections 8 and 9 of the Act. To accept the construction of the term 'payable' which commended itself to the Bench which decided *Ramanathan Chettiar* v. *Ramanathan Chettiar*[1], one should attribute to that phrase the meaning that the debt in question should be enforceable at the commencement of the Act. The *ratio decidendi* of the learned Judges who constituted the Bench is contained in the following passage :—

"But the question in the present case is whether the debt was one which would come within the provisions of section 19 (2) of the Act. Section 19 (2) restricts the powers of amendment by the Court to a case where the debt was payable before the commencement of the Act.

We have already referred to the fact that in the present case the decree was passed on the basis of a deposit made by the appellant's father with the respondent's father and that the demand for the return of the money was made on 2nd October, 1944. If the debt became payable only on demand it would follow that there was no decree in respect of a debt payable at the commencement of the Act (IV of 1938). To such a case the provisions of section 19 (2) would not in terms apply. It becomes, therefore, relevant to consider the nature of the deposit and when it becomes payable."

With all respect to the learned Judges we consider that in thus posing the question for decision they did not pay attention to the context of the phrase "payable at the commencement of the Act" occurring both in section 19 (2) and section 7 of the Act. The learned Judges referred to the decision in *Joachimson* v. *Swiss Bank Corporation*[2] and other decisions to hold that in the case of a deposit payable on demand the demand was essential to make the debt payable and enforceable and consequently before the demand was made such a debt could not to said to be payable. We have no quarrel with the proposition of law laid down in *Joachimson's case*[2], that a deposit which under the terms of contract was payable only on demand could be sued for only after the demand was made. The scope of the rule in this case was considered in *Arab Bank, Ltd.* v. *Barclays Bank*[3]. Certain observations occurring in this judgment seem to us to be apposite. In order to understand these observations it is necessary to set out the facts of the case briefly : In 1939 the Arab Bank opened a current account with the Barclay's Bank at its Jerusalem branch and deposited a certain sum of money. The mandate held by Great Britain over Palestine expired by the midnight of May 4, 1948. Immediately thereafter war broke out between Israel and the Arab States and by reason of the hostilities in Jerusalem performance of contract became impossible. The branch of Barclay's Bank at Jerusalem was closed on the day previous to 14th May, 1948 and did not re-open until July, 1948. In October, 1950, the Arab Bank sued the Barclay's Bank for repayment of the amount standing to its credit in the current account as money had and received to its use on the ground that the contract had been frustrated by the outbreak of the war. Barclay's Bank had paid the amount of the credit balance to the Custodian of the properties of the absentees appointed under the legislation of the State of Israel. On these facts the House of Lords held that the right to be paid the credit balance survived the outbreak of the war, and remained intact subject to the legislation of the State of Israel and that since the amount was legally paid to the Custodian it would not be recoverable by the Arab Bank from the Barclay's Bank. After referring to the rule laid down in spite of the rule which prohibited the bringing of an action for repayment of the deposit before a demand could be made, the right to recover the debt was not destroyed merely because no action could be brought to recover the debt without a previous demand. Lord Reid in speaking of this right of the creditor described it in these terms :

"At one stage of this case the appellants maintained that they had made a demand for payment before the outbreak of the war but they did not now manitain that and therefore the position is that at the outbreak of the war they had no cause of action against the respondents but in my judgment that does not mean that there was no debt owing to them by the respondents. The sum at their credit, was immediately payable to them. It is true that it was only payable in a particular place

1. (1960) 1 M.L.J. 1 : I.L.R. (1960) Mad. 97.
2. L.R. (1921) 3 K.B. 110.
3. L.R. (1954) A.C. 495.

and that to get the money they had to go there and ask for it but the case is in my opinion quite different from a case where one party still has to perform some service or fulfil some obligation under the contract in order to earn the money. . . . . But the sum to the credit of a customer on current account has always been regarded as a debt due by the bank to the customer."

Referring to *Joachimson's case*[1] the learned Judge observed thus :—

"Indeed I think that in *Joachimson's case*[1], Atkin, L.J., recognised that there is a debt before any demand for payment is made."

This decision clearly recognised that a debt may be payable but still not enforceable at a particular point of time. If we understand it aright the rule laid down in *Joachimson's case*[1] only serves to obviate the necessity of the customer suing for the return of every item of deposit under peril otherwise of its recovery being barred by limitation. Mr. Viswanathan contended that the term 'payable' by itself may be of neutral significance but in the phrase we have to consider it occurs in conjunction with the point of time at which the debt became payable. From this he argued that the term 'payable' had been used in this phrase only in the sense of being exigible or enforceable or recoverable at a particular point of time. He instanced his argument by referring to a mortgage debt the payment of which was specifically provided by the mortgage deed to be due on a date occurring beyond the date of the commencement of Act IV of 1938 and posed the question how could such a mortgage debt by payable at the commencement of the Act while the contract itself provided that it was payable at a future date. Our short answer to this argument is that the term 'payable' in the contest of sections 7 and 19 (2) of Act IV of 1938 can only mean owing, and not exigible, Mr. Viswanathan referred us to some decisions in connection with the construction of the term 'payable'. The first decision he referred to is *The Delhi Cloth General Mills & Co.* v. *Harnam Singh*[2] we are unable to find any assistance from this judgment which does not deal with any analogous question. He next referred to the decision In re *Bihar B and R and E Works*[3]. The question for consideration in that case was whether the words 'due and payable' occurring in section 530 (1) (*a*) of the Indian Companies Act, 1956, would apply to a payment of arrears of sales tax payable by a company in liquidation. Sahai, J., held that the words 'due and payable' were not synonymous and having regard to the facts of that case he held that the debt in question was entitled to priority under section 530 (1) (*a*) of the Companies Act since the arrears of tax became payable within a period of 12 months indicated in that provision though the debt had accured long prior to that period . The words used in this enactment (the Companies Act) have no resemblance to the words used in the sections which we are now called upon to interpret. In innumerable decisions of this Court ever since the Act IV of 1938 was put on the statute book this Court has taken the view that all debts outstanding and due by an agriculturist whether payable or not in the sense of being enforceable at the commencement of the Act could be scaled down under the Act. Even debts re-payable by instalments some of which fell due after the date of the commencement of Act IV of 1938 have been scaled down and as an instance we may refer to the decision in *Edupuganti Pichayya* v. *Gonnuguntla Venkata Ranga Rao*[4]. To hold that all these decisions of this Court were wrongly decided we must have more convincing reason than the argument of Mr. Viswanathan that the literal interpretation of the words 'payable at the commencement of the Act' should be adopted by us in preference to the interpretation which accords with the context and the stated object of the legislation. To hold otherwise would mean that the provisions of the Act though intended to give relief to agriculturists from their indebtedness is confined to cases where such debts were enforceable in any Court of law at the commencement of the Act and that the Act left out of its purview the class of cases in which debts though incurred before the Act became enforceable through the medium of law Courts after 22nd March, 1938.

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1. L.R. (1921) 3 K.B. 110.
2. (1955) 2 M.L.J. (S.C.) 141 : (1955) An. W.R. (S.C.) : 395 (1955) S.C.J. 645.
3. A.I.R. 1959 Pat. 537.
4. (1944) 1 M.L.J. 52.

The word 'due' occurring in the definition of 'debt' section 3 (*iii*) is a term of wide import and according to the *Dictionary of English Law* it means.

"anything owing, that which one contracts to pay or perform to another, that which law or justice requires to be paid or done, As applied to money 'due' means either that it is owing or that it is payable. In other words it may mean that the debt is payable at once or at a future time.".

Having regard to this we have no doubt that the term 'due' occurring in section 3 (*iii*) of the Act can only be given its extended meaning and not the restricted meaning. Consistent with this definition of debt due by an agriculturist we can only apply the primary meaning of the word payable in interpreting the phrase 'debt payable at the commencement of this Act', occurring both in sections 7 and 19 (2) of the Act. To hold otherwise the learned Judges who decided *Ramanathan Chettiar's case*[1] referred to *Govindasami Gounder* v. *Ramaswami Gounder*[2], *Bancharam Majumdar* v. *Adyanath Bhattacharjee*,[3], and other cases. In the *Govindasami Gounder's case*[2] the suit was laid on a promissory note which was executed subsequent to the commencement of Act IV of 1938. The interpretation placed in that decision upon the expression 'payable at such commencement' cannot have any relevance to the point which we are called upon to decide. In the *Bancharam's case*[3] the question arose whether the debt was in existence when it was still not payable for the purpose of deciding whether a certificate for its collection could be issued under the Succession Act. The Bench distinguished this decision on the ground that the decision merely held that the debt in that case was payable but that had no relevance to the question, whether it was a debt which would come within the provisions of section 19 (2) and section 7 of the Madras Act (IV of 1938). This decision also, in our opinion, does not touch the point we have to decide. The other decisions relied on by the Bench, viz., *Mohammad Akbar* v. *Attarsingh*[4] and *Ramaswami Chetty* v. *Manickam Chetty*[5], are cases which arose under Article 60 of the Limitation Act and dealt with the point whether in the case of a deposit made to a banker under the condition that the deposit would be payable on demand the amount would be payable without any demand being made for it. This is not the point which we are called upon to decide.

In our opinion *Ramanathan Chettiar* v. *Ramanathan Chettair*[6], in holding otherwise on Questions 1 and 2 was wrongly decided and we answer Questions 1 and 2 in the affirmative.

The papers will be returned to the Bench for disposal of C.M.P. No. 6577 of 1952 and the Civil Miscellaneous Appeal No. 721 of 1952 in the light of the opinion expressed by us.

V.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE SRINIVASAN.

The Kumbakonam Mutual Benefit Fund, Ltd., Kumbakonam *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-Tax Act (XI of 1922), *section* 10(1)—*Incorporated Mutual Benefit Fund—Dealings with share-holders only—Benefits available to share-holders only—Interest or profit arising from dealings with share-holders—Exemption from tax—Principles.*

The two features that must exist before the income of a Mutual Benefit Fund like the one in the present case can be exempt from tax are firstly the profits made by the Fund must arise from its own members and secondly there should be mutuality in the sense that the contributors to the profits must also be participators therein. There should be complete identify between the body of contributors and the body of the participators. If these features are available the fact the body has been incorporated and has a *juristic* personality would make no difference.

1. (1960) 1 M.L.J. 1.
2. (1958) 2 M.L.J. 185.
3. (1909) I.L.R. 36 Cal. 936.
4. (1937) 71 M.L.J. 712.
5. (1938) 1 M.L.J. 56.
6. (1960) 1 M.L.J. 1 : I.L.R. (1960) Mad. 97.

* Referred Case No. 78 of 1956. 20th October, 1960.

The fact that though all the members of the Fund are entitled to share in the surplus profits it is only a part of the members who had availed themselves of the facilities for taking loans would contribute thereto would not affect mutuality. What is required is both the right to contribute and the right to participate must be available to an identical body and it is not necessary that every member should contribute before he can be allowed to participate.

The total of the net profits is profits which arise from within. Though part of the profits only is immediately divisible and part of the profits go towards the Reserve Fund, depreciation, short realisations and building fund since the members are entitled to the benefits thereof the total of the net profits are exempt from tax.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (XI of 1922), in R.A. Nos. 746 to 753 of 1955-56 on its file (I.T.A. Nos. 69 to 76 of 1955-56, Assessment years 1946-47 to 1953-54) for decision on the following questions of law, *viz*:—

(1) "Whether there were materials for the Tribunal to hold that the assessee is a banking concern assessable under section 10 for all the assessment years and not exempt?"

(2) "If the answer to the above question is in the affirmative, and against the assessee whether the payments to the non-recognised provident fund by the assessee for the six years of assessment 1946-47 and 1948-49 to 1952-53 are allowable deductions under any provisions of the Act?"

R. Kesava Iyengar for *M. Subbaraya Iyer* and *S.R. Krishnamacharya*, for Applicant.

C.S. Rama Rao Sahib, Special Counsel for Income-tax and *S. Ranganathan*, on behalf of the Respondent.

The Judgment of the Court was delivered by

Srinivasan, J.—The question raised by this reference relates to the assessability of the income of the Kumbakonam Mutual Benefit Fund, Ltd., for the assessment years 1946-47 to 1953-54. It is desirable at the outset to set out the previous history of the income-tax proceedings relating to this case. As long back as in 1917-18 an assessment was made. But only the income from non-members of the fund by way of interest on Government securities and bank deposits and income from property were subjected to tax. In doing so, reliance was apparently placed on the ruling of our High Court given in *Secretary, Board of Revenue, Madras* v. *The Mylapore Hindu Permanent Fund, Ltd.*[1]. Several years later, the case of the *Commissioner of Income-tax* v. *Madura Hindu Permanent Fund*[2], was decided by the High Court. Certain observations were made by the learned Judges which appeared to suggest that the *Mylapore Hindu Permanent Fund case*[1] did not attract the principle laid down in *New York Life Assurance Co.* v. *Styles*[3]. On the basis of these observations assessments were made on this assessee for the assessment years 1932-33, 1933-34 and 1934-35. Before the assessee could canvass the correctness of these assessments by way of reference, another decision was rendered by our High Court in *Sri Meenakshi Swadeshi Saswatha Nidhi, Ltd.* v. *Commissioner of Income-tax, Madras*[4], wherein the *Mylapore Hindu Permanent Fund decision*[1] was re-affirmed. Accordingly the Commissioner of Income-tax set aside the assessments made on this assessee for the above assessment years. From then onwards the assessee was being assessed only in respect of income derived from non-members.

English and Scottish Joint Co-operative Society v. *Commissioner of Income-tax, Madras*[5], was decided by the High Court in favour of the assessee on the application of the principle of the *Styles' case.*[3] The correctness of this decision came to be considered in *English and Scottish Joint Co-operative Wholesale Society, Ltd.* v. *The Commssioner of Agricultural Income-tax, Assam*[6], by the Privy Council. In this case the Privy Council examined the applicability of the *Styles' case*[3], to cases like the appellant Society before them and held against the appellant. On the basis of this decision the Department proceeded to re-open the assessment during the last eight years holding that the

1. (1923) I.L.R. 47 Mad. 1 : 1 I.T.C. 217.
2. (1933) 64 M.L.J. 260 : I.L.R. 56 Mad. 415 : 6 I.T.C. 326 : (1933) 1 I.T.R. 46.
3. (1889) L.R. 14 A.C. 381.
4. 8 I.T.C. 83.
5. 3 I.T.C. 385 : I.L.R. (1949) 1 Cal. 279 (F.B.).
6. (1948) 2 M.L.J. 242 : L.R. 75 I.A. 196 : 16 I.T.R. 270 (P.C.).

fund was an ordinary banking institution, and that in the absence of such of those special features which would afford immunity to mutual fund concerns from income-tax, its income was assessable to tax. This conclusion of the Income-tax Officer was concurred in by the Appellate Assistant Commissioner. The Tribunal in a consolidated order relating to the eight assessment years in appeal held against the claim that the assessee fund is a mutual benefit society, and that the cardinal requirement of complete identity between the contributors and the participators to the common fund was not available in this case. The nature of the business was held by the Tribunal to be that of an ordinary banking concern though the business was restricted to its members or shareholders. But this restriction was held by the Tribunal not to take the income of the assessee out of the purview of the charging sections of the Act.

On an application under section 66 (1) of the Act the following question has been referred to us :

> " Whether there were materials for the Tribunal to hold that the assessee is a banking concern assessable under section 10 for all the assessment years and not exempt?"

Another question, which was also referred, related to the payments made by the assessee-fund to a non-recognished provident fund which were claimed as allowable deductions. That question not having been pressed before us, it will be treated as withdrawn.

Before dealing with the question, it is necessary to set out the facts relating to the constitution of this Fund. The Fund appears to have been originally incorporated under the Companies Act in 1903. At that time it was almost identical in the scope of its operations with the Mylapore Hindu Permanent Fund, to the constitution of which we shall refer in due course. In 1938 certain changes were made and the Fund, as at present constituted, has the following features. According to the Memorandum and Articles of Association of the Fund, the objects of the Association are among other things to enable the shareholders to save money, to invest the shareholders' savings in a prescribed manner, to advance loans at favourable interest, to receive deposits and to borrow if need be, etc. The nominal capital of the Association was fixed at Rs. 33 lakhs divided into as many shares of rupee one each. The Articles of Association however limited the scope of the Memorandum in a particular manner. Article 5 lays down that the Fund shall have dealing only with its shareholders. Under Article 3 a shareholder or member is defined to mean the duly registered holder for the time being of a share of the Fund and to include also applicants for shares pending allotment provided that allotment is made. The Fund is authorised to receive deposits of money only from shareholders and from no one else. These deposits are of two kinds, fixed deposits and recurring deposits. Interest is allowed on fixed deposits. Recurring deposits are of three kinds. Any shareholder could deposit a rupee per month for a period of 46, 86 or 24 months, and at the end of the period he is entitled to receive Rs. 50, Rs.100 or Rs.25 respectively. Loans of different kinds could be granted by the Fund but only shareholders were eligible for loans. Several of the rules make it clear beyond doubt that in so far as the benefits of the Fund are concerned, they are available only to shareholders or members and to no one else. The net ' profits ' of the Fund consisting, presumably of the interests realisations from members taking loans and from outside investments less interest paid by the Fund to members making fixed or recurring deposits and other expenses of management is dealt with in a particular manner under Article 100, which sets out that 20 per cent. of the net profits shall be transferred to the reserve fund, 10 per cent. for the depreciation of immovable properties and other securities, 5 per cent. for short realisations and 5 per cent. for the building fund. The balance of 60 per cent. is to be divided among the shareholders, as dividend not exceeding 9 per cent. per annum of the amount of the share money paid up. The balance if any is to be appropriated to such fund as the directors might deem fit. It will be noticed that the distribution to the shareholders is called dividend. It is not necessary to notice the other articles.

The prominent feature that is clearly discernible from the above is that the Fund is prevented from having any dealings with outsiders, meaning thereby persons who are not members of the Fund. It is true that the Fund is competent to invest its surplus funds over and above what it requires for its loans to its members in Government securities or in landed property in order to enable it to earn interest. But interest so earned is admittedly outside the scope of this reference. There is no claim put forward by the assessee-Fund that such interest is also exempt from income-tax. What we are specifically concerned with in this case is interest or " profits " earned by the Fund from the transactions with its members. It should be clear from the foregoing that such profits are comprised of interest payments by the members in respect of the loans taken by them from the fund. The short contention of the assessee-Fund is that in a fund circumscribed in the above manner in its activities, since the " profits " made by the assessee arise only from its members, the principle of the *Mylapore Hindu Permanent Fund case*[1] and other cases that followed it would apply and render this profit exempt from income-tax. For the Department the argument has been that the Fund is an entity quite apart from its members, and that this different capacity of the Fund cannot be ignored in the circumstances of the case, and if that is so, the Fund can rightly be subjected to tax on its profits, though realised from its members.

It is necessary to examine the principle that has been enunciated in the several previous decisions. The earliest case is that of the *Mylapore Hindu Permanent Fund*[1], decided by our High Court. That fund was also registered under the Indian Companies Act. It started with 11,904 shares and increased it to nearly ten times that number. A shareholder subscribed one rupee per share per month and at the end of seven years during which he had so subscribed Rs. 84, the fund paid Rs. 102-8-0 when he ceased to be a shareholder. The amount of Rs. 18-8-0 so earned by a shareholder was the guaranteed rate of interest. A defaulting shareholder, that is one who did not pay monthly subscriptions in time, had to pay default interest. The Fund also granted loans to be shareholders, apparently from out of the amount realised by way of subscription. Such amounts as were not immediately required were invested on fixed or current deposits in outside institutions such as public banks and earned interest. The excess of interest earned by the Fund over the expenses of the institution and the interest earned by the shareholders was regarded as the profits of the Fund, which were utilised for (i) the Reserve Fund, (ii) payment to directors subject to a certain maximum and (iii) distribution among the shareholders with reference to the number of shares and the number of months during which they held them. The learned Judges found that the earnings of the Fund consisted chiefly of interest from the shareholders either on loans or on overdue subscriptions and occasionally interest from outside investments, and that so far as the latter was concerned, it was liable to income-tax. With regard to the first item of earnings, it was decided that the principle of the *Styles' case*[2], should apply. That principle was explained to be that

> " income to be taxable must come in from outside and not from within. The fact that the Fund is a legal entity for certain purposes does not matter, for, in the language of Lord Watson 'it represents the aggregate of its members', and the members are the participators of its profits and ' I do not think that their complete indentity can be destroyed or even imparied by their incorporation. "

The learned Judges went on to hold further in " *Styles' case*[2] as in the case before us the persons dealt with and the participators are identitical." The conclusion was accordingly "that all earnings of the Fund from within are governed by the *Styles' case*[2] not liable to be taxed."

Another Full Bench of this Court in deciding the *Commissioner of Income-tax v. The Madura Hindu Permanent Fund*[3], was inclined to the view that the *Styles' case*[2] did not govern either the *Mylapore Fund case*[1] or the *English and Scottish Co-operative*

1. (1923) I.L.R. 47 Mad. 1 : 1 I.T.C. 217.
2. (1889) L.R. 14 A.C. 381.
3. I.L.R. 56 Mad. 413 : 6 I.T.C. 326.

Wholesale Society v. *Commissioner of Income-tax*, *Madras*[1]. The learned Judges did not however go to the extent of saying that those cases were wrongly decided, but contented themselves with observing

"I think that it is hardly right to say that the *New York Life Insurance Co.* v. *Styles*[2] governed either of the two cases referred to—and it does not govern this case—although the observations made by their Lordships in their judgment certainly support the result arrived at in both. I am not disposed to say therefore that those two cases were wrongly decided although, in my opinion, *The New York Life Insurance Co.* v. *Styles*[2] does not govern them."

Though the answer to the specific question that was before them "Are the facts of this case such that the ruling in the *New York Life Insurance Company* v. *Styles*[2], can be applied to them?" was couched in the above from, relief was given to the assessee on the ground that "the guaranteed interest on capital borrowed for the purpose of the Fund's business and that its payment is not in any way dependent on the earning of profit", and that it was deductible under section 10 (2) (*iii*) of the Act.

Notwithstanding the doubts cast on the applicability of the *Styles' case*[2], to Funds of this kind in the *Madura Permanent Fund case*[3], the principle of the *Styles' case*[2], was held applicable in the *Sivaganga Sri Meenakshi Swadeshi Saswatha Nidhi, Ltd.* v. *Commissioner of Income-tax*[4], to that fund, which was precisely of the same constitution and carried on the same business as the Mylapore and Madura Permanent Funds. The judgment is a very short one and gives no grounds. In the statement of the case submitted by the Commissioner the ground was taken that the earlier *Madura Hindu Permanent Fund decision*[3] decided that the *Styles cese*[2], did not govern the Madura Hindu Permanent Fund or the Mylapore Hindu Permanent Fund and that the *Mylapore Hindu Permanent Fund decision*[5], was not followed in the *Madura Fund decision*[3]. But the Full Bench which included two of the Judges who had participated in the *Madura case*[3]) held that the decision in the *Mylapore Hindu Permanent Fund case*[5], applied.

The question was again considered by another Full Bench in *Tanjore Permanent Fund, Ltd* v. *Commissioner of Income-tax*[6]. Here also the Fund was a company incorporated under the Indian Companies Act. It had a share capital, the amount of each share being payable in monthly instalments of Re. 1 the share account being closed on the expiry of 45 months by the member or share-holder being paid Rs. 50. Deposits were accepted from the shareholders on which interest was allowed to them. The collections of the Fund were lent to the shareholders at specified rates of interest. The Fund did no business with anyone other that its shareholders. On the question whether the profit derived by the Fund from the shareholders was assessable to tax, the Full Bench held that the *Mylapore Hindu Permanent Fund case*[5], applied that the Fund, though registered as a company, was not really a company but a mutual benefit society with a fluctuating capital, and that the income in question was not assessable. The importance of this decision consists in the fact, that it was held that there was no real conflict between the decisions in the *Mylapore Hindu Permanent Fund case*[5], *Madura Hindu Permanent Fund case*[3], for the reason that the latter case dealt with a different question altogether, namely, whether the guaranteed interest paid to the shareholders was an allowable deduction as interest on capital. Inferentially therefore if follows that the principle of the *Styles' case*[2], was held to govern cases of this kind.

The question whether a Fund of a similar nature was a banking concern or a mutual benefit society again came for consideration in *Trichinopoly T. H. P. Fund* v. *Commissioner of Income-tax, Madras*[7]. This case is of more importance. Though in outward form the features of that Fund were almost similar to those of the Mylapore Hindu Permanent Fund, it appeared that the rules of the Fund provided for the grant of loans to non-members as well. The learned Judges observed in dealing with the facts :

1. (1929) 3 I.T.C. 385.
2. (1889) L.R. 14 A.C. 381.
3. I.L.R. 56 Mad. 413 : 6 I.T.C. 326.
4. 8 I.T.C. 83.
5. (1923) I.L.R. 47 Mad. 1: 1 I.T.C. 217.
6. (1937) 5 I.T.R. 160.
7. I.L.R. (1938) Mad. 183 : (1937) 5 I.T.R. 703 (F.B.).

" The Trichinopoly Tennore Hindu Permanent Fund, Ltd., however, differs in material respects from the Mylapore Hindu Permanent Fund, Ltd. The company obtained, as I have already mentioned, considerable income from loans to non-members. No doubt it now only gives loan to persons who become ' members ' but it is said that the membership is in many cases merely nominal and that the company carries on in reality the same business as it did before the memorandum and the articles of association were altered. It appears to us that there is much substance in this contention.

A person who wants a loan can obtain one from this company if he pays one rupee for a share and he is entitled to have that one rupee paid back to him at the end of two years. The nominal members, those who had taken one rupee shares, invested practically nothing and consequently nothing was paid to them out of the profits either by way of dividend or in reduction of interest. By borrowing from the company they made for the company large profits, in which they were not allowed to share. In the circumstances it is impossible for the company to contend that it is a mutual benefit society and its income is not taxable."

It appears from the facts set out in the judgment, and in the statement of the case that, while the company had a large number of permanent shareholders with a share capital of Rs. 9,90,000, in order to effectuate the dealings with non-members, the company created what may be broadly described as non-permanent shares. A person who was not a shareholder but wanted a loan from the company became a nominal shareholder paying one rupee. This amount he was entitled to withdraw at the end of two years. It was therefore possible for him to cease to be even a nominal shareholder while continuing to be indebted to the fund in respect of the loan which he had taken and on which he paid interest. This was practically a dealing with a non-member, and obviously such a person did not become entitled to any distribution of the profits by way of dividend to which the permanent shareholders were entitled. The absence of any mutuality between the contributor and the participator which was an undeniable feature of the transaction led to the conclusion, that it was not a mutual benefit society with consequent immunity from tax.

From a consideration of the above decisions it is clear that the principle of the *Styles' case*[1], has been repeatedly held to apply to funds which are similar in their constitution and operations to those in the present case. But the case of the Department is nevertheless that the activities of the assessee fund are tainted by commerciality, and what the members get is not a share of the common fund but a dividend on their capital, and that therefore the fund is no different from a banking concern. Since the question has been debated at length and we have been taken through a large number of English decisions which explain the *Styles' case*[1] for various viewpoints, we shall proceed to examine these decisions.

In *Equitable Life Assurance Society of United States* v. *Bishop*[2], *Styles' case*[1], was distinguished from an earlier decision referred to as *Last's case*[3]. Smith, L.J., observed :

" It seems to me that the main distinction that they (House of Lords) drew between *Styles' case*[1] and *Last's case*[3] was that in the *Styles' case*[1] it was a case of mutual insurance pure and simple, and that there was no company, as in the present case, and as there was in the *Last's case*[3]; but in reality I may phrase it in this way. The members of the Company which did exist—that is, the members of the Mutual Insurance Company—were partners *inter se* and there was no profit making at all in the concern, and that therefore that distinguished *Styles' case*[1] from *Last's case*[3]. Now why do I say this? In the first place, I find in *Styles' case*[1] it is stated in the case which was drawn up—"The Company has no shareholders and there are no shares. The Company is organised for and (except as hereinafter stated) does business solely under the plan of mutual insurance." There was no company other than the Mutual Insurance Company ; there were no directors ; there were no shares; and there were no shareholders. Lord Halsbury in *Styles' case*[1], and Lord Fitzgerald (who was one of the majority in *Last's case*[3] did not think that made any difference at all, but the other Law Lords who took part in this case and *Styles' case*[1] thought it did."

The learned Judge went on to state

"In the assets of the company these policy-holders had no property, and they had no right to any share in its management. There existed, in that case, beyond doubt, a corporation carrying on a trade from which profits or gains arose or accrued to it, the only controversy being whether, inasmuch as the corporation had agreed to permit those with whom it dealt to take a share of the profits, that part of the surplus income which was thus applied was to be regarded as expenditure for the purpose of enabling the corporation to earn profits, or as profits arising or accruing to it."

1. (1889) L.R. 14 A.C. 381.
2. (1900) 4 T.C. 147.
3. (1884) 2 T.C. 100.

It would appear from this therefore that where the company is a distinct personality, distinct from the members that compose it, the profits earned by trasnactions with persons entirely outside the company was regarded as profits earned by the company and the division of the profits among the members was not construed as anything other than expenditure enabling the earning of the profits by the company. It should be remembered, however, that though in *Styles' case*[1], there was an incorporated company, its existence was regarded as immaterial in the particular features of the case and that company had no transactions with any other than its own members.

Liverpool Corporation Trade Association, Ltd. v. *Monks*[2], to which the principle of *Styles' case*[1], was held inapplicable, has been relied upon by the Department. Rowlatt, J., in explaining *Styles' case*[1], said :

" the corporation is merely an entity which stands at the back and all it is doing is to collect from a certain body of people certain funds and hand them back to them as far as they are not wanted; to put it very crudely, that is about what it comes to. In a case like that it does not matter whether there is an incorporation or not, because there is nothing belonging to the corporation which is severable from what belongs to the aggregation of individuals—nothing. But in a case of this kind, where there is a share capital, with a chance of dividends, a chance of a right to dividends if declared, upon the share capital, and to one side of that a dealing with people who happened to be the owners of the share capital, affording benefits to those people one by one individually, for which they pay money by way of subscriptions and by way of entrance fees as a sort of overriding subscription, if I may use that word, which opens the door to subscription, there is no reason at all for saying that you are to neglect the incorporation, or that you can regard otherwise than as profits the difference which is obtained by dealings between that corporation and people who happen to be its members."

On behalf of the Department, it is argued that the features relied upon by Rowlatt, J. in holding against the appellant in that case exist in the case of the assessee-fund, in the sense that here also is a company earning profits and declaring dividends to the shareholders. But from the facts it appears that the corn trade association, besides providing for its shareholders certain facilities extended precisely the same facilities to others on payment of subscriptions. This was a prominent feature which distinguished it from *Styles' case*[1]; the question naturally arose why when what was earned by transactions of the company with non-members was undoubtedly profits, identical transactions with members should not be held to result in profit and why in those circumstances the incorporation should be ignored.

In yet another case, *Thomas* v. *Richard Evans & Co.*[3], Rowlatt, J., noticed :

"The principle laid down in the *New York Insurance Company case*[1] is that no one can make a profit out of himself. That is true, but I am not at all sure that it does not confuse us in this case. But a company can make a profit out of its members as customers, although its range of customers is limited to its shareholders. If a railway company makes a profit by carrying its shareholders, or, if a trading company, by trading with its shareholders—even if it is limited to trading with them—makes a profit, that profit belongs to the shareholders, in a sense, but it belongs to them qua shareholders. It does not come back to them as purchasers or customers. It comes back to them as shareholders, upon their shares. Where all that a company does is to collect money from a certain number of people—it does not matter whether they are called members of the company, or participating policy holders—and apply it for the benefit of those same people, not as shareholders in the company, but as the people who subscribed it, then, as I understand the *New York case*[1], there is no profit, If the people were to do the thing for themselves, there would be no profit, the fact that they incorporate a legal entity to do it for them makes no difference, there is still no profits. This is not because the entity of the company is to be disregarded, it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of share-holders, but in the character of those who have paid it. That, as I understand it, is the effect of the decision in the *New York case*.[1]"

The broad principle was there laid down that, if the interest in the money does not go beyond the people or the class of people who subscribed it, then just as there is no profit earned by people subscribing if they do the thing themselves so there is none if they get a company to do it for them.

Dealing with *Styles' case*[1], and laying down the tests of mutuality Lord Macmillan said in *Municipal Mutual Insurance, Ltd.* v. *Hills*[4] :

1. (1889) L.R. 14 A.C. 381.
2. (1926) 10 T.C. 442.
3. L.R. (1927) 1 K.B. 33 : 11 T.C. 790 at 2.
4. (1932) 16 T.C. 430.

" As the common fund is composed of sums provided by the contributors out of their own moneys, any surplus arising after satisfying claims obviously remains their own money. Such a surplus resulting merely from miscalculation or unexpected immunity cannot in any sense be regarded as taxable profit. This was clearly laid down in the case of *New York Life Insurane Co.* v. *Styles*[1] and is now beyond dispute.

The cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund ; in other words, there must be complete identity between the contributors and the participators. If the requirement is satisfied, the particular form which the association takes is immaterial.

Now this cannot be predicted of the employers' liability insurance and the miscellaneous insurance business conducted by the appellant company. The common funds created to meet employers' liability claims and miscellaneous claims are contributed by those who have taken out policies against these risks respectively, and these contributors include both persons who have and persons who have not taken out fire policies, but the surpluses arising redound, not to the benefit of all the contributors to the common funds, but to the benefit only of those contributors who happen also to be holders of fire policies. Certain of the contributors to those common funds thus benefit at the expense of the other contributors. This is, in my opinion, sufficient to negative the contention that either the employers' liability business or the miscellaneous business of the Appellant Company is conducted on a mutual basis.

In the *National Association of Local Government Officers* v. *Matkins*[2], Finlay, J., observed in connection with the *Styles' case*[1] :

" The fundamental point there was that people cannot trade with themselves. There was no outside trade ; it was simply the return to a subscriber of an amount in excess of what was necessary. That is the principle of the *New York Insurance Company case*[1] and, though I repeat there was a company there, that was held by the Lords to be really an immaterial circumstance. I think that distinguies the case at once from the class of cases more than once referred to in later cases."

All these cases came to be considered by the Supreme Court in *Commissioner of Income-tax, Bombay* v. *Royal Western India Turf Club*[3]. Briefly stated the assessee in that case was a company limited by guarantee which carried on the business of a race course. The assessee provided the same or similar amenities to members and non-members, except that non-members had no access to the members' enclosure though both were charged the same admission fee. The assessee claimed that in computing its total income, receipts from members should be excluded. Their Lordships examined the several decisions in which *Styles' case*[1], has been considered and approved the observations of Lord Normal in *English & Scottish Joint Co-operative Wholesale Society, Ltd.* v. *Commissioner of Agricultural Income-tax, Assam*[4], which were expressed thus :

" From these quotations it appears that the exemption was based on (1) the identity of the contributors to the fund and the recipients from the fund, (2) the treatment of the company, though incorporated as a mere entity for the convenience of the members and policy holders, in other words, as an instrument obedient to their mandate and (3) the impossibility that contributors should derive from contributions made by themselves to a fund which could only be expended or returned to themselves.

In dealing with the case before them, they stated :

"It is clear to us, taking the facts admitted or found in the case before us, that the principles of *Styles' case*,[1], as explained by subsequent decisions noted above, can have no application to this case. Here there is no mutual dealing between the members *inter se* in the nature of mutual insurance, no contribution to a common fund put up for payment of liabilities undertaken by each contributor to the other contributors and no refund of surplus to the contributors. There being no mutual dealing the question as to the complete identity of the contributors and the participators need not be raised or considered. Suffice it to say that in the absence, as there is in the present case, of any dealing between the members *inter se* in the nature of mutual insurance the principles laid don in *Styles' case*[1], and the cases that followed it can have no application here. The principle that no one can make a profit out of himself is true enough but may in its application easily lead to confusion. There is nothing *per se* to prevent a company from making a profit out of its own members. Thus a railway company which earns profits by carrying passengers may also make a profit by carrying its shareholders or a trading company may make a profit out of its trading with its members besides the profit it makes from the general public which deals with it but that profit belongs to the members as shareholders and does not come back to them as persons who had contributed them. Where a com-

1. (1889) L.R. 14 A.C. 381.
2. (1934) 18 T.C. 499.
3. (1953) S.C.J. 739 ; (1953) 2 M.L.J. (S.C.) 828 : (1954) S.C.R. 289 : 24 I.T.R 551.
4. I.L.R. (1949) Cal. 279 : 16 I.T.R. 270 : L.R. 75 I.A. 196 : (1948) 2 M.L.J. 242 (P.C.).

pany collects money from its members and applies it for their benefit not as shareholders but as persons who put up the fund the company makes no porfit. In such cases where there is identity in the character of those who contribute and of those who participate in the surplus, the fact of incorporation may be immaterial and the incorporated companhy may well be regarded as a mere instrument, a convenient agent for carrying out what the members might more laboriously do for themselves. But it cannot be said that incorporation which brings into being a legal entityseparate from its constituent members is to be disregarded always and that the legal entity can never make a profit out of its own members. What kinds of business other than mutual insurance may claim exemption from tax liability under section 10 (1) of the Act under the principles of *Styles' case*[1] need not be here considered ; it is clear to us that those principles cannot apply to an incorporated company which carries on the business of horse racing and realises money both from the members and from non-members for the same consideration, namely, by the giving of the same or similar facilities to all alike in course of one and the same business carried on by it."

At page 565 (24 I.T.R.) they observed :

"As already stated..........there is no dispute that the dealings of the company with non-members take place in the ordinary course of business carried on with a view to earning prpofit as in any other commercial concern........The Company gives to its members the same or similar amenities as it gives to non-members........The rest of the facitilities mentioned above which the members get are in substance the same as those enjoyed by the public. Those facilities are given to members and non-members alike for a price. The character of the charges made on members is precisely the same as or is similar to that of the charges made on non-members, for the company receives moneys from both members and non-members in return for the same or similar facilities given to both in the course of one and the same business. The dealings in both cases disclose the same profit-earning motive and are alike tainted with commerciality."

From this lengthy discussion it is apparent that two features must exist before the income of a Fund like the one in the present case can be exempt from tax. Firstly, the "profit" made by the Fund must arise from its own members and secondly there should be mutuality, in the sense that the contributors to these profits must also be participators therein. There should be, as the decisions have it, complete identity between the body of contributors and the body of participators. If these features are available, then according to the decisions, the fact that the body has been incorporated and has a juristic personality would make no difference. It should be obvious that where a large body of persons fluctuating in number join together for effectuating a common purpose, it is necessary that there should be a juristic personality competent to put through the transactions. It is impossible that all the members of the society should join in putting through each and every one of the transactions. The incorporation serves that purpose only, and notwithstanding the creation of such a personality, it does not follow that that personality is different from the body of the members, provided the other conditions set out above exist.

On behalf of the Department it has been contended that this is not a case where the principle of the *Styles' case*[1] should be invoked in favour of the assessee. The English decisions cited earlier wherein the existence of a company distinct from the body of the members was relied upon in denial of the exemption from tax have been relied upon by the learned counsel for the Department. We are unable to accept this argument. particularly in view of the numerous decisions of our High Court wherein the fact of incorporation has been disregarded in dealing with profits of mutual benefit fund associations like the one in the present case. In almost every one of the cases which came up before our High Court the fund had been incorporated under the Companies Act, shares had been issued ; there were shareholders ; the dealings in shares were controlled by the provisions of the Companies Act and dividends were declared from out of the surplus profits of the concern. Nevertheless it was found that the real purpose of the organisation being to benefit its own members and the income arising only from the members the incorporation was immaterial. That principle has been too firmly established to be questioned at the present time.

It is next necessary to examine the argument that the Fund's activities are tainted by commerciality. and that the test of mutuality is not met. It is not denied that the benefits of the association are available only to the members thereof. No non-member can participate in the benefits. The profits that arise from this mutual

1. (1889) L.R. 1 A.C. 381.

trading are the result of interest collected from members who taking advantage of the loans offered by the Fund and also of the default interest paid by members who delay payment of recurring deposits. We are at a loss to see how the taint of commerciality can attach to such mutual trading. This " profit " after the payment of interest to depositors and after meeting the other expenses of administration of the Fund are available for distribution among the entire body of the members. There is no doubt whatsoever that there is complete mutuality. But the view taken by the Department appears to be that though all the members of the Fund are entitled to share in the surplus profits it is only a part of the members who would contribute thereto ; that is to say, it is only that smaller group of members who had availed themselves of the facilities for taking loans or who would have contributed to the common fund going to make up this profit represented by the interest. Accordingly it is the contention that there is no complete identity between the contributors and the participators.

It seems to us that this view in untenable. If it is the argument that unless every member of the society makes a contribution and every member also participates therein there cannot be this complete identity. it is difficult to follow the argument. To accept that would mean that each member takes what he puts in by way of surplus. If so it is difficult to see where mutuality exists. In the *National Association of Local Government Officers* v. *Watkins*[1], a similar question appears to have arisen. That was an association of local Government officers which purchased a camp to provide cheap holiday facilities for its member. Facilities were available to non-members as well and while the sums received from non-members were brought to tax, the question arose whether the sums received from members could be regarded as profits. A subsidiary question appears to have arisen also, whether when all the members did not participate in the benefits of the association, it could still be regarded as entitled to the benefit of mutuality.

Finlay, J., observed :

" The substance of the argument of the Solicitor-General in the presnet case appeared to me to be this. He said that this, in a sense, is a club but it is very different from the ordinary case of a club. Anyhow, as regards this particular activity, the supplying of the holiday camp, he said that that cannot fall within the club principle or mutual principle, because the subscribers to it are only a certain number of members, whereas the participants are the whole of the members............ I cannot think that that is a correct way of looking at the matter............ I cannot think that you can, in the case of a club, isolate the dining room, the library, or the other various facilities which are offered by the club. The truth of the matter is, I think, that the members own the whole. The members have a right to participate in the whole. Some members will participate in some things. Some members will participate in other things, but to no members can there truly be said to be a sale. There is, I think, no trade among the members. They cannot trade with themselves,. It is upon that ground, I am afraid very imperfectly expressed, but which is fundamental and lies at the root of the thing, that I think that, so far as this camp was used by the members, no profit could accrue from its user. "

This point again came up for decision in *Ismalia Grain Merchants Association* v. *Income-tax Commissioner*[2]. Chagla, C.J., after referring to the above English decision observed in dealing with this argument :

" Now the fallacy underlying this argument is that although only a few members of the association could avail themselves of the benefit of the holiday camp and contribute to the profits, every member had a right to go to the camp and contribute to the profits. Therefore, for the purpose of mutuality it may not be necessary that contribution in fact should be made by every member, but every member should have the right to make the contribution and Mr. Justice Finlay points out at page 506 that in a club which gives various facilities some members may avail themselves of some facility and others may avail themselves of other facilities,from that it does not follow that all the facilities were not available to the members or the members could not participate in all the facilities."

What is accordingly required is that both the right to contribute and the right to participate must be available to an identical body, and it is not necessary that every member should contribute before he can be allowed to participate. That this test is also satisfied in the present case is beyond question.

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1. (1934) 18 T.C. 499. 2. A.I.R. 1958 Bom. 32.

We have examined the balance-sheets of the Fund for the relevant years in order to discover whether the dominant intention of the Fund was to embark on banking business in general in order to earn profits for its members. That the Fund had no dealings with non-members is conceded by the Department. The only outside source of income is by way of investments in Government securities or deposits with banks of such of the Fund's accumulation which was not required for loans to members. The liability to tax of such outside income is not in dispute. The following figures are sufficient to establish that the Fund did not engage itself in activities designed to earn income for its members.

Assessment Year	1946–47	47–48	48–49	49–50	50–51	51–52	52–53	53–54
Interest realisations from members ..	44,259	46,104	56,042	61,397	63,395	65,814	68,804	78,977
From securities and investments ..	4,328	4,481	1,265	458	228	389	104	369

The argument of the Department that the Fund was motivated with the object of augmenting the capital by making profits finds no support from the above figures, which clearly establishes that virtually the worth of the "profits" was contributed by members alone.

It is now necessary to refer in particular to the decision of the Privy Council on the basis of which the present assessments have been made, the Department holding that the immunity which the assessee Fund enjoyed up to now was based on erroneous considerations. The appeal to the Privy Council arose from the Judgment of the Calcutta High Court. The appellant (The English and Scottish Joint Co-operative Wholesale Society, Ltd., had been incorporated in the United Kingdom under the Industrial and Provident Societies Act, 1893. It had as its object the carrying on the business of planters, growers, producers, merchants and manufacturers and brokers of tea. The Society consisted of two members and it owned a tea estate where tea was grown and manufactured. Except a small portion of the produce, the Society's output of tea was sold to its two members at market rates. Each year the members paid to the Society, by way of advances, sums of money to meet the cost of tea to be supplied and the market prices of tea supplied to them were debited against these payments. The supplies were recorded as sales to the members. Out of the proceeds from the sales, the expenses of production and management and the interest on loans were paid or provided for. Under the rules of the Society, its net profits were applied in depreciation of land, building, etc., payment of interest on share capital, appropriation to a reserve fund, etc., and payment of a dividend to members in proportion to the amount of purchases made by them. The plea was put forward by the Society that it was a mutual association whose transactions with its members were incapable of producing a profit. The Calcutta High Court found against the appellant-Society and the matter was taken in appeal to the Privy Council. It is necessary also to mention that a case under the Indian Income-tax Act in relation to this Society was decided by the Madras High Court in *English and Scottish Joint Co-operative Wholesale Society, Ltd.* v. *Commissioner of Income-tax, Madras*[1], in which it had been held that the society was a purely mutual co-operative society making no profits and was within the ruling of the *Styles' case*[2]. The Calcutta High Court refused to follow the Madras decision, Gentle, J., after considering the matter, said[3]:

"In the view which I hold, the Society is a trading concern and carried on business as growers, manufacturers and sellers of tea ; out of this business it derives profits ; the dividends which it pays to its members are a distribution amongst them of its trading profits ; and the payments of these dividends are not a return to the members of balances from the sums which they have subscribed to the Society..............The circumstance that the Society's produce is sold to its members does not affect the position and would not do so even if the Society were restrictrd to selling to its members alone."

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1. 3 I.T.C. 385 (F.B).
2. (1889) L.R. 14 A.C. 381.
3. *English and Scottish Co-operative Wholesale Society, Ltd.* v. *Commissioner of Agricultural Income-tax, Assam*, A.I.R. 1946 Cal. 261 at 265.

Obviously, in the Madras case, the opposing view had been taken. In dealing with this case, Lord Normand examined the previous decisions and after quoting the observations of Lord Macmillan in *Municipal Insurance, Ltd.* v. *Hills*[1], when dealing with the tax exemption of surplus arising in the conduct of mutual insurance, went on to hold

"The requirement (of mutuality) is not satisfied in the present case; for there is no common fund to which the members of the appellant Society contribute and in which they participate."

Earlier in the judgment, the Judicial Committee noticed that there was a complete dichotomy between the appellant-society and its members. They said :

"An argument was addressed to their Lordships by counsel for the appellant in which the advances made annually by the two members to the Society were treated as contributions by the members in cash which afterwards came back to them in kind when the tea was sold to them. This is a view of the transactions which their Lordships cannot accept. The advances were a loan to the Society for the purpose of enabling it to produce tea on its own land. When the tea was produced it was sold to the lenders and the price was set off against the amount of the loan. There was, therefore, a dual relationship between the appellant and its members ; there was a mutual creditor-debtor relationship and there was a buyer and seller relationship. There was nothing notional about either of these relationships ; they were not mere conventional machinery to give efficacy to a relationship which was in substance that of principal and agent. On the facts stated, the members genuinely made a loan to the appellant ; the appellant genuninely owned the land which it itself genuinely cultivated and it genuinely sold the tea at a genuine market price to its members."

It is obvious from the above passage that the view was taken that the Society and the two constituent members were distinct personalities, and that the Society did in fact enter into the trade on its own account though such trade was limited to the members. It quite naturally followed that in whatever form the transactions were clothed the real purport of the transactions revealed that the Society as a trading body was in receipt of profits from its trade. Both for that reason and for the reason that there was no common fund to which the members of the appellant-Society contributed and in which they participated the Privy Council held that the Society was not exempt from liability to agricultural income-tax.

Though the Privy Council appears to have cast some doubts upon the applicability of *Styles' case*[2], to other kinds of businesses than mutual insurance, they did not decide that that was not applicable to mutual benefit associations of the kind we are dealing with now. There is no doubt that that decision went on the peculiar facts of the case before the Privy Council and cannot be taken as authority for the proposition, that in all cases where a company is brought into existence by the members for the purpose of facilitating the transactions of business confined to members alone, such incorporation disentitled the members to the considerations applying to mutual benefit associations. On the other hand, we have in the present case a set of facts which establishes that the benefits conferred by the association were available only to the members thereof, and that there is a complete identity in the sense set out in *The National Association of Local Government Officers* v. *Watkins*[3], and *Ismalia Grain Merchants' Association* v. *Income-tax Commissioner*[4] between the contributors and the participators. Under these circumstances and in the light of the earlier decisions of our High Court of which the most prominent one is the *Mylapore Hindu Permanent Fund case*[5], the incorporation of the Fund is an immaterial circumstance. It should therefore follow that the surplus profits arising to the Fund by transactions with its own members are profits which arise from within and are not liable to be taxed.

A last argument was advanced by the learned counsel for the Department that in any event non-liability to income-tax should be limited only to such amount as was actually distributed to the members or was set apart for such distribution. Under the Articles of the Association the allocation of net profits is as below :

1. 20% to the Reserve Fund.
2. 10% to depreciation of immovable properties and securities.

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1. (1932) 16 T.C. 430.
2. (1889) L.R. 14 A.C. 381.
3. (1934) 18 T.C. 499.
4. A.I.R. 1958 Bom. 32.
5. (1923) 1 I.T.C. 217 : 1 I.L.R. 47 Mad. 1.

3. 5% to short realisations.
4. 5% to the Building Fund.
5. 60% for division to members (and to the dividend equalisation reserve).

The argument is that at least items 1 to 4 above will not come within the scope of division to the members and should therefore be held to be part of the common fund which is not divisible. The argument at first sight is no doubt plausible but is hardly consistent with the principle on which the exclusion is based. The total of such net profits is profits which arise from within; and though part of it is not immediately divisible, the members as a whole are entitled to the benefits thereof. The position was exactly similar in the other Fund cases to which reference has been made in which the entire net profits were held immune from tax. We are therefore unable to see how a different conclusion is possible in the present case.

In the result, we answer the question in the negative and in favour of the assessee. The assessee will get his costs Rs. 250.

This reference having been set down for being mentioned this day, the Court made the following Order :—

The Order of the Court was made by

Rajagopalan, J.—In *Ramaswami Ayyangar* v. *Commissioner of Income-tax*[1], a Bench of this Court held that in appropriate cases there can be a direction to refund to the successful assessee the initial deposit of Rs. 100 for each of the cases referred. The learned counsel for the Department pointed out that the present case, where a similar request has been preferred, can be distinguished on facts from *Ramaswami Ayyangar* v. *Commissioner of Income-tax*[1]. In the present case the Department went back upon their earlier decision in other assessment years not to treat the income as assessable income and assessed the assessee Fund with reference to eight years, to which the consolidated reference related. In view of the special circumstances of this case we think this is a fit case where the institution fee of Rs. 100 for each of the references should be ordered to be refunded to the assessee, as part of the costs to which, as successful assessee, it will be entitled to.

V.S. ——— *Reference answered against the Department.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

V. D. Kothandapani Mudaliar .. *Appellant**

v.

V. D. Seetharama Mudaliar and others .. *Respondents.*

Partition Act (IV of 1893)—Sale of property under orders of Court—Confirmation—Nature of—Inadequacy of price—Relevant factors to be considered.

The condition as to confirmation of sale held in pursuance of an order of Court under the Partition Act is intended to safeguard against irregularity or fraud in connection with the sale and against the property being sold at an inadequate price. The Court has undoubted discretion in refusing to accept the highest bid at the auction held in pursuance of its orders, should that price be deemed inadequate. But it is not in every case where a higher offer is made subsequent to the auction that a Court will be justified in refusing the highest bid at the auction. No hard and fast rule could be laid in such cases and the Court has to decide each case on its own merits. While the Court should no doubt see that an adequate price is fetched for the property sold, it is not desirable to refuse to accept the highest bid in the auction merely in the hope that some better price will be fetched if a re-sale is held. It is equally undesirable that sales held in pursuance of orders of Court should be nullified after a lapse of long time without any material to show that the previous sale was in any way objectioneble, merely because higher offers are forthcoming at that time.

Appeal against the Order of the Court of the Subordinate Judge, Chingleput, dated 16th December, 1959 and made in I.A. No. 815 of 1953 in O.S. No. 16 of 1946.

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1. R.C. No. 26 of 1957.

* A.A.O. Nol 75 of 1960. 17th November, 1960. (26th Kartika, 1882, Saka).

K. S. Naidu and *R. Vijayan*, for Appellant.

V. Seshadri and *G. Viswanathan*, for Respondent.

The Court delivered the following

JUDGMENT—In O.S. No. 16 of 1946 on the file of the Sub-Court of Chingleput, Dhanagopala Mudaliar claimed partition of the joint family properties which he held in common with his three sons, who are the appellant-respondents 1 and 2 to this appeal. Most of the properties were by consent divided and taken possession by the respective parties to the suit. One of the items which was comprised in the suit, namely, No. 24, Arunachala Mudali Street, Madras, was left undivided, evidently for the reason that it was incapable of partition by metes and bounds. The property itself was subject to a mortgage. Dhanagopla Mudaliar died in 1951, and in his place his widow the third respondent was brought on record. In I.A. No. 815 of 1953 the lower Court directed that No. 24, Arunachala Mudali Street, should be sold under the provisions of the Partition Act and the proceeds divided. The order was substantially confirmed by this Court in C.M.A. No. 254 of 1956. Under the directions given by this Court the parties were allowed to bid at the auction. The judgment further stated :

> " In the case of strangers bidding at the auction they will have to pay the price according to the rules of the Civil Procedure Code. But in the case of the claimants the payment will be postponed only after the adjudication is made with regard to the exact proportion in which they are entitled to the property. After such adjudication they will be entitled to set off to the extent of their shares in the property and will be called upon to pay the balance of the sale proceeds."

In pursuance of the order Messrs. Murray & Co., were appointed as auctioneers to sell the property. In due course the auctioneers advertised the property for sale to be held on 28th February, 1957. It is admitted that the conditions of the sale stated that the property was " sold pursuant of the order of the Court and the highest bid would be subject to acceptance by Court."

At the auction held on the 28th February, 1957, the appellant was the highest bidder. His bid was Rs. 6,750 subject to the mortgage that was subsisting on the property. The second defendant who was present at the auction and who is the main contesting respondent to this appeal signed the bid list. That would show that there was no irregularity in the conduct of the sale. The price for which the property was bid was however not paid by the appellant as the order of this Court permitted such a course, namely that the successful bidder if he happened to be a sharer need not pay the price then and there but could adjust it in the final accounts at the time of the passing of the final decree. This was for the reason that subsequent to the passing of the preliminary decree, Dhnagopala Mudaliar had died and the parties were entitled to increased shares in the property on his death and his widow also had become a party.

The appellant who was functioning as a Receiver in the partition suit was already in possession of the property. It is said that after the sale was knocked down in his favour he effected repairs to the property to the extent of Rs. 2,000. A statement to this effect is contained in his affidavit filed in support of the application for stay filed along with this appeal (C.M.P. No. 1918 of 1960). In the counter-affidavit filed by the second respondent the factum of repair has not been controverted though the extent of amount spent for the repairs is denied.

The sale was stated to be subject to the acceptance of the bid by the Court ; but nothing appears to have been done for a considerable time. None of the parties challenged the propriety of the sale for a period of nearly 2½ years. No formal application for either setting aside the sale or for not accepting the highest bid of the appellant was made to the Court. The matter however came up before Court on 16th December, 1959. On that day there appears to have been some controversy as to whether the sale should be confirmed or whether a fresh sale should be had. The learned Subordinate Judge passed a somewhat curious order in I.A. No. 815 of 1953. It will be convenient to refer to the order itself at this stage :

"The learned counsel for defendants 2 and 3 contend that there is now good prospect of the sale going for price above upset price fixed for Rs. 7,500. This is denied by first defendant's counsel. It is also urged on behalf of first defendant that if the sale goes ultimately for a sum below Rs. 6,750 for which the first defendant had bid the loss is to be borne by defendants 2 and 3 at whose instance the sale is to be held again. I consider the contention of defendants 2 and 3 (*sic*) to be reasonable in the event of the sale ultimately going for any sum less than for Rs. 6,750. Defendants 2 and 3 would be made liable for the deficiency. Hence sale would be held by Murray & Co., after due publication and as per the order of the High Court in A.A.O. No. 254 of 1956."

It will be noticed that the learned Subordinate Judge did not consider whether the sale conducted by Messrs. Murray & Co., on 28th February, 1957, should be accepted or not. A reference is made to the upset price having been fixed at Rs. 7,500. But the learned counsel appearing before me are not able to show whether at all any upset price was fixed in the case, and if so at what amount. The first defendant has appealed.

When the appeal came up before me for hearing, learned counsel appearing for respondents 2 and 3 raised a preliminary objection that the appeal was not maintainable as the appellant had impliedly agreed to re-sale. I thereupon called for affidavits to be filed as to the circumstances under which the order appealed against was passed by the learned Subordinate Judge. The affidavits filed in pursuance of my order were not however such as could be acted upon. I therefore called for a report from the lower Court as to whether the order of the lower Court was one on the basis of a consent or on contest. The lower Court has submitted a report that it decided the case on contest and not on the basis of any consent by the parties. There is therefore no substance in the preliminary objection urged on behalf of the appellant which I overrule.

Mr. K. S. Naidu, on behalf of the appellant, contended that the lower Court had no jurisdiction to refuse to accept the highest bid of the appellant after the sale was held and in the informal way in which it did. I am of opinion there is considerable force in the contention of the learned counsel for the appellant. As I pointed out earlier the learned Subordinate Judge did not even consider the circumstances under which the previous sale was held. He does not say anything about the irregularity of the sale or why the highest bid made on that occasion should not be accepted. He has proceeded to pass an order for re-sale without giving any finding whatsoever as to the validity or otherwise of the sale held on 27th February, 1957. It is however clear that the main reason which influenced him not to confirm the sale held in 1957 was the possibility of obtaining a higher price for the property.

Mr. K. S. Naidu contends that a sale under the Partition Act is a sale by Court and the provisions of Order 21, Civil Procedure Code, will apply to it and that in the absence of an application to set aside a sale and in the absence of proof of the relevant facts requisite for setting aside a sale as contained in rules 89 to 91 of Order 21 there would be no power in the Court to ignore the previous sale and direct a re-sale. I cannot however accept the argument as entirely correct. Sales under the Partition Act are governed by rules framed under that Act. Rule 9 of the Rules framed under the Partition Act states thus :

"If, under the Partition Act, 1893, or otherwise, the sale of any property is ordered, an order for sale shall be made, and the subsequent proceedings shall be conducted in manner prescribed by rules 193 to 205 of Chapter IX, Part I, supra, of the Civil Rules of Practice and Circular Orders, Vol. I, as far as the same are applicable............"

Rule 201 of Chapter IX is the relevant rule. That relates only to sales held under Order 21, rules 89 to 91, Civil Procedure Code, and cannot govern a case like the present one. The validity of a sale held under the Partition Act would be governed by the terms of the order directing the sale and the conditions subject to which the property is sold. In the present case the highest bid at the sale was subject to confirmation by Court. A confirmation is not a mere formality. The Court will have to examine whether the sale held was fair and just. In considering whether a sale should be confirmed or not the Court will not be hampered by the limitaions and conditions contained in Order 21, rules 89 to 91. But at the same time it would not be entitled to refuse to accept the bid for purely speculative or insufficient reasons.

In *Soundararajan* v. *Mohomed Ismail*[1], a Bench of this Court held :

> "The fact that the sale is subject to the confirmation of the Court does not mean that the Court shall refuse to accept the highest bid because at a later stage some one else is willing to pay more. The condition is only a safeguard against irregularity or fraud in connection with the sale and against property being sold at an inadequate price and an auction-purchaser making an adequate bid and complying with all the requirements of the Court and there being no irregularity or fraud is entitled to have the sale confirmed even though at a later stage, some other person is willing to pay more."

This question was again considered by my Lord the Chief Justice sitting with Venkatarama Ayyar, J., in *Subbarau* v. *Sundararajan*[2]. The learned Judges observed:

> "It will, therefore, be not only proper but necessary that the Court, in exercising the discretion, which it undoubtedly has, of accepting or refusing to accept the highest bid at the auction in pursuance of its orders, should see that the price fetched at the acution is an adequate price."

What the Court, therefore, has to see is whether the highest bid made at the sale was adequate and proper. For coming to a decision as to whether that price is proper or not it can certainly take into account offers made before it ;and if there were infirmities attending the notice, proclamation or publication of the sale it can legitimately infer that if the sale had been properly advertised higher offers would have come. But it is not in every case where a higher offer is made in Court, that it would be entitled to ignore the sale. To accept any such principle would destroy the utility of auction sales and would really be subversive of sound practice : persons will not come forward to bid at auction sales if there were no guarantee that the highest bid would be ultimately accepted and that sales conducted in public auction would not be liable to be set aside merely because some other person offers more at the time when the matter comes up for the order of the Court. That will be neither fair nor just to the purchaser. No hard and fast rule can be laid for such cases; the Court has to decide in each case whether in the circumstances of the case the price was not a proper one.

In the present case there is no evidence that the property was worth more at the time when it was put for auction. No doubt 2½ years after the sale the other parties might have thought either by reasons of the repairs effected to the property by the appellant or by reason of the general rise in the value of the house property in Madras that the property was worth more. That surely is not a circumstance which should influence a Court which has got to judge the validity of the sale as on the date it was held. The learned Subordinate Judge had no tangible evidence before him to show that the price for which the property was bid in 1957 was inadequate or was in any way less than the market price ; it was nobody's case that there was any fraud or irregularity in the conduct of sale. The learned Subordinate Judge has in effect proceeded to direct a re-sale on a mere possibility of getting a higher price. I say 'possibility' because the parties themselves appear to have thought that the price that might be obtained at the fresh auction might not even go up to the price that was offered by the appellant on the former occasion, and provided safeguards for respondents 2 and 3 bearing the loss in case there was a deficiency. It is undesirable that the Court should refuse to accept the highest bid in an auction sale held under its orders merely in the hope that some better price might be obtained if the property were to be sold afresh. It is equally undesirable that sales held under orders of Court should be nullified years afterwards without there being any material to show that the previous sale was in any way objectionable. I am of opinion that the order of the learned Subordinate Judge cannot be supported.

The order is set aside. The sale in favour of the first defendant held on 27th February, 1957, will stand confirmed. The appellant will be entitled to his costs from the respondents.

R.M. — *Appeal allowed.*

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1. A.I.R. 1940 Mad. 42.
2. (1951) 2 M.L.J. 353 : I.L.R. (1952) Mad. 502 at 507.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VEERASWAMI.

N.E. Sankarasubbu Pillai .. *Appellant**

v.

K. Parvathi Ammal and others .. *Respondents.*

Co-owners—Nature of ownership—Building put up by one co-owner on the joint land—When could be directed to be demolished.

Injunction—Co-owner putting superstructure on joint land—Mandatory injunction to demolish—When could issue.

In the case of co-owners no one can claim an exclusive right to any particular part of the property owned in common and an encroachment by a co-owner by building upon a portion of the common property cannot be equated to trespass. Unless such an encroachment is shown to have been objected to by the other co-owners at the earliest time and is also shown to cause material and substantial injury to the other co-owners which cannot be otherwise compensated, a mandatory injunction to demolish the building will not be issued. A purchaser from a complaining co-owner cannot claim any better right.

Appeal against the Decree of the Court of the Subordinate Judge of Tirunelveli, in Appeal Suit No. 24 of 1950, preferred against the Decree of the Court of the District Munsif, Tirunelveli, in Original Suit No. 275 of 1948.

R. Ramamurthi Ayyar and *M. D. K. Vallinayakam*, for Appellant.

P. S. Chandrasekara Ayyar and *P. S. Ramachandran*, for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal by defendant 7 arises out of a suit instituted by the late husband of the first respondent for a mandatory injunction directing him to remove an encroachment consisting of a portion of a pucca building and a compound wall on a part of the land in T. S. No. 1551 and for other reliefs. The plaintiff claimed he had in June, 1947, purchased the land covered by T.S. Nos. 1552 and 1553 and was, therefore, entitled in common with defendants 1 to 6 to the exclusive use of the lane. He further maintained that defendant 7 had wrongfully encroached upon a part of the lane and was bound to remove the offending structure. Defendant 7 alone resisted the suit, defendants 1 to 6 remaining *ex parte*. He denied the encroachment and the plaintiff's right to the lane. He also pleaded that in any case there was no case to direct removal of the encroachment.

The following facts as found by the Courts below are no longer in dispute before me. The encroachment was true but the compound wall occupied only a width of 5 inches on a margin of the lane while the encroachment by the building covered a little longer space on the same margin of the lane. The land comprised in T. S. No. 1551 belonged to the plaintiff as well as defendants 1 to 7 in common. The encroachment had come into existence even before June, 1947 and neither the plaintiff's vendor nor defendants 1 to 6 appeared to have objected to it. The encroachment did not cause material or substantial injury or inconvenience to the co-owners in the use of the lane as a passage. On these findings the trial Court dismissed the suit. The lower appellate Court agreed with it so far as the compound wall was concerned as it encroached upon a width of only 5 inches. But it disagreed with the trial Court and ordered removal of the encroachment by a part of the building on the ground that it occupied a wider space on the lane. Hence this Second Appeal by defendant 7.

The question, therefore, is whether the lower appellate Court was justified in granting a mandatory injunction to the extent mentioned above. Sri R. Ramamurthi Ayyar, the learned counsel for the appellant, contended that this is not a case of a trespasser putting up a construction upon the land of another, but a case of a co-owner exceeding his rights, if at all, in putting up a construction over a portion

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* S.A. No. 292 of 1959. 8th December, 1960.
(17th Agrahayana, 1882, Saka).

of the land owned in common. He argued that in such cases, unless it was established by the co-owners aggrieved against the encroachment by another co-owner of a portion of the common property that the encroachment caused material and substantial injury to them in relation to their right to use the lane as a common passage and that the encroachment, when it was being built, was objected to by the complaining co-owners, no mandatory injunction could be granted for the demolition of the encroachment. In support of his contention the learned counsel cited a number of authorities. But it is not necessary to refer to all of them.

A Division Bench of the Patna High Court in *Krishna Kumar* v. *Padum Singh*[1], held that the plaintiff who complained of the building of a permanent structure on the joint property by his co-owner, could not obtain a decree for its demolition or for joint possession, unless he established that he had sustained some substantial injury by reason of the act and that he took reasonable steps in time to prevent the erection. In that case the defendant who was a co-owner had put up a substantial structure on a portion of what was admittedly a joint property. As the plaintiff there failed to establish those elements, mandatory injunction to remove the encroachment was refused. In so doing, the learned Judges, after referring to a number of decided cases, quoted from and relied on *Ananda Chandra* v. *Parbati Nath*[2], as laying down the correct principles of law applicable to such cases :

> "I am not prepared to hold that an exclusive appropriation by one co-owner of a part of the joint land to his own use by the erection of a permanent structure, is necessarily evidence of an ouster........ The rule is well-settled that the plaintiff who complains of the Act of his co-owner, cannot obtain a decree for demolition of buildings or for joint possession unless he can establish that he has sustained some substnatial injury by reason of the act of which he complains. See *Shamugger Jute Factory Co., Ltd.* v. *Rama Narain*[3]; *Joy Chunder* v. *Bippro Churn*[4]; *Atarjan* v. *Ashak*[5]; *Madan Mohan* v. *Rajab Ali*[6]; *Soshi Bhusan* v. *Ganesh Chundder*[7] and *Fasilatunnessa* v. *Ijaraz Hassan*[8]. These cases show that the Court will not interfere, unless it is proved that the injury has accrued to the plaintiff by reason of the erection of the building, and that he took reasonable steps in time to prevent the erection."

Reference was also made in the Patna case to the following passage in the Tagore Law Lectures of 1895-96 on the Law of Joint Property and Partition in British India by R. C. Mitra:

> "The result of the above discussion is, that in no case should the Courts, at the nstance of a co-sharer, order demolition of pucca buildings on a joint land, after the same have been erected by another co-sharer, unless it be shown (1) that injury would otherwise accrue to the co-sharer-plaintiff and (2) that before the buildings were started objection was taken to their erection ; *Nocurry Lall* v. *Brindabun Chunder*[9]. In short it is only where a co-sharer cannot be adequately compensated otherwise than by the demolition of a building that a Court of Equity should order such demolition."

The Principles of law as expounded in the above extracts were accepted by the Patna High Court as those governing the grant of a mandatory injunction in circumstances such as in this case. In *Akshay Kumar Shaha* v. *Bhajagobindo Shaha*[10] and *Manilal* v. *Nanubai*[11], which were also cases of encroachment, actual or threatened, by co-owners upon joint property and for either a mandatory injunction, for demolition or an injunction to prevent the proposed encroachment, the principles as stated above, were recognised as settled law applicable to such cases. With due respect, I adopt these principles as sound and equitable.

In the case of co-owners, no one of them can claim an exclusive right to any particular part of the property owned in common. Manifestly, therefore, a co-owner who has encroached upon a portion of the common property cannot be regarded in the same way as a trespasser would be. So then, it seems to me that when a co-owner has encroached upon a portion of the common property, unless the encroachment is shown to have been objected to by the other co-owners at the earliest time and also shown to cause material and substantial injury to the other co-owners, it cannot be viewed as just and equitable to grant a mandatory injunction to remove the encroach-

1. A.I.R. 1950 Pat. 511.
2. 4 Cal.L.J. 198.
3. (1886) I.L.R. 14 Cal. 189.
4. (1886) I.L.R. 14 Cal. 236.
5. (1900) 4 C.W.N. 788.
6. (1900) I.L.R. 28 Cal. 223.
7. (1902) I.L.R. 29 Cal. 500.
8. (1903) I.L.R. 30 Cal. 901.
9. (1882) I.L.R. 8 Cal. 708.
10. (1929) I.L.R. 57 Cal. 92.
11. A.I.R. 1947 Bom. 394.

ment. I think that a co-owner who watches with silence the progress and completion by another co-owner of a substantial building which is an encroachment upon the land owned in common comes to Court, in the absence of justifying reasons, too late for an injunction for its removal. A purchaser from such a complainant co-owner of his interest in the common property can obviously claim no better right. In this case the plaintiff's vendor does not appear to have objected to the raising and completion of the offending structures. Neither has it been proved that it caused material or substantial injury to the plaintiff. Actually the finding is that it does not. This finding is also supported by the fact that the other co-owners, defendants 1 to 6, have not raised any objection at any time. The only ground on which the lower appellate Court took a different view in respect of the encroachment marked A, B, C, F in the plaint plan was that it occupied a wider space than the compound wall. I fail to see how that fact by itself made a difference to the principles applicable to the case.

In the above circumstances the Second Appeal is allowed. The judgment and decree of the lower appellate Court, in so far as they are against the appellant, are set aside. The decree of the trial Court dismissing the suit is restored. But there will be no order as to costs throughout.

No leave.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR AND MR. JUSTICE JAGADISAN.

Ethiraja Mudali and others .. *Appellants**

v.

Muthu Reddi *alias* Muthukrishna Reddi and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 105 (2)—Order remanding the case and dismissing appeal—Scope—Finality of directions given.

Where the High Court in an appeal against an order of remand dismissed the appeal and remitted the case to the Trial Court for fresh disposal with certain directions,

Held, that (1) the directions together with the final order dismissing the appeal formed an integral whole and they cannot be dissected and have become final ; and

(2) when an appellate Court remands a case to the trial Court for fresh disposal, it can give directions as to the manner in which the suit when it goes back should be dealt with.

Jainul Abideen v. *Habibulla,* A.I.R. 1928 Mad. 430 and *The Secretary of State for India* v. *Jagannadham,* (1941) 2 M.L.J. 47, distinguished.

[The directions in the instant case as regards the applicability of Madras Act IV of 1938 given in the order dismissing an appeal against an order of remand having become final cannot be re-agitated.]

Appeal against the Decree of the District Court of Chingleput in Appeal Suit No. 220 of 1955, preferred against the Decree of the Court of the District Munsif of Chingelput in Original Suit No. 520 of 1946.

A. K. Muthuswami and *S. Vaidyanathan,* for Appellants.

C. R. Krishna Rao, for Respondents.

The Judgment of the Court was delivered by

Balakrishna Ayyar, J.—On 4th December, 1922, four brothers executed Exhibit A-1, a deed of mortgage for Rs. 3,000 in favour of one Govinda Reddi. The consideration for it according to the recitals in the document, was thus made up—(*a*) Rs. 350 being the balance due on an earlier mortgage executed on 25th November, 1907, by the father of the mortgagors in favour of Govinda Reddi; (*b*) Rs. 382 being the balance due on a mortgage executed by the father of the mortgagors in favour

* S.A. No. 1089 of 1956. 30th March, 1960.
(10th day of Chaitra, 1882-Saka.)

of one Doraisami Pillai, of which Govinda Reddi had taken an assignment; (*c*) Rs. 404 due on a promissory note executed by the father and mother of the mortgagors in favour of Govinda Reddi; and (*d*) Rs. 1,955 being the balance due on a promissory note executed by one Thiruvengada Mudaliar, a brother of the mortgagors and their father in favour of Govinda Reddi on 31st July, 1919. The document also contained a recital making it plain that the brothers had divided among themselves on 1st December, 1922, for it says

"The kurchit for the partition effected by us on 1st December, 1922 and the cancelled document and promissory notes aforesaid have been delivered to you as security."

Though the document recited that the liability was joint, the parties proceeded on the footing that each of the brothers was liable to pay one-fourth of the debt. Two of the brothers, Kannappa Mudaliar and Ramanatha Mudaliar, paid their fractions of the debt in full and appropriate endorsements were made on the mortgage bond—*vide* Exhibits A-3 and A-4. The former endorsement ends thus: "The amount due by Kannappa Mudaliar under this bond has become zero." A-4 is in the following terms: "On 15th August, 1932, ¼th of the entire balance under this bond, namely Rs. 1,568 (Rupees one thousand five hundred and sixty eight only) by Ramanatha Mudaliar". Govinda Reddi, the mortgagee, died, and on 31st October, 1946, his heirs, three in number, filed O.S. No. 520 of 1946 on the file of the District Munsif, Chingleput, to recover the balance due under the mortgage.

There were seven defendants in the suit. The first defendant was the second of the four mortgagors as recited in Exhibit A-1. Defendants 3 to 5 are his sons. The second defendant was the fourth of the mortgagors. The sixth defendant is his son. The seventh defendant is an alienee from the second defendant.

The defendants contended that they were entitled to have the debt scaled down in accordance with the provisions of Act IV of 1938. On this point the District Munsif observed:

"Believing P.W. 1 and relying on the recitals in Exhibit A-1, I find that there was a partition between the mortgagors and their brother Thiruvenkata Mudali about a few days prior to Exhibit A-1 and that the mortgagors executed Exhibit A-1 to discharge the debts allotted to them in the partition."

The District Munsif further observed:

"But it is clear from what I have stated above that there is no scope for the defendants to invoke *Explanation* to section 8 of Madras Act IV of 1938 and to treat the suit debt as a renewal of the prior debts mentioned in Exhibit A-1".

On this basis the suit was decreed with costs. The defendants appealed to the District Judge, Chingleput, in A.S. No. 15 of 1949. During the pendency of that appeal, *i.e.*, to say on 12th January, 1949, Madras Act XXIII of 1949 came into force and on 1st August, 1949, the defendants filed Application No. 286 of 1949 praying that the benefits of that Act might be accorded to them and the decree of the lower Court modified accordingly. On 16th November, 1949, the learned District Judge pronounced judgment holding that Act XXIII of 1949 was applicable to the case and in view of that directed:

"In the result, both the appeal and the I.A. are allowed and the decree and judgment of the lower Court are set aside and both matters are remitted for fresh disposal according to law."

Against the order of remand the plaintiffs appealed to this Court in C. M. A. No. 214 of 1951.

During the pendency of this appeal Madras Act XXIV of 1950 was passed and the respondents to the appeal, that is to say, the original defendants, filed C.M.P. No. 9676 of 1953 praying for reliefs under that Act. On 4th December, 1953, Mack, J., disposed of the petition and the appeal by a common order. He observed:

"There has been argument before me as to the method and the starting point for scaling down under the Act as it now stands............It is true that strictly under the mortgage Exhibit A-1 there is one principal to discharge which these four brothers are jointly and severally liable. The endosements however on the mortgage bear out the plaintiffs' case that the brothers regarded themselves separately liable under an understanding effected at the time of the mortgage to the extent of

one-quarter of the principal in the mortgage and that it was on that footing that two of the brothers discharged their debt, and the plaintiffs acknowledged their discharge exonerating them from further liability. It was on this footing also that the suit was instituted only against the two defendants. Mr. Muthuswami Iyer for the debtors claims a right to enforce the damdupet principle in this case tracing all the debts back to their original principal as family debts and also to take advantage of all the payments made by their two borthers in discharge of their quotas of liability. I have no hesitation in finding that he cannot do so under either *Explanation* 3 or *Explanation* 4. The only scaling down which is at all practicable and possible on the facts of this case is from 1922. The defendants will be entitled to have interest wiped out on their portions of liability, *i.e.*, respective principals of Rs. 750 and scaling down on this basis in accordance with the Act. If the position of Mr. Muthuswami Iyer is conceded, it would be merely putting a premium on debtors who have deferred payment indefinitely and giving them an undue advantage over other joint debtors who have even long prior to Act IV of 1938 discharged their quotas of liability in full. The appeal is with these observations dismissed and the case will be remitted to the trial Court for scaling down in accordance with these observations."

In pursuance of this order of remand the matter went back to the Distict Munsif's Court at Chingleput. On 13th May, 1955, the District Munsif passed a preliminary decree for sale as prayed for with costs. The defendants again appealed to the District Judge in A.S. No. 220 of 1955. On 22nd June, 1956, the learned District Judge dismissed the appeal. The defendants then filed the present Second Appeal No. 1089 of 1956.

On 18th November, 1958, Ramaswami, J., before whom the appeal came on for hearing, referred the matter to a Bench. That is how the case now comes up before us.

Both the District Munsif and the District Judge were bound by the directions which Mack, J., had given, and in the memorandum of appeal to this Court no complaint is made that either of the Courts below had failed to conform to the directions which Mack, J., had given. Mr. Muthuswami Iyer the learned counsel for the appellants, however, contended that a distinction must be made between the directions which Mack, J., had given as regards the manner in which the debt should be scaled down and his final decision dismissing the appeal. According to Muthuswami Iyer, it is only the order dismissing the appeal that has become final. The directions which Mack, J., gave regarding the manner in which the debt should be scaled down have not become final, and it is therefore open to him to show that those directions are erroneous. He considered that the decisions in *Jainul Abideen* v. *Habibulla*[1], and in *The Secretary of State for India* v. *Jagannadham*[2], supported his contention. The facts in the former case were as follows. A Mohamedan had mortgaged some properties and the deed contained a covenant for per-emption in favour of the mortgagee. Subsequently he transferred the properties to his wife for a consideration of Rs. 700 which was the mahar debt due to her. The mortgagee brought an action to enforce the covenant for pre-emption in his favour. He also pleaded that the wife had notice of the covenant for pre-emption in his favour. The District Munsif took the view that the covenant for pre-emption was valid but that the transfer to the wife was not a sale but a *hiba-bil-iwaz* and as the husband had not "sold" the properties he dismissed the suit. In that view the District Munsif considered it unnecessary to record a finding on the question whether the wife took the conveyance in her favour with knowledge of the agreement in favour of the plaintiff. In appeal the Subordinate Judge held that the conveyance to the wife was a sale and not a gift and that in consequence the plaintiff would have a right to enforce his right of pre-emption against her if she had purchased with knowledge of that agreement. As that question had not been decided by the District Munsif the Subordinate Judge set aside the decree of the District Munsif and remanded the suit for fresh disposal. The matter was then brought before this Court. Here the scope of an order of remand was examined and the following observations were made. Referring to section 105, sub-section (2) as it then stood, the learned Judges observed :

"We think that this provision confines the scope of the appeal to the question of the correctness of the order of remand, which may be impeached either on the ground that the remand itself was

1. A.I.R. 1928 Mad. 430. 2. (1941) 2 M.L.J. 47.

illegal as the decision of the first Court was not on a preliminary point or on the ground that the decision of the preliminary point by the appellate Court is erroneous. No other questions can be raised in this appeal, whatever bearing they may have upon the merits of the appellants' case. That this is the right view to take will appear if the question is looked at in another way."

This Court agreed with the learned Subordinate Judge that the transfer was a sale and taking the view that further questions remained to be tried by the Court of first instance, namely, whether the second defendant had taken the sale-deed from the first defendant with notice of the plaintiff's right and what the market value of the property was at the time of the sale to the second defendant remanded the suit for disposal.

The facts in the second case were as follows. The Examiner of Local Fund Accounts surcharged one Jagannadham, the President of the Union Board of Dharmavaram, in a sum of Rs. 455-8-0 on the ground that he had failed to collect arrears of house tax for a certain period. Jagannadham appealed to the State Government which reduced the amount of the surcharge to Rs. 389-8-0. Jagannadham paid this amount under protest but later on he filed a suit in the Court of the District Munsif of Chodavaram to recover this amount. His case was that it would have been unlawful for him to collect the arrears of tax, because, according to him, the notification under which the tax was levied was invalid. The Secretary of State, who was the defendant in the suit, contended that the Court had no jurisdiction to try the suit. The District Munsif overruled that contention and upheld the plea of Jagannadham that the notification was invalid. The Secretary of State appealed to the Subordinate Judge of Vizagapatam. The Subordinate Judge agreed with the District Munsif but remanded the case to the District Munsif to decide whether the tax could be deemed to be lawfully levied under an earlier notification. On remand the District Munsif held that the earlier notification also was invalid and accordingly passed a fresh decree. There was another appeal to the Subordinate Judge, who agreed with the District Munsif that the earlier notification was also invalid. The Secretary of State came up in appeal to this Court and the point whether the civil Court had jurisdiction to try the suit was raised. It was then objected that as there had been no appeal against the order of remand passed by the Additional Subordinate Judge in the first instance, the point could not be raised. This Court overruled the objection and held that the question could be gone into. It will be noticed that there is no point of resemblance between the facts in either of those two cases and those in the present case. There can be no doubt that when an appellate Court remands a case to the trial Court for fresh disposal it can give directions as to the manner in which the suit when it goes back should be dealt with. What Mack, J., decided was that the debtors were entitled to the benefit of Madras Act IV of 1938 and that the benefit should be computed on a certain basis. The order dismissing the appeal was consequential on this and the two formed an intergral whole. That was not the position in either of the two cases which Mr. Muthuswami Iyer cited before us. We are not prepared to accept the contention of Mr. Muthuswami Iyer that the scope of an order made in an appeal against an order of remand is so limited that the appellate Court cannot give directions to the trial Court as to the manner in which it should deal with the suit when it goes back to it. We would repeat that the real question which Mack, J., had to decide was ; what was the extent of the relief to which the debtors were entitled under Act IV of 1938 as subsequently amended? Naturally he had to give directions in that regard. Those directions together with the final order formed one piece and they cannot be dissected. The fallacy in the argument of Mr. Muthuswami Iyer lies in the assumption that the order of Mack, J., consists of two severable parts whereas it is not really so.

Mr. Muthuswami Iyer finally stated that it has now been held that under Madras Act IV of 1938 it is open to a judgment-debtor, against whom a decree remains unsatisfied, to apply to the Court to scale down the decree debt, even though he had not taken the plea at an earlier stage of the case. But that argument is really beside the mark here, since the defendants did raise the plea that they were entitled to the benefits of the Act and Mack, J., in his judgment after examining the arguments,

before him gave directions that the debt should be scaled down on a particular basis. The present, it must be borne in mind, is not an appeal against the order of Mack, J. His final decision and the directions which he gave in connection thereunder formed an integral whole and they have become final.

In the result the appeal fails and is dismissed with costs.

K.L.B. *Appeal dismissed.*

[END OF VOLUME (1961) 1 M.L.J. (REPORTS).]

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(The Supreme Court.)

I] JANUARY [1961

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—B.P. SINHA, *Chief Justice*, S. J. IMAM, J. L. KAPUR, K. N. WANCHOO AND K. C. DAS GUPTA.

Sant Ram .. *Appellant.**

Supreme Court Rules (as Amended) Order IV-A, rule 24, framed under Article 145 *of the Constitution of India* (1950)—*Vires of—" Touts "—Rules regulating—If offend Articles* 14, 19 *and* 21 *of the Constitution of India* (1950).

The Supreme Court has the inherent jurisdiction to regulate the proceedings relating to conduct of persons appearing before it, in and out of Court, in so far as such conduct has a bearing on their professional relations and ethics, apart from the Constitutional provisions of Article 145. Apart from the inherent jurisdiction the Constitution itself has authorised the Court to make rules for regulating generally the practice and procedure of the Court. The expression, " the practice and procedure of the Court" in Article 145 must be construed in its fullest amplitude and must include regulating the conduct of all persons, appearing before the Court, in relation to the business of the Court. Thus the conduct of advocates and their assistants in relation to the business of the Court must form the subject-matter of regulation by the rules of the Court.

All persons who frequent the precincts of Court shall be dealt with under the same rules and all persons included in the list of touts will be liable to be dealt with in the same way, irrespective of any other considerations. Hence there is no room for any discrimination so far as the precincts of the Supreme Court are concerned and there is no infringment of Article 14 of the Constitution.

If a person has been rightly declared to be a tout, he cannot justly complain that he is being deprived of the right to carry on his occupation accorded to him under Articles 19 and 21 of the Constitution. The language of Article 21 is such that it cannot be held that the word " life " includes " livelihood " also.

[In the instant case on evidence of general repute against him the party concerned was a tout.]

Appeal against the Order dated the 16th May, 1959, of the Registrar of the Supreme Court.

M. G. Bhimasena Rao, Advocate, for Sant Ram, Appellant.

H. N. Sanyal, Additional Solicitor-General of India and *N. S. Bindra*, Senior Advocate (*R. H. Dhebar*, Advocate with them), for *Attorney-General of India.*

The Judgment of the Court was delivered by

Sinha, C.J.—This matter was placed before the Constitution Bench by an Order of the Chamber Judge dated August 14, 1959, as it involved the vires of the

*Civil Miscellaneous Petition No. 928 of 1959.

7th April, 1960.

rules framed under Article 145 of the Constitution with particular reference to rule 24 of Order IV-A of the Supreme Court Rules (as Amended).

It appears that on receipt of a letter dated April 28, 1959, from the Supreme Court Bar Association forwarding a copy of a resolution which had been passed by the Executive Committee of that Association, the Registrar initiated proceedings and held an enquiry under rule 24 (2) of Order IV-A. The enquiry was made against two persons named Sant Ram and Budh Dev Sharma on a complaint made by the Honorary Secretary of the Supreme Court Bar Association. The complaint against those persons was to the effect that they were " continuing their undesirable activities" and were seen every day in the Court premises and in the verandah in front of the Bar Association " accosting clients ". On receipt of the Secretary's letter the Registrar caused notices to be issued to the two persons aforesaid to show cause why their names should not be included in the " list of touts " to be kept hung up on the Court notice board according to rule 24 aforesaid. The Registrar fixed a date for holding the enquiry and called upon those persons to appear before him and to adduce such evidence as they may be advised, in showing cause against the inclusion of their names in such a list. The notice further called upon them to file their replies, if any, to the complaint on or before May 6, 1959, and to be ready with all their evidence and witnesses, if any, at the hearing on May 9, 1959. Copies of the complaint and other relevant papers were also sent to the Secretary of the Supreme Court Bar Association inviting him to take such part in the proceedings as the Association may be advised and requesting him to furnish particulars of the evidence in support of the complaint and to be ready with the evidence. In pursuance of the notice aforesaid Budh Dev Sharma *alias* B. D. Pathak filed his reply on May 6, 1959, annexing thereto certain documents and praying that he may be allowed to continue earning his livelihood. He also prayed that his employer Shri Dharam Bhushan, Advocate, may be accorded permission to have his name registered as a clerk in the Registry and also in the Bar Association. On May 8, 1959, Sant Ram filed his reply to the said notice annexing thereto a certificate of Mr. M. G. Bhimasena Rao, Advocate, and praying that the notice against him may be discharged and that he be " allowed to make both ends meet in the service of his present employer ", meaning thereby Mr. Bhimasena Rao, Advocate. The proceedings before the Registrar commenced on May 9, 1959, and were concluded on May 11, when evidence was recorded.

A preliminary objection was raised on behalf of the persons proceeded against that the rules framed by the Supreme Court under which the proceedings had been initiated against them were *ultra vires* the powers of the Court conferred by Article 145 of the Constitution. It was contended on their behalf that the Registrar had no jurisdiction to initiate the proceedings against them. The learned Registrar overruled the preliminary objection and held that it was not competent for him to go behind the rules and that he must follow them, though he indicated that if he had the competence to decide the preliminary objection on its merits, he would have no difficulty in holding that the objection was wholly unfounded.

After considering the evidence adduced before him the learned Registrar by his order dated May 16, 1959, recorded the finding that it had been proved to his satisfaction that both those persons had been habitually frequenting the precincts of the Court for the purpose of procuring business for certain advocates in their profession, for remuneration, over a period of years right up to the time the show cause notice had been served upon them. He directed accordingly that a list of touts be published forthwith in accordance with rule 24 (1), Order IV-A, of the Supreme Court Rules, showing the names of the two persons aforesaid in that list which shall be kept hung up on the Court notice board.

Against this order of the Registrar only Sant Ram appealed to the Chamber Judge. As already indicated, the learned Chamber Judge directed the matter to be placed before the Constitution Bench in view of the constitutional question raised by the appellant challenging the vires of the rules aforesaid.

Though other points were also raised in support of the appeal before us, the most important question that falls to be determined is whether this Court had the jurisdiction under Article 145 of the Constitution to frame the rules impugned in this case. Before the rules which were amended in the present form and which came into force with effect from April 15, 1959, there was no provision in the rules of this Court containing the definition of the word "tout" or laying down the procedure for dealing with persons who were alleged to have been acting as such. Order IV-A was therefore added. It was headed : "Professional or other Misconduct". It contains rules relating to the suspension or removal of advocates from the roll of advocates of this Court including the procedure to be followed in proceedings started against an advocate of the Court. Rules 23 and 24 which are the relevant rules are in these terms :—

"23. Any Advocate, who accepts an engagement in any legal business through a person included in the list of touts published as provided in the next following Rule, shall be deemed guilty of professional misconduct.

Explanation :—"Tout" means a person who procures, in consideration of any remuneration moving from any Advocate or from any person on his behalf, the employment of such Advocate in any legal business, or who proposes to any Advocate to procure, in consideration of any remuneration moving from such Advocate or from any person on his behalf, the employment of the Advocate in such business, or who for purposes of such procurement frequents the precincts of the Court."

"24. (1) The Registrar shall publish lists of persons proved to his satisfaction, by evidence of general repute or otherwise, habitually to act as touts, to be known as 'lists of touts' and may, from time to time, alter and amend such lists.

A copy of every list of touts shall be kept hung up on the Court Notice Board.

Explanation.—The passing of a resolution by the Supreme Court Bar Association declaring any person to be a tout shall be evidence of general repute of such person for purpose of this Rule.

(2) No person shall be included in the list of touts unless he has been given an opportunity to show cause against his inclusion in such list. Any person may appeal to the Chamber Judge against the order of the Registrar including his name in such list.

(3) The Registrar may, by general or special order, exclude from the precincts of the Court all such persons whose names are included in the list of touts."

The question is whether these rules are within the rule-making power of this Court conferred by Article 145 (1) (*a*) of the Constitution which is in these terms :

"145. (1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including—

(*a*) rules as to the persons practising before the Court :

....

....................."

It has been contended that the power of this Court to frame rules is confined to making rules for regulating the "practice and procedure" and rules for regulating the "practice and procedure" do not include rule to declare a person a tout and the procedure leading up to such a declaration. In our opinion there is no force in this contention. It has not been, and it cannot be, contended that this Court is incompetent to frame rules regulating conduct in and out of Court bearing on the professional activities of an advocate of this Court. This Court has the inherent jurisdiction to regulate its proceedings relating to conduct of persons appearing before it, in and out of Court, in so far as such conduct has a bearing on their professional relations and ethics, apart from the constitutional provisions of Article 145 set out above. This Court must in the very nature of things have the fullest power to lay down rules with a view to ensuring honest and efficient discharge of their duties by officers of the Court, including legal practitioners admitted to the roll of advocates of the Court. This Court has, subject to such legislation as may be made by Parliament, the responsibility vested in it of maintaining proper discipline in Court and of insisting upon proper standards being observed by legal practitioners who have the privilege of appearing, acting and pleading in this Court. This Court must, therefore, in

the proper discharge of its duties as the highest Court in the land make such rules as would ensure sound administration of justice and proper conduct on the part of those whose duty it is to help the Court in the discharge of its responsibilities. Apart from the inherent jurisdiction of this Court, the Constitution itself has authorised the Court to make rules for regulating generally the practice and procedure of the Court. The expression, "the practice and procedure of the Court" must be construed in its fullest amplitude and must include regulation the conduct of all persons, appearing before the Court, in relation to the business of the Court. Thus the conduct of advocates and their assistants in relation to the buasiness of the Court must form the subject-matter of regulation by the rules of the Court.

Once it is held that this Court has the authority to frame rules relating to the conduct of persons practising in this Court, it follows that this Court has the power to prescribe a code of conduct for advocates, regulating their relations with their clients and their conduct in Court as officers of the Court. When this Court, as in rule 23, provides that an advocate shall be guilty of professional misconduct if he accepts an engagement in any legal business through a person included in the list of touts, such a rule cannot be said to be beyond the rule-making powers of this Court. It follows that with a view to enforcing that rule, a "tout" has to be defined, which is done by the *Explanation* to rule 23. It is equally clear that rule 24, which lays down the procedure for publishing lists of touts and for holding an enquiry to determine whether or not a particular person should be included in such a list must be equally within the purview of the rule-making power of this Court. In our opinion, therefore, it is futile to contend that rule 24 in question is *ultra vires* the rule-making power of this Court.

It is next contended that Article 14 of the Constitution has been infringed by the provisions contained in rule 24. It was difficult for the appellant to indicate in what way the alleged discrimination occurs. It was faintly suggested that there was some difference between the provisions now impugned and those of section 36 of the Legal Practitioners' Act (XVIII of 1879). Assuming that there is some difference between the two provisions, it cannot be said that *ipso facto* there is discrimination. All persons who frequent the precincts of this Court shall be dealt with under the same rules, if and when the occasion arises. All persons who are included in the list of touts under rule 24 will be liable to be dealt with in the same way irrespective of any other considerations. Hence there is no room for any discrimination so far as the precincts of this Court are concerned.

It is also contended that the impugned rule infringes Articles 19 and 21 of the Constitution, because it has the effect of excluding him from the precincts of the Court, and of carrying on his occupation and that it has a tendency to deprive him of his livelihood. The rule, as already indicated, has been made with a view to ensuring the purity and soundness of the profession of law so far as the advocates of this Court are concerned. It cannot, therefore, be said that it is not in the interest of the general public to exclude touts from the precincts of this Court. If the appellant has been rightly declared to be a tout, he cannot justly complain that he is being deprived of the right to carry on his occupation, an occupation which is regarded as having a corrupting influence. A tout as such cannot claim any rights in relation to the business of the Court and it is incumbent on every Court where legal practitioners are allowed to appear and plead to see that toutism is completely eliminated.

With reference to the terms of Article 21, it was also argued by the appellant himself, after he had been permitted by the Court to dispense with the services of his advocate, that life must include livelihood. The argument that the word "life" in Article 21 of the Constitution includes "livelihood" has only to be stated to be rejected. The question of livelihood has not in terms been dealt with by Article 21 of the Constitution. That question is included in the freedoms enumerated in Article 19, particularly clause (*g*) or even in Article 16 in a limited sense, but the language of Article 21 cannot be pressed into aid of the argument that the word "life" in Article 21 includes "livelihood" also. Even if this extreme proposi-

tion were to be accepted as well founded, the appellant will have to be kept out of the precincts of the Court only after the procedure established by the rules of this Court has been observed. We have already held that the rule in question is not *ultra vires*. That being so, the only question that remains to be considered is whether the procedure laid down by the rule has not been followed as contended by the appellant. It has already been stated that the appellant had been properly served with the notice to show cause why his name should not be included in the list of touts. He put in his show cause petition and he was given time to adduce such evidence as he may have been advised in support of his case. The appellant has not contended that the procedure laid down in the rule has not been followed, but his contention was that as the Registrar did not grant further time and did not issue summons to his witness he had been deprived of his right to adduce evidence. In our opinion, there is no substance in this contention. The enquiry was a summary one. The matter was dealt with by the Registrar on two dates. If the lawyers whom the appellant wished to examine on his behalf did not turn up on the date fixed, it may be due to the fact that they were not willing to support his case. It is a little difficult to appreciate what those advocates, even if they had appeared before the Registrar, could prove. They could not prove the negative. It was for the complainant to adduce evidence in support of the allegation that the appellant is a tout. The whole question, therefore, which the Registrar had to determine was whether or not the evidence adduced in support of the complainant's case was sufficient to make out that complaint. The Registrar has come to a distinct finding that it had been established to his satisfaction by evidence of repute that the appellant is a tout. It appears that the appellant started coming to this Court as a litigant after his conviction under section 409 of the Indian Penal Code. He said he worked as clerk with a lawyer who had taken up his cause, but he appears to have changed his masters rather too frequently and pretended to have worked as an advocate's clerk without his name being shown in the Register of Clerks maintained by the Bar Association. His case that a number of advocates of this Court had started a false propaganda against him and some others, because they felt that their clients were being misled into engaging other advocates, has not been accepted by the Registrar. It appears to have been the case that not being a registered clerk, he could not do any job permissible for such a clerk. Naturally, therefore, he was found wandering about in the corridors in circumstances which led to the genuine belief that he had no other business in Court than that of touting for such legal practitioners as would engage him for that nefarious activity. We cannot, therefore, accede to the argument that the appellant has been a victim of mere suspicion. The evidence of general repute against him, in our opinion, was sufficient to brand him as a " tout ".

It follows that there is no merit in this appeal, which is hereby dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Original Jurisdiction).

PRESENT:—B. P. SINHA, *Chief Justice*, S. J. IMAM, A. K. SARKAR, K. SUBBA RAO AND J. C. SHAH, JJ.

H. C. Narayanappa and others .. *Petitioners.**

v.

The State of Mysore and others .. *Respondents.*

D.R. Karigowda .. *Intervener.*

Motor Vehicles Act (IV of 1939), *section* 68-*D* (2) *and Constitution of India* (1950), *Articles* 19 (1) (*g*) *and* 19 (6)—*Scheme approved by the Government of Mysore—Scheme excluding private operators on certain routes and reserving those routes for the State Transport Undertaking—Validity of the scheme in the light of the fundamental right guaranteed by Article* 19 (1) (*g*).

It is unnecessary to decide whether it is open to a State Transport Undertaking under a scheme framed for a notified area to limit its application to some only of the routes, because on a true reading

* Petition No. 2 of 1960. 28th April, 1960.

of the scheme it is clear that the scheme was approved in relation to fourteen notified routes and not in relation to a notified area.

Even if the routes on which the stage carriages of the two named operators ply overlap the notified area, in the absence of evidence to show that they had the right to pick up passengers en route the discrimination alleged cannot be deemed to have been made out.

Chapter IV-A of the Motor Vehicles Act, 1939, is not merely regulatory of the procedure for carrying on business of road transport by the State; it enables the State Transport Undertaking, subject to the provisions of the scheme, to exclude private operators and to acquire a monopoly partial or complete in carrying on transport business in a notified area or on notified routes.

The expression "commercial and industrial monopolies" is wide enough to include grant of monopolies to the State and citizens as well as control of monopolies. The expression used in a constitutional enactment conferring legislative powers must be construed not in any narrow or restricted sense but in a sense beneficial to the widest possible amplitude of its powers.

The right of the State to carry on trade or business to the exclusion of others does not arise by virtue of Article 19 (6); but it is recognised by Article 298 and the authority to exclude competitors in the field is conferred on the State under Entry 21 of List III of the Seventh Schedule.

It is true that the Government on whom the duty to decide the dispute rests, is substantially a party to the dispute, but if the Government or the authority to whom the power is delegated acts judicially in approving or modifying the scheme, the approval or modification is not open to challenge on a presumption of bias.

Provided that the authority invested with the power to consider the objections gives an opportunity to the objectors to be heard, the ultimate order passed by that authority is not open to challenge either on the ground that another view may possibly have been taken or that detailed reasons have not been given for upholding or rejecting the contentions raised by the objectors.

Petition under Article 32 of the Constitution of India for the enforcement of Fundamental Rights.

A.V. Viswanatha Sastri, Senior Advocate (*B. R. L. Iyengar*, Advocate, with him), for Petitioner.

G. S. Pathak, Senior Advocate (*R. Gopalakrishnan* and *T. M. Sen*, Advocates, with him), for Respondents.

C. K. Daphtary, Solicitor-General of India (*B.R.L. Iyengar*, Advocate, with him), for Intervener.

The Judgment of the Court was delivered by

Shah, J.—The petitioners pray for a writ quashing a scheme approved under section 68-D (2) of the Motor Vehicles Act, 1939, by the Government of the State of Mysore and for a writ restraining the respondents, *i.e.*, the State of Mysore, the General Manager, the Mysore Government Road Transport Department and the Regional Transport Authority, Bangalore, from taking action pursuant to the scheme.

The petitioners are operators of stage carriages on certain routes in the sector popularly known as "Anekal area" in the Bangalore District. On January 13, 1959, the General Manager, Mysore Government Road Transport Department who will hereinafter be referred to as the 2nd respondent published a scheme in exercise of the powers conferred by section 68-C of the Motor Vehicles Act, 1939, for the exclusion of private operators on certain routes and reservation of those routes for the State Transport Undertaking in the Anekal area. The Chief Minister of the Mysore State gave the operators affected by the scheme an opportunity of making oral representations and on perusing the written objections and considering the oral representations, approved the scheme as framed by the 2nd respondent. On April 23, 1959, the scheme was published in the Mysore State Government Gazette. On June 23, 1959, renewal applications submitted by petitioners 1 to 3 for permits to ply stage carriages on certain routes covered by the scheme were rejected by the Transport Authority and the 2nd respondent was given permanent permits operative as from June 24, 1959, for plying buses on those routes. In Writ Petition No. 463 of 1959 challenging the validity of the permanent permits granted to the 2nd respondent, the High Court of Mysore held that the issue of permits to the 2nd respondent before the expiry of six weeks from the date of the application was illegal. To petitioners 1 to 3 and certain other operators renewal permits operative till March 31, 1961, were thereafter issued

by the 3rd respondent. The 2nd respondent applied for fresh permits in pursuance of the scheme approved on April 15, 1959, for plying stage carriages on routes specified in the scheme and notices thereof returnable on January 5, 1960, were served upon the operators likely to be affected thereby. On January 4, 1960, the five petitioners applied to this Court under Article 32 of the Constitution for quashing the scheme and for incidental reliefs.

The petitioners claim that they have a fundamental right to carry on the business of plying stage carriages and the scheme by the second respondent and approved by the State of Mysore unlawfully deprives them of their fundamental right to carry on the business of plying stage carriages in the Anekal area. The diverse grounds on which the writ is claimed by the petitioners need not be set out, because, at the hearing of the petition, counsel for the petitioners has restricted his argument to the following four heads :

(1) that the scheme violates the equal protection clause of the Constitution, because only fourteen out of a total of thirty-one routes on which stage carriages were plied for public transport in the Anekal area were covered by the scheme and that even from among the operators on the fourteen routes notified, two operators were left out, thereby making a flagrant discrimination between the operators even on those fourteen routes ;

(2) that by Chapter IV-A of the Motor Vehicles Act, 1939, Parliament had merely attempted to regulate the procedure for entry by the States into the business of motor transport in the State, and in the absence of legislation expressly undertaken by the State of Mysore in that behalf, that State was incompetent to enter into the arena of motor transport business to the exclusion of private operators ;

(3) that the Chief Minister who heard the objections to the scheme was biassed against the petitioners and that in any event, the objections raised by the operators were not considered judicially ; and

(4) that the Chief Minister did not give " genuine consideration " to the objections raised by the operators to the scheme in the light of the conditions prescribed by the Legislature.

Re. I : In column 1 of the scheme " part of Bangalore District, *viz.*, Bangalore North, Bangalore South, Anekal and Hosakote Taluks " is set out as the area in relation to which the scheme is approved ; and in column 3, " the routes (with their starting points, termini, intermediate stations and route length) in which the State Transport Undertaking will introduce its services to the exclusion of private operators " are those set out in statement 1 appended to the scheme. Statement 1 sets out the description of fourteen routes with their intermediate points, route length, number of buses to be operated and the maximum number of trips to be performed on each route. By column 4 " the number of exisintg stage carriages on each route with the number of trips and the names of their operators " are described " as in statement 2 appended ". Statement 2 sets out the names and places of business of fifty-six operators together with the routes operated and the numbers of the stage carriages and trips made by those operators. In the Anekal area, there are thirty-one routes, which are served by stage carriage operated by private operators, and by the approval of the scheme, only fourteen of those routes are covered by the scheme.

Section 68-C, in so far as it is material, provides that a State Transport Undertaking, if it is of opinion that it is necessary in the public interest that road transport services in relation to any area or route or portion thereof should be run and operated by itself, whether to the exclusion, complete or partial, of other persons or otherwise, it may prepare a scheme giving particulars of the nature of the services proposed to be rendered, the area or route proposed to be covered and other particulars respecting thereto as may be prescribed. Section 68-D (1) provides for inviting objections by persons affected by the scheme. Sub-section (2) of section 68-D authorises the State Government after considering the objections and

giving an opportunity to the objectors to approve or modify the scheme ; and by sub-section (3), the scheme as approved or modified and published by the State Government in the Official Gazette shall " become final and shall be called the approved scheme and the area or route to which it relates shall be called the notified area or notified route ". Counsel for the petitioners contended that exercising powers under section 68-C, the State Transport Undertaking may prepare a scheme in respect of an area or a number of routes in that area, but not a scheme for an area which is to apply to some only and not to all routes on which public transport vehicles in the area operate. In this case, it is unnecessary to decide whether it is open to a State Transport Undertaking under a scheme framed for a notified area to limit its application to some only of the routes, because on a true reading of the scheme, it is amply clear that the scheme was approved in relation to fourteen notified routes and not in relation to a notified area. The approved scheme is in the form prescribed by the rules, and in the form prescribed, by column 1, the area in relation to which the scheme is approved is required to be set out. But a scheme under section 68-C must be one in relation to an area or any route or portion thereof wherein the transport service is to be undertaken by the State Transport Undertaking to the exclusion, either complete or partial, of other operators. Column 1 of the approved scheme undoubtedly describes the area in relation to which the scheme is approved, but by the designation of the area in the scheme, an intention to exclude either wholly or partially the operators of stage carriages from that area is not evinced either expressly or by implication. By column 3, the scheme expressly directs that State Transport Undertaking will introduce its service to the exclusion of private operators on the specified routes. The scheme must therefore be regarded as one for the fourteen notified routes and not in relation to the area described in column 1.

Counsel for the petitioners submitted that an order passed on 22nd October, 1959, by the 3rd respondent—the Regional Transport Authority—rejecting applications for permits for one of the fourteen routes to an applicant, indicated that in the opinion of the third respondent, the scheme related to a notified area and not to notified routes. The order states that " an approved scheme for the exclusive operation in the *notified area of Bangalore District* " by the second respondent " has come into existence after the notification of the route Bangalore to Nallur, and the major portion of the route applied for lie in the notified area and as such it was not desirable to grant any permit to operators to pass through notified area in the intra-State route ". The third respondent may have in considering the application assumed that the scheme related to a notified area, but the true interpretation of the scheme cannot be adjudged in the light of that assumption. The other document relied upon is a statement of objections filed by the second respondent on 24th October, 1959, resisting the application for stage carriage permits to a private operator on the route Siddalaghatta—Bangalore *via* Nallur. In paragraph 4 of the statement, it was submitted that " the existing notification, dated 15th October, 1959, came under the notified area of the department " of the second respondent " and that would overlap certain services of the department ". But because in making his defence, the second respondent has referred to the scheme as dealing with "the notified area", the scheme will not necessarily be held to be one in relation to the notified area.

The argument that among the operators on the fourteen routes, two have been selected for special treatment and on that account, the scheme is discriminatory, has, in our judgment, no substance. It is averred in paragraph 13 of the petition that two persons, Chikkaveerappa operating on route Chikkathirupathi to Bangalore *via* Surjapur, Domsandra and Agara and Krishna Rao operating on route Bangalore to Chikkathirupathi *via* Agara and Surjapur are not amongst those who are excluded from operating their vehicles on the notified routes,. In the affidavit filed by the State and the second respondent, it is submitted that the plea of the petitioners that the two persons operating stage carriages on specified routes were not amongst those to be excluded is incorrect, and that those two persons had been notified by the Secretary of the third respondent that they were

"likely to be affected on giving effect to the approved scheme". Undoubtedly, route-item No. 2 in statement 1 to the scheme is "Bangalore to Surjapur or any portion thereof" and the route operates *via* Agara and Domsandra, but the record does not diclose that the two named persons are, in plying their stage carriages, entitled to operate on the route specified with right to stop at the named places for picking up passengers. It is not clear on the avertments made in the petition that the route on which the stage carriages of the two named persons ply are identical; even if the routes on which the stage carriages of these two operators ply overlap the notified route, in the absence of any evidence to show that they had the right to pick up passengers en route, the discrimination alleged cannot be deemed to have been made out.

Re. 2 : Article 298 of the Constitution as amended by the Constitution (Seventh Amendment) Act, 1956, recognises the executive power of the Union and of each State as extending to the carrying on of any trade or business. That power of the Union is subject in so far as the trade or business is not one in respect of which Parliament may make laws, to legislation by the State; and the power of each State, in so far as the trade or business is not one with repect to which the State Legislature may make laws, is subject to legislation by Parliament. Like ordinary citizens, the Union and the State Governments may carry on any trade or business subject to restrictions whch may be imposed by the Legislatures competent to legislate in respect of the particular trade or business. Under Article 19 (6) of the Constitution as amended by the First Amendment Act, 1951, nothing in sub-clause (*g*) of clause (1) of Article 19 is to affect the operation of any existing law in so far as it related to, or prevent the State from making any law relating to the carrying on by the State or by a Corporation owned or controlled by the State of any industry or business, whether to the exclusion, complete or partial, of citizens or otherwise. The State may therefore carry on any trade or business, and legislation relating to the carrying on of trade or business by the State, is not liable to be called in question on the ground that it infringes the fundamental freedom of citizens under Article 19 (1) (*g*). The Motor Vehicles Act, 1939, was enacted by the Central Legislative Assembly in exercise of its power under the Government of India Act, 1935, to legislate in respect of mechanically propelled vehicles. Chapter IV-A containing sections 68-A to 68-I was incorporated into that Act by the Parliament by Act C of 1956 whereby special provisions relating to the conduct of Transport Undertakings by the States or corporations owned or controlled by the State were made. Section 68-A defines the expression "State Transport Undertaking" as meaning among others an undertaking for providing transport service carried on by the Central Government or a State Government or any Road Transport Corporation established under Act XLIV of 1950. By section 68-B, the provisions of that chapter and the rules and orders made thereunder are to override Chapter IV and other laws in force. Section 68-C authorises the State Transport Undertaking to prepare and publish a scheme of road transport services of a State Transport Undertaking. Section 68-D deals with the lodging of objections to the scheme framed under the preceding section, the consideration of those objections and the publication of the final scheme approved or modified by the State Government. Section 68-F deals with the issue of permits to State Transport Undertakings in respect of a notified area or notified route and provides that the Regional Transport Authority shall issue such permits to the State Transport Uundertaking notwithstanding anything contained in Chapter IV. It also enables the Regional Transport Authority, for giving effect to the approved scheme, to refuse to entertain any application for the renewal of any other permit, to cancel any existing permit, to modify the terms of any existing permit so as to render the permit ineffective beyond a specified date, to reduce the number of vehicles authorised to be used under the permit and to curtail the area or route covered by the permit. Section 68-G sets out the principles and method of determining compensation to persons whose existing permits are cancelled.

By Chapter IV-A, the State Transport Undertaking which is either a department of the State or a corporation owned or controlled by the State on the appro-

val of a scheme, is entitled, consistently with the scheme, to exclusive right to carry on motor transport business. The Regional Transport Authority is bound to grant permit for the routes covered by the scheme to the State Transport Undertaking if that authority applies for the same and the Regional Transport Authority is also bound in giving effect to the approved scheme, to modify the terms of existing permits and to refuse to entertain applications for a renewal of permits of private operators. Chapter IV-A is not merely regulatory of the procedure for carrying on business of road transport by the State ; it enables the State Transport Undertaking, subject to the provisions of the scheme, to exclude private operators and acquire a monopoly, partial or complete, in carrying on transport business, in a notified iarea or on notified routes.

The authority of the Parliament to enact laws granting monopolies to the State Government to conduct the business of road transport is not open to serious challenge. Entry No. 21 of List III of the Seventh Schedule authorises the Union Parliament and the State Legislatures concurrently to enact laws in respect of commercial and industrial monopolies, combines and trusts. The argument of the petitioners that the authority conferred by Entry No. 21 in List III is restricted to legislation to control of monopolies and not to grant or creation of commercial or industrial monopolies has little substance. The expression " commercial and industrial monopolies " is wide enough to include grant of monopolies to the State and Citizens as well as control of monopolies. The expression used in a constitutional enactment conferring legislative powers must be construed not in any narrow or restricted sense but in a sense beneficial to the widest possible amplitude of its powers : *Navinchandra* v. *Maftalal* v. *The Commissioner of Income-tax, Bombay City*[1], *The United Provinces* v. *Atiqua Begum*[2]. Entry No. 26 of List II of the Seventh Schedule which invests the States with exclusive authority to legislate in respect of trade and commerce within the State, subject to the provision of Entry No. 33 of List III, does not derogate from the authority conferred by Entry No. 21 of List III concurrently to the Parliament and the State Legislatures to grant or create by law commercial or industrial monopolies. The amplitude of the powers under the entry in the Concurrent List expressly dealing with commercial and industrial monopolies cannot be presumed to be restricted by the generality of the expression " trade and commerce " in the State List. If the argument of the petitioners and the Intervener that legislation relating to monopoly in respect of trade and industry is within the exclusive competence of the State be accepted, the Union Parliament cannot legislate to create monopolies in the Union Government in respect of any commercial or trading venture even though power to carry on any trade or business under a monopoly is reserved to the Union by the combined operation of Article 298, and the law which is protected from the attack that it infringes the fundamental freedom to carry on business by Article 19 (6). We are therefore of the view that Chapter IV-A could competently be enacted by the Parliament under Entry No. 21 read with Entry No. 35 of the Concurrent List.

The plea sought to be founded on the phraseology used in Article 19 (6) that the State intending to carry on trade or business must itself enact the law authorising it to carry on trade or business is equally devoid of force. The expression " the State " as defined in Article 12 is inclusive of the Government and Parliament of India and the Government and the Legislature of each of the States. Under Entry No. 21 of the Concurrent List, the Parliament being competent to legislate for creating commercial or trading monopolies, there is nothing in the Constitution which deprives it of the power to create a commercial or trading monoploy in the constituent States. Article 19 (6) is a mere saving provision : its function is not to create a power but to immunise from attack the exercise of legislative power falling within its ambit. The right of the State to carry on trade or business to the exclusion of others does not arise by virtue of Article 19 (6). The right of the State to carry on trade or business is recognised by Article 298 ; authority to exclude competitors

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1. (1955) S.C.J. 158 : (1955) 1 M.L.J. (S.C.) 7 : (1955) 1 S.C.R. 829 at 836.
2. (1940) F.L.J. 97 : (1941) 1 M.L.J. (Sup.) 65 : (1940) F.C.R. 110.

in the field of such trade or business is conferred on the State by entrusting power to enact laws under Entry No. 21 of List III of the Seventh Schedule, and the exercise of that power in the context of fundamental rights is secured from attack by Article 19 (6).

In any event, the expression " law " as defined in Article 13 (3) (*a*) includes any ordinance, order, bye-law, rule, regulation, notification, custom, etc. and the scheme framed under section 68-C may properly be regarded as " law " within the meaning of Article 19 (6) made by the State excluding private operators from notified routes or notified areas, and immune from the attack that it infringes the fundamental right guaranteed by Article 19 (1) (*g*).

Re. 3 : The plea that the Chief Minister who approved the scheme under section 68-D was biassed has no substance. Section 68-D of the Motor Vehicles Act undoubtedly imposes a duty on the State Government to act judicially in considering the objections and in approving or modifying the scheme proposed by the Transport Undertaking. *G. Nageswara Rao* v. *Andhra Pradesh Road Transport Corporation and another.*[1] It is also true that the Government on whom the duty to decide the dispute rests, is substantially a party to the dispute but if the Government or the authority to whom the power is delegated acts judicially in approving or modifying the scheme, the approval or modification is not open to challenge on a presumption of bias. The Minister or the officer of the Government who is invested with the power to hear objections to the scheme is acting in his official capacity and unless there is reliable evidence to show that he is biassed, his decision will not be liable to be called in question, merely because he is a limb of the Government. The Chief Minister of the State has filed an affidavit in this case stating that the contention of the petitioners that he was " biassed in favour of the scheme was baseless "; he has also stated that he heard such objections and representations as were made before him and he had given the fullest opportunity to the objectors to submit their objections individually. The Chief Minister has given detailed reasons for approving the scheme and has dealt with such of the objections as he says were urged before him. In the last paragraph of the reasons given, it is stated that the Government have heard all the arguments advanced on behalf of the operators and "after giving full consideration to them, the Government have come to the conclusion that the scheme is necessary in the interest of the public and is accordingly approved subject to the modifications that it shall come into force on 1st May, 1959 ". In the absence of any evidence controverting these averments, the plea of bias must fail.

Re. 4 : The argument that the Chief Minister did not give " genuine conisderation" to the objections raised by operators to the scheme in the light of the conditions prescribed has no force. The order of the Chief Minister discusses the questions of law as well as questions of fact. There is no specific reference in the order to certain objections which were raised in the reply filed by the objectors, but we are, on that account, unable to hold that the Chief Minister did not consider those objections. The guarantee conferred by section 68-D of the Motor Vehicles Act upon persons likely to be affected by the intended scheme is a guarantee of an opportunity to put forth their objections and to make representations to the State Government against the acceptance of the scheme. This opportunity of making representations and of being heard in support thereof may be regarded as real only if in the consideration of the objections there is a judicial approach. But the Legislature does not contemplate an appeal to this Court against the order passed by the State Government approving or modifying the scheme. Provided the authority invested with the power to consider the objections gives an opportunity to the objectors to be heard in the matter and deals with the objections in the light of the object intended to be secured by the scheme, the ultimate order passed by that authority is not open to challenge either on the ground that another

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1. (1959) S.C.J. 967 : (1959) 2 M.L.J. (S.C.) 56 : (1959) 2 An.W.R. (S.C.) 156 : A.I.R. 1959 S.C. 308.

view may possibly have been taken on the objections or that detailed reasons have not been given for upholding or rejecting the contentions raised by the objectors.

In the view taken by us, the contentions raised by the petitioners fail and the petition is therefore dismissed with costs.

Petition dismissed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction].

PRESENT :—S. K. DAS, A. K. SARKAR AND M. HIDAYATULLAH, JJ.

The State of Bombay (in both the Appeals) .. *Appellant**

v.

M/s. Supreme General Films Exchange, Ltd., and another .. *Respondents.*

Court-fees Act (VII of 1870) as applied to Bombay by Court-fees Bombay Amendment Act (XII of 1954)—Amendment not retrospective—Provisions as do not apply to appeals after the date of amendment in suits which were pending before that date.

In the absence of provisions giving retrospective effect to certain amendments made in the Court-fees Act, 1870, as applied to Bombay by the Court-fees (Bombay Amendment) Act (XII of 1954) which amendments came into force on April 1, 1954, the Court-fee payable on memorandum of appeal will be according to the law in force at the date of filing of the suits which was prior to the date of coming into force of the amendments and not according to the law in force at the date of the filing of the memorandum of appeal which was after the date of coming into force of the amendment. An impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition (*e.g.*, imposing a heavier Court-fee) is not a matter of procedure only; it impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment.

Appeals from the Judgment and Order dated the 24th November, 1954, of the Bombay High Court in Appeals Nos. 89/X and 96/X of 1954.

H. R. Khanna and *R. H. Dhebar*, Advocates for Appellant.

S. D. Goswami and *Gopal Singh*, Advocates for Respondents.

The Judgment of the Court was delivered by

S. K. Das, J.—These two consolidated appeals arise out of the judgment and order of the High Court of Bombay dated November 24, 1954, passed on two applications in two appeals disposed of by the said High Court. The facts are similar and the question of law arising therefrom is one and the same, namely, whether in the absence of provisions giving retrospective effect to certain amendments made in the Court-fees Act, 1870, as applied to Bombay by the Court-fees (Bombay Amendment) Act, 1954 (Bombay Act No. XII of 1954) which amendments came in force on April 1,1954, hereinafter called the relevant date, the Court-fees payable on the two memoranda of appeal were payable according to the law in force at the date of filing of the suits which was prior to the relevant date, or according to the law in force at the date of the filing of the memoranda of appeal which was after the relevant date.

The facts are simple and may be very shortly stated. On April 16, 1953, Messrs. Sawaldas Madhavadas brought a suit against the Arati Cotton Mills, Ltd., praying for a decree for rupees two lacs and odd. The suit was decreed on July 22, 1954. The Arati Cotton Mills, Ltd., filed a memorandum of appeal against the said decree on September 4, 1954, and paid Court-fees of Rs. 3,193-12-0 on the said memorandum. On or about October 5, 1954, a settlement was arrived at between the parties and on October 9, 1954, a prayer was made for dismissal of the appeal for want of prosecution. On November 18, 1954, an application was made under section 151, Code of Civil Procedure by the Arati Cotton Mills, Ltd., for

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* C.As. Nos. 86 and 87 of 1956. 22nd April, 1960.

refund of excess Court-fees paid on the memorandum of appeal. In the appplication it was stated :

> "The appellants say that the appeal having arisen out of a suit which had been instituted on or about 16th April, 1953, long prior to the coming into force of the Court-fees (Bombay Amendment Act (XII of 1954) no Court-fees were payable on the memorandum of appeal herein except as provided in the Table of fees hereinafter mentioned and that it was due to a mistake that the appellants were called upon to pay the said institution fee amounting to Rs. 3,193-12-0 and the said sum was paid by the appellants under a *bona fide* mistake and/or inadvertence and/or oversight. The appellants say that the only fee payable for the filing of the said memorandum of appeal was the fee of Rs. 32 under item No. 58 of the Table of fees set out at page 396 of the Rules of this Court. The appellants say that they were not legally bound to pay anything more than the said sum of Rs. 32 and that sum of Rs. 3,161-12-0 paid by them in excess of the said sum of Rs. 32 was paid by mistake and ignorance of the appellant's legal rights and/or through inadvertence or oversight. The appellants submit that it is necessary for the ends of justice that the said sum of Rs. 3,161-12-0 should be ordered to be refunded to them."

Similarly, on December 17, 1953, M/s. Rasiklal & Co., Ltd., brought a suit against M/s. Supreme General Films Exchange, Ltd., and two other defendants in which a decree was passed on May 11, 1954, for a sum of Rs. 44,876-12-0 against M/s. Supreme General Films Exchange, Ltd. The latter filed a memorandum of appeal on July 31, 1954, and paid Court-fees of Rs. 1,958 on it. The appeal was, however, withdrawn with the leave of the High Court on September 27, 1954. M/s. Supreme General Films Exchange, Ltd., then applied for refund of the excess Court-fees paid on a ground similar to that mentioned earlier in connexion with the application of the Arati Cotton Mills, Ltd.

Both the applications were heard together after issue of notice to the Advocate-General, Bombay who appeared for the State of Bombay and opposed the applications. By its judgment and order dated November 24, 1954, the High Court allowed the applications. The State of Bombay then asked for and obtained a certificate in the two cases which were consolidated to the effect that they were fit for appeal to this Court. These two appeals have been preferred on the strength of that certificate.

Now, the learned Chief Justice who delivered the judgment allowing the two applications, referred to an earilier decision of his, reported in *a Reference under section 5 of the Court-fees Act*[1], and said that that decision governed the present cases also. The facts which led to the earlier decision were : (i) that prior to the relevant date a suit for partition of joint family property fell under Schedule II, Article 17 (vii), of the Court-fees Act and the Court-fees payable were Rs. 18-12-0 only ; (ii) an amendment which came into effect on the relevant date said that the Court-fees payable in such suits should be according to the value of the share in respect of which the suit is instituted ; (iii) a suit for partition of joint family property was brought before the relevant date but an appeal was filed thereafter. The question was : on the facts stated above, what court-fees were payable on the memorandum of appeal. Relying on the decision of this Court in *Hoosein Kasam Dada (India) Ltd.* v. *The State of Madhya Pradesh and others*[2], and certain other decisions to which we shall presently refer, the learned Chief Justice held that a right of appeal is a substantive right which vests in a litigant at the date of the filing of the suit, and cannot be taken away unless the Legislature expressly or by necessary intendment says so ; furthermore, an appeal is a continuation of the suit, and it is not merely that a right of appeal cannot be taken away by a procedural enactment which is not made retrospective, but the right cannot be impaired or imperilled nor can new conditions be attached to the filing of the appeal ; nor can a condition already existing be made more onerous or more stringent so as to affect the right of appeal arising out of a suit instituted prior to the enactment. Learned Counsel for the appellant has made a somewhat feeble attempt to distinguish the decision in a *Reference under section 5 of the Court-fees Act*[1], on facts, but it cannot be seriously disputed that if that decision is correct, then it must govern the two cases before

1. 57 Bom. L.R. 180.

2. (1953) S.C.J. 276 : (1953) S.C.R. 987.

us. Though the facts are not identical, we see no difference in principle between them.

On behalf of the State of Bombay, appellant before us, the correctness of the decision has been challenged on the ground that there is no vested right in procedure and reliance has been placed on the principle,

"that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts, even when the alteration which the statute makes may be disadvantageous to one of the parties" (*see* Maxwell on Interpretation of Statutes, 10th Edition, page 225.)

Very strong reliance has been placed on the decision in *Mohri Kunwar* v. *Keshri Chand*[1], and on the observations made therein to the effect that no suitor has a vested right to insist that during the pendency of a litigation which a suitor has started, the enactment relating to Court-fee shall not be changed and the fee leviable shall not be increased or reduced with regard to future appeals and he would be entitled to carry on proceedings on the basis of the law as it stood when the plaint was filed even though the law is different when he comes to file an appeal. On behalf of the respondent it has been submitted that since the decision of the learned Chief Justice of the Bombay High Court in a *Reference under section* 5 *of the Court-fees Act*[2], there has been another decision of this Court which concludes the question (*Garikapatti Veeraya* v. *N. Subbiah Choudhry*[3]) and it is argued that the true principle is that where a right of appeal is impaired or imperilled or a more onerous or stringent condition is put on the right of appeal, the impairment, peril or imposition of a more stringent condition is not retrospective unless the Legislature says so expressly or by necessary intendment.

It is necessary to state here what the High Court has clearly pointed out with regard to the amendments made by the Court-fees (Bombay) Amendment Act, 1954 (Bombay Act No. XII of 1954). On the relevant date the whole system of charging Court-fees in the Bombay High Court on the Original Side was altered and instead of a fixed fee payable on the plaint, etc., *ad valorem* fees become leviable as in the districts. The change was effected *inter alia* by deleting section 4 and amending section 6 of the Court-fees Act, 1870 and Article 1 of Schedule I to the Act. There was no provision, express or by necessary intendment, for giving retrospective effect to the amendments made in the sense of affecting a right of appeal arising out of a suit instituted prior to the relevant date. As this position has not been contested, it is not necessary to read here the provisions of the amending Act.

We proceed straightaway to consider the arguments advanced on behalf of the appellant. So far as we have been able to appreciate the submissions made on behalf of the parties, the point of controversy is really this : is an impairment of the right of appeal by imposing a more stringent or onerous condition thereon a matter of procedure only or is it a matter of substantive right ? We think that the question is really concluded by the decisions of this Court. We refer first to the decision in *Hoosein Kasam Dada (India) Ltd.* v. *The State of Madhya Pradesh and others*[4]. The facts of that case were these : Section 22 (1) of the Central Provinces and Berar Sales Tax Act, 1947, provided that no appeal against an order of assessment should be entertained by the prescribed authority unless it was satisfied that such amount of tax as the appellant might admit to be due from him, had been paid. This Act was amended on the 25th November, 1949, and section 22 (1) as amended provided that no appeal should be admitted by the said authority unless such appeal was accompanied by satisfactory proof of the payment of the tax in respect of which the appeal had been preferred. On the 26th of November, 1947, the appellant submitted a return to the Sales Tax Officer, who, finding that the turnover exceeded 2 lacs, submitted the case to the Assistant Commissioner for disposal and the latter made an assessment on the 8th April, 1950. The appellant

1. I.L.R. (1941) All. 558.
2. 57 Bom.L.R. 180.
3. (1957) S.C.J. 439 : (1957) 2 M.L.J. (S.C.) 1 : 1957 S.C.R. 488.
4. (1953) S.C.J. 276 : 1953 S.C.R. 987.

preferred an appeal on the 10th May, 1950, without depositing the amount of tax in respect of which he had appealed. The Board of Revenue was of opinion that section 22 (1) as amended applied to the case as the assessment was made, and the appeal was preferred, after the amendment came into force and rejected the appeal. It was held by this Court that the appellant had a vested right of appeal when the proceedings were initiated in 1947 and his right of appeal was governed by the law as it stood then. It was further held that the amendment of 1950 could not be regarded as a mere alteration in procedure or an alteration regulating the exercise of the right of appeal ; it whittled down the right itself, and had no retrospective effect as the Amendment Act of 1950 did not expressly or by necessary intendment give it retrospective effect. This decision proceeded on the principle that impairment of the right of appeal by imposing a more onerous condition is not a matter of procedure only. The decision in *Garikapatti Veeraya* v. *Subbiah Choudhury*[1], referred specifically to two decisions relating to an increase in Court-fees by subsequent amendment of the Court Fees Act, and one of the decisions was *Sawaldas Madhavdas* v. *Arati Cotton Mills, Ltd*[2], the very decision which is under appeal here. The other decision was *R. M. Seshadri* v. *The Province of Madras*[3]. Perhaps, our attention was not then drawn to the circumstance that the decision in *Sawaldas Madhavdas* v. *Arati Cotton Mills, Ltd.*,[2] was at the time pending in appeal here. The point of the decision in *Garikapatti Veeraya* v. *Subbiah Choudhury*[1] is, however, this : this Court referred with approval to decisions which accepted the position that taking away a right of appeal and imposing a more onerous condition on such right involved the same principles as to retrospective effect of the subsequent legislation. A similar view was expressed in *Amara Eswaramma and others* v. *Makkam Seethamma*[4], and *Arjun* v. *Amrita and others*[5].

The appellant has relied on *Punya Nahako and others* In re,[6]. That was a case of review, and it was held that if between the date of the plaint or the appeal and the date for filing the petition for review, there was a change in the Court Fees Act increasing the fee payable *ad valorem*, the petitioner must pay at the increased rate. The learned Chief Justice (Chagla, C.J.), expressed the opinion that a review does not stand on the same footing as an appeal, and one cannot say that there is a substantive right of review. It may be pointed out here that even in respect of a review, a view different from that of the Madras High Court was taken in *Parmeshar Kurmi and another* v. *Bakhtwar Pande and others*[7]. It is, however, unnecessary to say any thing more about a review, because we are not concerned with it in the present case.

In *Anand Ram Pramhans and Others* v. *Ramgulam Sahu and Others*[8], the question which was mooted and discussed related to the proper presenteation of a memorandum of appeal, and incidentally it was observed that the new Bihar and Orissa Court Fees Act which had already come into force applied to the case. There was no discussion of the question as to whether the enactment in question was given retrospective effect or not. As to the decision in *Mohri Kanwar* v. *Keshri Chand*[9], on which so much reliance has been placed by the appellant, it is necessary to point out that the question there was if the right of appeal created by section 6-A of the Court Fees Act, which was added by U. P. Act XIX of 1938, was available as against an order passed after the coming into force of the latter Act, although that Act was not in existence and consequently there was no right of appeal at the date of filing that plaint. It was held that the enactment, by the Amending Act of 1938, of section 6-A which allowed an appeal against an order demanding the payment of a deficiency in Court-fees did not take away any right which was vested in the plaintiff on the date on which he filed the plaint, it only conferred on him a new right ; nor did it take away any right which was vested in the defendant, for though

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1. (1957) S.C.J. 439: (1957) 2 M.L.J. (S.C.) 221. 1 : 1957 S.C.R. 488.
2. 57 Bom. L.R. 394.
3. (1954) 1 M.L.J. 206 : I.L.R. (1954) Mad. 643.
4. (1955) An. W.R. 482 : A.I.R. 1955 Andh.
5. I.L.R. (1956) Nag. 296.
6. 52 M.L.J. 128: I.L.R. 50 Mad 488.
7. I.L.R. 54 All 1092.
8. A.I.R. 1923 Pat. 150.
9. I.L.R. (1941) All 558.

the defendant could object if the plaint was not properly stamped and might also have a right to have the matter determined by the Court he had no vested right in the procedure by which it was to be determined, and this procedure could be changed pending the suit and a change in procedure could not be said to deprive him of any vested right. It would appear from what has been stated above that the decision proceeded on the footing that the Amending Act conferred a new right of appeal, and not that it took away a vested right of appeal ; and the reason of the decision was based on the principle that there is no vested right in the procedure by which the sufficiency of Court-fees is determined by a Court. That is a principle of a different character from the one we are concerned with in the present case, *viz.*, the retrospective effect of a subsequent enactment which either takes away a right of appeal or impairs it by imposing a more stringent or onerous condition thereon. We do not, therefore, think that the Allahabad decision[1] helps the appellant.

The question was considered in reverse in *Delhi Cloth and General Mills Co., Ltd.* v. *Income-tax Commissioner, Delhi*[2], and the principle of *Colonial Sugar Refining Co.* v. *Irving*[3], was applied. Another decision in point is that of *Nagendra Nath Bose* v. *Mon Mohan Singh*[4]. In that case the plaintiff instituted a suit for rent valued at Rs. 1,306-15-0 and obtained a decree. In execution of that decree the defaulting tenure was sold on November 20, 1926, for Rs. 1,600. On December 19, 1928, an application was made under Order 21, rule 90 of the Code of Civil Procedure by the petitioner who was one of the judgment debtors for setting aside the sale. That application having been dismissed for default of his appearance, the petitioner preferred an appeal to the District Judge, Hoogly, who refused to admit the appeal on the ground that the amount recoverable in execution of the decree had not been deposited as required by the Proviso to section 174 (*c*) of the Bengal Tenancy Act as amended by an amending Act of 1928. The contention of the petitioner was that the amending provision, which came into force on February 21, 1929, could not affect his right of appeal from the decision on an application made on December 19, 1928, for setting aside the sale. Mitter, J., said :

"We think the contention of the petitioner is well-founded and must prevail. That a right of appeal is a substantive right cannot now be seriously disputed. It is not a mere matter of procedure. Prior to the amendment of 1928 there was an appeal against an order refusing to set aside a sale (for that is the effect also where the application to set aside the sale is dismissed for default) under the provisions of Order 43, rule 1, of the Code of Civil Procedure. That right was unhampered by any restriction of the kind now imposed by section 174 (5), Proviso. The Court was bound to admit the appeal whether the appellant deposited the amount recoverable in execution of the decree or not. By requiring such deposit as condition precedent to the admission of the appeal, a new restriction has been put on the right of appeal, the admission of which is now hedged in with a condition. There can be no doubt that the right of appeal has been affected by the new provision and in the absence of an express enactment this amendment cannot apply to paoceedings pending at the date when the new amendment came into force. It is true that the appeal was filed after the Act came into force, but that circumstance is immaterial—for the date to be looked into for this purpose is the date of the original proceeding which eventually culminated in the oppeal ".

This decision was approved by this Court both in *Hossein Kasam Dada*[5] and *Garikapatti Veeraya*[6]. It is thus clear that in a long line of decisions approved by this Court and at least in one given by this Court, it has been held that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only ; it impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment.

We are, therefore, of the view that the High Court was right in the view it took, and the orders of refund of excess court-fees which it passed were correct in law.

Accordingly, the appeals fail and are dismissed with costs. There will be one set of costs, as the appeals have been consolidated and heard together.

Appeals dismissed.

1. I.L.R. (1941) All. 558.
2. L.R. 54 I.A. 421 : 53 M.L.J. 819.
3. L.R. (1905) A. C. 369.
4. 34 C.W.N. 1009.
5. (1953) S.C.J. 276 : 1953 S.C.R. 987.
6. (1957) S.C.J. 439: (1957) 2 M.L.J. (S.C.) 1 : 1957 S.C.R. 488.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, J. L. KAPUR AND M. HIDAYATULLAH, JJ.

Chandaji Kubaji & Co. .. *Appellants.**

v.

The State of Andhra Pradesh .. *Respondent.*

Madras General Sales Tax Act (IX of 1939) *(as applied to Andhra), section* 12-*A* (6) *(a)—Scope—Review —When permissible.*

The provision in section 12-A (6) (*a*) of the Madras General Sales Tax Act as applied to Andhra, permits a review when through some oversight, mistake or error the necessary facts, basic or evidentiary were not present before the Court when it passed the order sought to be reviewed. It is entirely wrong to think that the sub-section permits a party to play hide and seek with a judicial Tribunal; that is to say to raise a fact in issue or evidentiary fact as a plea in support of a claim and at the same time deliberately withhold the evidence thereof. Such a situation cannot be said to be one within the meaning of the expression "facts not present before the Tribunal". A party is not entitled to ask for review under section 12-A (6) (*a*) by reason of his own deliberate negligence and intentional withholding of evidence.

State of Andhra v. *Sri Anisetty Sriramulu,* (1957) 1 An. W.R. 51 : A.I.R. 1957 A.P. 130 (F.B.), overruled.

Appeal by Special Leave from the Judgment and Order dated the 8th August, 1955, of the former Andhra High Court, in Tax Revision Case No. 2 of 1955, and appeal from the Judgment and Order, dated the 28th July, 1955, of the former Andhra High Court in T.R.C. No. 32 of 1954.

N. Rajeswara Rao and *Sardar Bahadur,* Advocates for Appellants (in both the Appeals).

T. V. R. Tatachari and *T. M. Sen,* Advocates for Respondent (in both the Appeals).

The Judgment of the Court was delivered by

S. K. Das, J.—These two appeals, one with Special Leave from this Court and the other on a certificate granted by the High Court of Andhra, have been heard together and this judgment will govern them both.

The facts are similar and the short question for decision is whether the appellant, M/s. Chandaji Kubaji & Co., Guntur, was entitled to apply under section 12-A (6) (*a*) of the Madras General Sales Tax Act, 1939 (Madras Act IX of 1939) as applied to Andhra, for a review of an order of the Appellate Tribunal made under sub-section (4) of section 12-A of the said Act. The relevant facts are these. The appellant is a dealer in ghee, groundnut oil, chilles, etc. and was carrying on its business at Guntur. In Civil Appeal No. 420 of 1957, the Deputy Commercial Tax Officer, Guntur, assessed the appellant to sales tax for the year 1948-49 on a turnover of Rs. 28,69,151 and odd. The appellant having unsuccessfully appealed to the Commercial Tax Officer, Guntur, made a second appeal to the Sales Tax Appellate Tribunal, hereinafter called the Tribunal. Before the Tribunal the appellant contended *inter alia* that out of the total turnover a sum of Rs. 10,45,156 and odd related to commission purchase of commodities taxable at the stage of sale on behalf of principals resident outside the State of Andhra and was not therefore taxable by the respondent State. In respect of this plea the Tribunal said :

"As regards the alleged commission agency business to the tune of Rs. 10,45,156-4-9 the appellants have neither advanced arguments nor placed before us any materials in support of the contention raised in this behalf."

In the result the Tribunal dismissed the appeal on 30th May, 1953.

In Civil Appeal No. 142 of 1958 the appellant was assessed by the Deputy Commercial Tax Officer, Guntur, on a net turnover of Rs. 28,72,083 and odd for

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* C.A. Nos. 420 of 1957 and 142 of 1958. 29th April, 1960

the year 1949-50. The appellant objected to the inclusion of a sum of Rs. 19,89,076 and odd on the ground that the goods relating thereto had been consigned to self and despatched to places outside the State and in fact were delivered outside the State. This plea was disallowed by the Sales Tax Authorities, and the Tribunal said :

"In the grounds of appeal it has been urged with regard to these sale transactions the ownership in the goods continued to vest in the appellant till the sale price was collected and the goods were delivered to the buyers at places outside the State. Beyond advancing a broad argument of this type no material has been placed before us or was placed before the assessing authority or the Commercial Tax Officer to support the appellant's version that the property in the goods passed to the buyer only at places outside the State.".

....

"It is not denied that though contracts in writing were not entered into, these transactions were the result of correspondence between the appellant on the one hand as seller and various persons on the other as buyers. It is conceded that such correspondence exists but the appellants have not chosen to make this correspondence available either to us or to the officer below. When documents which would establish the nature of the transaction beyond doubt are available and have been withheld by the appellant, the normal result is that an inference adverse to his contention has to be drawn. We are accordingly of the openion that in this case, the sales must be deemed to have taken place within this State and that they have been rightly included in the taxable turnover ".

The appeal was disposed of on this finding on 19th August, 1952.

In respect of both the aforesaid orders the appellant filed applications for review under section 12-A (6) (*a*) of the Act. That section, in so far as it is relevant for these appeals, reads :

"12-A (6) (*a*) The Appellate Tribunal may, on the application either of the assessee or of the Deputy Commissioner, review any order passed by it under sub-section (4) on the basis of facts which were not before it when it passed the order :

Provided that no such application shall be preferred more than once in respect of the same order ".

The point taken on behalf of the appellant in Civil Appeal No. 420 of 1957 was that the accounts were in Gujarati language and as there was none on behalf of the appellant who could give instructions to the appellant's advocate either in Telugu or English when the appeal was heard by the Tribunal, the appellant could not place the materials before the Tribunal. In the other appeal, the point taken in support of the application for review was that the relevant correspondence was mixed up with other records and so it could not be placed before the Tribunal. The Tribunal rejected the applications for review on the ground that a failure to produce the necessary materials in support of a plea taken before it, due either to gross negligence or deliberate withholding, did not come within the reason of section 12-A (6) (*a*) as stated in the expression " on the basis of facts which were not before it when it passed the order ". The appellant then moved the High Court in revision under section 12-B of the Act and contended that the view which the tribunal took of section 12-A (6) (*a*) was not correct. The High Court drew a distinction between what is called basic facts and evidence in support thereof and said :

"There is an essential distinction between a fact and the evidence to establish that fact ".

....

"Section 12-A (6) (*a*) in our view is not intended to give two opportunities to every assessee to establish his case before a Tribunal. It is really conceived in the interests of the assessee, who was not able to place some facts before the Tribunal at the first instance which would have made a difference in its decision ".

In the view which the High Court took of section 12-A (6) (*a*), it held that the applications for review were rightly rejected.

In the two appeals before us the argument has been that the Tribunal as also the High Court took an erroneous view of the true scope and effect of section 12-A (6) (*a*) of the Act. Our attention has been drawn to a subsequent Full Bench deci-

sion of the same High Court in *The State of Andhra* v. *Sri Arisetty Sriramulu*[1] and it has been submitted that the view expressed therein is the correct view. In that decision, it was held that the word " facts " in section 12-A (6) (*a*) may be taken to have been used in the sense in which it is used in law of evidence, that is to say, as including the *factum probandum* or the principal fact to be proved and the *factum probans* or the evidentiary facts from which the principal fact follows immediately or by inference ; facts may be either " facts in issue " which are the principal matters in dispute or relevant facts which are evidentiary and which directly or by inference, prove or disprove the " facts in issue ".

In the view which we have taken of these two appeals, it is not necessary to discuss at great length the divergent views taken in the High Court of Andhra as to the true scope and effect of section 12-A (6) (*a*) of the Act. A Division Bench expressed the view that " facts " in the sub-section meant basic facts, that is, facts necessary to sustain a claim, and drew a distinction between such facts and the evidence required to establish them ; it further expresses the view that under section 12-A (6) (*a*) the Tribunal may review its order if any of the basic facts were not present before it when it passed the order, but the sub-section was not meant to give a second opportunity to a party to produce fresh evidence. The Full Bench took a wider view of the sub-section and said that facts referred to in the sub-section might be " facts in issue " or " evidentiary facts ". We think that in an appropriate case evidentiary facts may be so interlinked, with the facts in issue that they may also fall within the purview of the sub-section. The Full Bench, however, went a step further and said that even if relevant evidentiary facts were intentionally or deliberately withheld or suppressed, the party guilty of such suppression or withholding would still be entitled to ask for a review under section 12-A (6) (*a*). We say this with great respect, but this is precisely what the section does not permit. The Full Bench said :

> "The language of section 12-A (6) (*a*) is so wide and general that it might possibly lead to inconvenient results in that it might enable an assessee to get a further chance of hearing before the Appellant Tribunal on the strength of evidence which he negligently or designedly failed to produce at the first hearing. As the language used in section 12-A (6) (*a*) is clear and unequivocal and, in our oinion, capable only of one interpretation, we are bound to give effect to it in spite of the possibility of any inconvenience resulting therefrom. The inconvenience, if any, is not to the assessee for whose benefit the provision is intended. In any case, the remedy is with the Legislature".

It is, we think, doing great violence to language to say that an intentional or deliberate withholding or suppression of evidence in support of a plea or contention or a basic fact urged before the Tribunal, is comprehended within the expression " facts which were not before it (Tribunal) when it passed the order ". To so construe the section is to put a premium on deliberate negligence and fraud and amounts to allowing a party to profit from its own wrong. We do not think that such a construction follows from the language used, which is mote consistent with the view that the provision in section 12-A (6) (*a*) permits a review when through some oversight, mistake or error the necessary facts, basic or evidentiary, were not present before the Court when it passed the order sought to be reviewed. It is entirely wrong to think that the sub-section permits a party to play hide and seek with a judicial Tribunal ; that is to say to raise a fact in issue or evidentiary fact as a plea in support of a claim and at the same time deliberately withhold the evidence in support thereof. Such a situation cannor be said to be one within the meaning of the expression " facts not present before the Tribunal."

In the appeals before us there was intentional withholding or suppression of evidence. In one case, the materials were not produced on the plea that they were written in Gujarati and nobody was available to instruct Counsel in English or Telugu and in the other, on an equally specious plea that the correspondence

1. (1957) 1 An. W.R. 51 : A.I.R. 1957 Andh. Pra. 130 (F.B.).

was mixed up with other records for about two years. These two appeals can be disposed of on this short ground that the appellant was not entitled to ask for review under sectilon 12-A (6) (*a*) by reason of his own deliberate negligence and intentional withholding of evidence.

We see no merit in these appeals and dismiss them with costs.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR AND M. HIDAYATULLAH, JJ.

S. N. Namasivayam Chettiar .. *Appellants**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax (XI of 1922), section 13, Proviso—Applicability—Conditions—Power to compute profits under the Proviso.

The power to compute profits under the Proviso to section 13 of the Income-tax Act arises only where no method of accounting has been regularly employed by the assessee and where the method employed is such that the income, profits and gains cannot properly be deducted therefrom. It means that the method adopted by the assessee must *prima facie* prevail where it is regularly employed, though the Income-tax Officer can resort to the Proviso if the method is such that true profits cannot be correctly determined therefrom. In other words, even if the assessee has regularly employed a method of accounting it can be discarded under the Proviso if the method does not show correct profits of the year.

It is for the Income-tax Authorities to consider the material which is placed before them and, if, after taking into account in any case the absence of a stock register coupled with other materials they are of the opinion that correct profits and gains cannot be deduced, then they would be justified in applying the Proviso to section 13.

Appeals by Special Leave from the Judgments and Orders, dated the 14th September, 1951, and 30th September, 1955 of the Income-tax Appellate Tribunal, Madras, in I.T.A. Nos. 3158 of 1949-50, 7840 and 7841 of 1952-50 and E.P.T. Nos. 300, 301 and 302 of 1952-53.

S. Chowdhuri, Senior Advocate (*N. A. Palkhivala* and *Naunit Lal*, Advocates, with him), for Appellant.

H. N. Sanyal, Additional Solicitor-General of India (*R. Ganapathi Iyer* and *D. Gupta*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—In these six appeals the common question raised is whether the Proviso to section 13 of the Income-tax Act is applicable to the facts and circumstances of these cases. They are therefore disposed of by one judgment. Civil Appeal No. 218 of 1955 arises out of the assessment for the year 1943-1944. Civil Appeals Nos. 219 to 223 relate to the assessment years 1944-1945, 1946-1947 and for the chargeable accounting periods from January 1943 to February 1944, and from February 1945 to February 1946. The appellant in each of the appeals is the assessee and the respondent is the Commissioner of Income-tax and Excess Profits Tax, Madras.

The appellant is a ' resident and ordinarily resident ' in India and carried on extensive trade in Colombo in grains, fodder, gram and other food-stuffs for cattle and poultry. For the assessment year 1943-1944 the appellant showed a turnover of Rs. 17,74,825 and a gross profit of Rs. 63,217 which is about 3.5 per cent. For the two previous assessment years the appellant's gross profits were 9 per cent. and 8 per cent. respectively. The Income-tax Officer, by his order dated March 20, 1948, rejected the accounts and estimated the gross profit by adding back Rs. 2,38,831 to the returned income. Thus he raised the turnover to Rs. 20,00,000.

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* C.A. Nos. 218 and 219 to 223 of 1955. 3rd February, 1960.

and the gross income to Rs. 3,00,000 giving a profit of 15 per cent. on the estimated turnover. On appeal to the Appellate Assistant Commissioner, the order of the Income-tax Officer was confirmed. The Income-tax Appellate Tribunal on appeal by its order dated September, 14, 1951, after pointing out various defects, rejected the account books but accepted the appellant's turnover and computed the profits at 15 per cent. on grains imported from India and 12½ per cent. on grains purchased in Ceylon. It held that correct profits for the year under assessment could not be deduced from the books produced by the appellant. The Excess Profits tax for the chargeable accounting period from February 10, 1942 to January 16, 1943, was decided on the basis of the Income-tax assessment for the year 1943-44. On November 21, 1951, the appellant applied to the Tribunal for stating a case under section 66 (1) on the following four questions :

(1) Whether under the circumstances of the case the Tribunal was justified in holding that section 13 of the Indian Income-tax Act applies to the case.

(2) Whether the reasons set out by the Appellate Tribunal in paragraph 2 of its judgment are sufficient to invoke section 13 of the Act.

(3) Whether the Tribunal, having disagreed with the department on the basis of the assessment, had jurisdiction to apply section 13 and make an assessment on an alleged estimate.

(4) Whether the Tribunal was justified in making an assessment on the basis of section 13 without giving an adeuqate opportunity to the assessee to meet the materials upon which eventually the assessment was rested.

But the Tribunal, by its order dated February 12, 1950, held that no question of law arose and therefore declined to state a case and thus rejected the application. The appellant then applied to the High Court of Madras under section 66 (2) of the Act on the same four questions of law. This application was dismissed by the High Court on February 26, 1953. Against this order the appellant applied for Special Leave to appeal and, by leave of this Court, amended the petition so as to make it an appeal against the order of the High Court as well as the order of the Tribunal dated September 14, 1951.

In the other appeals also the course of proceedings before the Income-tax Officer the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal was the same. For the assessment years 1944-1945 and 1946-1947 the appellant disclosed a turnover of Rs. 10,35,748 and Rs. 5,98,728 respectively and the gross profits rates were 10.7 per cent. and 8.7 per cent. repsectively. As the books of accounts in regard to these years also were rejected, the Income-tax Appellate Tribunal applied section 13 and estimated the gross profits rates at 12½ per cent. and 10 per cent. for the respective years. The appellant applied to the Tribunal under section 66 (1) of the Act for stating a case to the High Court for its decision on the following two points :—

(1) Whether on the facts and in the circumstances of the case, the Department was right in acting under the Proviso to section 13 of the Act in the absence of a finding that income, profits and gains cannot properly be deduced from the books produced or that no method of accounting has been regularly employed.

(2) Whether on the facts and in the circumstances of the case, the Department had sufficient materials before it to justify the rates of 12½ per cent. and 10 per cent. gross profits on the total turnover on the ground that the rates worked out by the figures submitted by the assessee work out at a lesser figure.

The Tribunal dismissed the application on January 15, 1954. The appellant did not apply to the High Court under section 66 (2) of the Income-tax Act but obtained Special Leave from this Court against the order of the Tribunal by which it applied the Proviso to section 13 of the Income-tax Act. All the six appeals were heard together and a common question arises whether the Income-tax Appellate Tribunal was justified in applying the Proviso to section 13 of the Income-tax Act.

It was contended by the appellant in Civil Appeal Nos. 218, 219 and 221 of 1955 that the Income-tax Appellate Tribunal was not justified in applying the Proviso to section 13 and assuming that the Proviso did apply then the percentage worked out was unjustified and had been arrived at by relying upon material

which the appellant had no opportunity to meet and therefore the case fell within the rule in *Dhakeshwari Cotton Mills, Ltd.* v. *The Commissioner of Income-tax, West Bengal*[1], where a similar violation of the fundamental rule of natural justice, *i.e.*, the information upon which the Tribunal relied was not disclosed to the assessee and no opportunity was given to him to rebut such material—was held to be a ground for interference with the order of the Tribunal.

It was rightly argued that the power to compute profits under the Proviso to section 13 arises only where no method of accounting has been regularly employed by the assessee and where the method employed is such that the income, profits and gain cannot properly be deduced therefrom. It means that the method adopted by the assessee must *prima facie* prevail where it is regularly employed, though the Income-tax Officer can resort to the Proviso if the method is such that true profits cannot be correctly determined therefrom. In other words, even if the assessee has regularly employed a method of accounting it can be discarded under the Proviso if the method does not show correct profits of the year.

The Appellate Tribunal, by its order, dated September 14, 1951, held that correct profits could not be deduced from the books produced by the assessee and therefore the Proviso to section 13 of the Income-tax Act applied. The reasons it gave were (1) that vouchers for several purchases made in Colombo had not been produced and for purchases of over Rs. 3,00,000 no vouchers were forthcoming and without the vouchers the entries in the account books could not be verified; (2) there was no quantitative tally for the grains and for other materials purchased by the appellant, which were ground into powder, turned into fodder, packed in different sizes and then sold. It was not possible, according to the Tribunal, to accept the books of account, where the turnover was as large as about seventeen lacs of rupees, without quantitative tally; (3) a fairly big sum of money was alleged to have been paid towards purchasing of licences for export from India; and Rs. 19,000 worth of purchases were made in Tuticorin when only a small sum of money in cash was shown in the assessee's accounts; (4) several outsiders' cheques had been entered in the accounts of the assessee without any proof as to why those cheques were paid to the assessee; and (5) a fairly big sum of money had been invested in India in the purchase of property without money being received from Colombo. On these facts the Tribunal said:

> 'In view of these defects, we are clearly of opinion that the correct profit coud not be deduced from the books produced by the assessee, and accordingly hold that Proviso to section 13 of the Act applies in this case. The question, therefore, is regarding the estimate.'

After giving this finding the Tribunal accepted the turnover as shown in the appellant's books. In making the computation of profits the Tribunal took into consideration the following matters: that the export of food grains from India was prohibited except under a license, that there was an acute shortage of cattle fodder in Ceylon and the appellant had to resort to dubious means in order to obtain grains, that during a substantial portion of the year of accounting there was no price control in Colombo, that as the appellant was a manufacturer of forage by mixing several kinds of grains and powdering them and sold them in packets of various weights, the appellant must have made higher profits than persons who deal in grain only. Keeping all this in view the Tribunal was of the opinion that the rate of 15 per cent. adopted in regard to imported grains was not too high but in the case of local purchases it was, and therefore reduced the rate of profit in the latter case to 12½ per cent. It was on this material that the Tribunal adopted the figure of profit as estimated by the Income-tax Officer, and in order to support this opinion further, the Tribunal remarked that in certain cases which had come to its notice the rate of profits went up to 20 per cent.'

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1. (1955) 1 M.L.J. (S.C.) 60: (1955) An.W.R. (S.C.) 60: (1955) S.C.J. 122: (1955) 1 S.C.R. 941.

On the basis of this remark it was argued that the principle of natural justice had been violated in that the Tribunal had taken into consideration the rate of profit in other cases without giving an opportunity to the appellant to explain those cases and relied upon *Dhakeshwari Cotton Mills, Ltd. v. The Commissioner of Income-tax, West Benal*[1]*g*, where a violation of the fundamental rule of justice, *i.e.*, where the information was not disclosed to the assessee and no opportunity was given to rebut that material, was held to be a ground for interference with the order of the Tribunal. In our opinion, no such case arises in the present appeal. No information, as in *Dhakeshwari's case*[1] was supplied to the Tribunal by any one and taken into consideration by it, and therefore it was not necessary to give any such opportunity as the appellant contends for. In the present case the Tribunal has held that from the method of accounting adopted by the appellant correct profits could not be deduced because of the various reasons which have been set out above and the reference to profits made in other cases was only by way of supporting that conclusion. It was not the basis on which the conclusion was formed nor the basis on which the percentage was arrived at.

As a matter of fact, the Income-tax Officer who also rejected the accounts of the appellant had also given similar reasons. He had held that there was absence of vouchers, that the stock account and the manufacturing account had not been kept or produced, that the cheques of other parties had been credited in the accounts of the appellant which had not been explained and that there was purchase of goods and property by the appellant without there being sufficient cash in hand. The Income-tax Officer also said that in other cases where grains were purchased in India and sold in Colombo the rates of profit were higher, ranging between 20 per cent. and 39 per cent. He then worked out profits in respect of various grains in the case of the appellant and found that the average rate of gross profit worked out to 15.8 per cent. and in his opinion the gross profit in fodder should have been higher. He further took into consideration the fact that Colombo was bombed in April, 1942, resulting in panic in that town and therefore during a portion of the accounting year the appellant might not have made the same margin of profit. He estimated the sales at twenty lacs and the gross profit at three lacs, thus arriving at a figure of 15 per cent. on the turnover. It appears to us that neither the Income-tax Officer nor the Appellate Tribunal relied upon the profits made by traders in other cases as a basis for arriving at any conclusion as to the percentage at which the income should be computed and that they used that material for a different purpose. It is extremely doubtful if the order of the Income-tax Officer or the Tribunal would have been different if no reference had been made to the rate of profits in other cases. In other words, the profits in other cases were not the reason for holding that 15 per cent. profit was a proper rate but merely an ancillary support to that conclusion.

It may be mentioned that throughout in his grounds of appeal the appellant has emphasised the inapplicability of section 13 of the Income-tax and the Proviso thereto, but not this particular violation of principles of natural justice which was emphasised and particularised before us. In his appeal to the Appellate Assistant Commissioner no objection was taken to the reference by the Income-tax Officer to the rate of profits made by other dealers in grains. In the grounds of appeal to the Tribunal also there was no such objection. In the application under section 66 (1) there was no specific ground taken and in the application under section 66(2) the matter does not seem to have been raised. The order of the High Court, dated February 26, 1953, does not show that any such question was raised before it; all it shows is that the appellant's books of account were found to be defective and afforded no data for arriving at correct profits of the business. The order also refers to the non-production of invoices, the unexplained steep fall in profit made during the year when compared with the previous years. The High Court could not find any legal flaw in the order of the Appellate Tribunal to justify an order for

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1. (1955) 1 M.L.J. (S.C.) 60 : (1955) 1 S.C.R. 941. An.W.R. (S.C.) 60 : (1955) S.C.J. 122: (1955)

directing the case to be stated. In the grounds of Special Leave to this Court no pointed reference was made to the material which is now alleged to have been used by the Tribunal without giving an opportunity to the appellant to explain that material. An amended petition by leave of this Court was filed on April 28, 1954, and there also no such pointed reference was made to the material to which objection is now being taken before us. *Dhakeshwari's case*[1] cannot, in our opinion, apply to the facts of this case.

It was then urged that the four reasons given, which we have set out above, could not make section 13 applicable. For the rejection of accounts several reasons were given by the Appellate Tribunal; one of these reasons was the non-production of stock registers and manufacturing accounts. This reason was given by the Income-tax Officer and adopted by the Appellate Tribunal. It was submitted that the non-production of stock account was not such a defect as to entitle the Taxing Authorities to reject the books and apply the Proviso to section 13. Reliance was placed on the judgment of the Punjab High Court in *Pandit Brothers* v. *The Commissioner of Income-tax, Delhi*[2]. The facts in that case were very different. The Income-tax Officer there added a certain sum to the assessee's profits on the ground that the expense ratio was too high and the profits disclosed were too low and there was no stock register. The finding in that case was that the assessee maintained regular accounts of his purchases and sales and there was no finding by the Income-tax Officer that in his opinion the income could not properly be deduced therefrom. Khosla, J. (as he then was) there said :

> "There is no finding that there was material before the Income-tax Officer to lead him to the conclusion that a proper statement of income profits and gains could not be deduced from the material placed before him. All he said was that the profits appeared to be somewhat low and there was no stock register."

The want of a stock register was, in that particular case not a very serious defect because the account books had been found and accepted as correct and disclosed a true state of affairs. It cannot therefore be said that that case laid down as a proposition of law that the want of a stock register by which a proper check could be made was not such a serious defect as to make the Proviso to s. 13 inapplicable.

The importance of such a register was pointed out by the Nagpur High Court in *Ghanshyam Das Permanand* v. *Commissioner of Income-tax, C.P. & Berar*[3]. In cases such as the instant case, the keeping of a stock register is of great importance because that is a means of verifying the assessee's accounts by having a 'quantitative tally'. If, after taking into account all the materials including the want of a stock register, it is found that from the method of accounting correct profits of the business are not deducible, the operation of Proviso to section 13 of the Income-tax Act would be attracted, *Bombay Cycle Stores Co., Ltd.* v. *Commissioner of Income-tax*[4]. It may also be added, as was held by this Court in *Commissioner of Income-tax* v. *MacMillan & Co.*[5], that the Income-tax Officer, even if he accepts the assessee's method of accounting, is not bound by the figure of profits shown in the accounts. It is for the Income-tax Authorities to consider the material which is placed before them and, if, after taking into account in any case the absence of a stock register coupled with other materials they are of the opinion that correct profits and gains cannot be deduced, then they would be justified in applying the Proviso to section 13. In our opinion therefore when the Tribunal applied the Proviso to section 13 bacause of the various blemishes which were pointed out by the Income-tax Officer and accepted by the Appellate Tribunal, it cannot be said that there was any error in the order of the Appellate Tribunal justifying the interference of this Court under Article 136.

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1. (1955) 1 M.L.J. (S.C.) 60 : (1955) An. W.R. (S.C.) 60 : (1955) S.C.J. 122 : (1955) 1 S.C.R. 941.
2. 26 I.T.R. 159.
3. 21 I.T.R. 79, 81.
4. 33 I.T.R. 13.
5. (1958) 2 M.L.J.(S.C.) 1 : (1958) 2 An. W.R. (S.C.) 1 : (1958) S.C.J. 530 : 33 I.T.R. 182, 197.

In regard to the Appeal No. 220 of 1955 for the assessment year 1946-1947 the objection raised was that the Tribunal had committed the same error in that it took into consideration the earlier decision of the Tribunal 'in an identical situation, *i.e.*, in the case of the same assessee in regard to previous years. As we have held that there was no error in the order of the Tribunal in regard to the previous years, it cannot be said that this observation of the Tribunal was in any manner erroneous. This appeal should therefore be dismissed.

The other appeals which arise under the Excess Profits Tax Act for the various chargeable accounting periods depend upon the result of the Income-tax assessment appeals and, as we have dismissed those appeals, these appeals also must be dismissed.

In the result all the six appeals are dismissed with costs. As the appeals were consolidated there will be one set of costs.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. N. WANCHOO AND J. C. SHAH, JJ.

The State of Uttar Pradesh .. *Appellant**

v.

Hafiz Mohd. Ismail (In Crl.A. No. 129 of 1957) and Hafiz Jawed Ali (In Crl. A. No. 130 of 1957.) .. *Respondents.*

Penal Code (XLV of 1865), *sections* 486 *and* 28—*Counterfeit—Essentials.*

In order to apply section 28 of the Penal Code, what the Court has to see is whether one thing resembles another thing, and if that is so and if the resemblance is such that a person might be deceived by it there will be a presumption of the necessary intention or knowledge to make the thing counterfeit, unless the contrary is proved. Accordingly a person cannot be acquitted of an offence under section 486 on the ground that the labels and wrappers were colourable imitations of the genuine labels and wrappers. If the resemblance was such as might deceive a person the labels and wrappers are "counterfeit" under section 28 of the Penal Code.

Appeals by Special Leave from the Judgment and Order dated the 13th July, 1956, of the Allahabad High Court (Lucknow Bench) at Lucknow in Criminal Revisions Nos. 118 and 119 of 1955, arising out of the Judgment and Order dated the 31st March, 1955, of the Second Civil and Sessions Judge, Lucknow, in Criminal Appeals Nos. 511 and 512 of 1954.

H. N. Sanyal, Additional Solicitor-General of India (*G. C. Mathur*, Advocate and *C. P. Lal*, Advocate for *G. N. Dikshit*, Advocate, with him), for Appellant.

Nuruddin Ahmad and *Naunit Lal*, Advocates, for Respondents.

The Judgment of the Court was delivered by

Wanchoo, J.—These are two connected appeals by Special Leave against the judgment of the Allahabad High Court. The brief facts necessary for their disposal are these. One Bhagwan Swarup Saxena, the Trade Market Investigator, Lever Brothers Ltd., India (hereinafter called the company) was working in Lucknow on behalf of the company. He came to know that counterfeit Sunlight and Lifebuoy soaps were being manufactured and sold on a large scale in Yahiaganj and other places in Lucknow. This was investigated on behalf of the company which manufactured genuine Sunlight and Lifebuoy soaps. It was found that two soap factories in Lucknow were manufacturing counterfeit Sunlight and Lifebuoy soaps. It was also found that Hafiz Mohammad Ismail and Hafiz Jawed Ali who are the respondents in the two appeals before us were selling these counterfeit

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* Crl. Appeals Nos. 129 and 130 of 1957. 9th February, 1960.

soaps in Yahiaganj where they have shops. Consequently a raid was made on the shops with the help of the police on May 19, 1953. A large number of soaps were recovered from the two shops which were wrapped in labels said to be counterfeits of those in which the genuine Sunlight and Lifebuoy soaps of the company are sold. Consequently the two respondents were prosecuted under sections 482 and 486 of the Indian Penal Code.

The Magistrate found the case proved and held that the labels in which the respondents were selling soaps were counterfeit of the labels of genuine Sunlight and Lifebuoy soaps. He, therefore, convicted the respondents under sections 482 and 486 of the Code. The respondents went in appeal to the Sessions Judge but their appeals were dismissed. They then went in revision to the High Court. The High Court held that the cases did not fall within section 482 of the Indian Penal Code and therefore acquitted them of the charge under that section. It further held that the labels or wrappers used on the soaps sold by the respondents could not be regarded as counterfeit of the genuine wrappers and labels of Sunlight and Lifebuoy soaps though they were colourable imitations of the same; it therefore acquitted them under section 486 also, without going into the other points raised on behalf of the respondents. The applications of the State of Uttar Pradesh for a certificate to appeal to this Court having been rejected, the State applied for leave to appeal to this Court which was granted; and that is how the matter has come up before us.

The learned Additional Solicitor General appearing for the State has not pressed the appeals so far as the acquittal under section 482 of the Code is concerned. The acquittal therefore under that section will stand. He has, however, strenuously urged that the view of the High Court that the wrappers and labels are not counterfeit but are mere colourable imitations of the genuine trade marks of the company is incorrect inasmuch as the High Court has not given full effect to the words of section 486 in that behalf and the definition of 'counterfeit' in section 28 of the Indian Penal Code.

Section 28 is in these terms—

"A person is said to 'counterfeit' who causes one thing to resemble another thing, intending by means of that resemblance to practise deception or knowing it to be likely that deception will thereby be practised.

Explanation 1.—It is not essential to counterfeiting that the imitation should be exact.

Explanation 2.—When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be prsumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised."

The relevant part of section 486 is in these terms—

"Whoever sells, or exposes, or has in possession for sale or any purpose of trade or manufacture any goods or things with a counterfeit trade mark or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves—

(*a*) ....

(*b*) ....

(*c*) ....

be punished with imprisonment of either description for a term which may extend to one year or with fine or with both."

The contention on behalf of the appellants is that the High Court in holding that the labels and wrappers in this case were only colourable imitations of the genuine trade mark labels and wrappers of the company and were not counterfeit has not taken into account the words of section 28 and particularly of the two *Explanations* thereof. It is pointed out that the words "colourable imitation" do not appear in section 28 which defines the word "counterfeit" and the High Court seems to have misdirected itself by treating the wrappers and labels in this case as colourable imitations and not counterfeit within the meaning of section 28.

The main ingredients of counterfeiting as laid down in section 28 are (i) causing one thing to resemble another thing, and (ii) intending by means of that resemblance to practise deception or (iii) knowing it to be likely that deception will thereby be practised. Thus if one thing is made to resemble another thing and the intention is that by such resemblance deception would be practised or even if there is no intention but it is known to be likely that the resemblance is such that deception will thereby be practised there is counterfeiting. Then comes *Explanation* 1 to section 28 which lays down that it is not essential to counterfeiting that the imitation should be exact. Ordinarily counterfeiting implies the idea of an exact imitation; but for the purpose of the Indian Penal Code there can be counterfeiting even though the imitation is not exact and there are differences in detail between the original and the imitation so long as the resemblance is so close that deception may thereby be practised. Then comes the *Second Explanation* which lays down that where the resemblance is such that a person might be deceived thereby it shall be presumed until the contrary is proved that the person causing one thing to resemble another thing was intending by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised. This *Explanation* lays down a rebuttable presumption where the resemblance is such that a person might be deceived thereby. In such a case the intention or the knowledge is presumed unless the contrary is proved.

This analysis of section 28 shows that there is no necessity of importing words like 'colourable imitation' therein. In order to apply it, what the Court has to see is whether one thing is made to resemble another thing, and if that is so and if the resemblance is such that a person might be deceived by it there will be a presumption of the necessary intention or knowledge to make the thing counterfeit, unless the contrary is proved. What the Court therefore has to see is whether one thing has been made to resemble another thing. If it finds that in fact one thing has been made to resemble another it has further to decide whether the resemblance is such that a person might be deceived. If it comes to the conclusion that the resemblance is such that a person might be deceived by it, it can presume the necessary intention or knowledge (until the contrary is proved) and counterfeiting would then be complete. Therefore the two things that were necessary to decide in this case were (i) whether the labels or wrappers on the soaps sold by the respondents were made to resemble the labels and wrappers of the genuine Sunlight and Lifebuoy soaps, and (ii) if they were so made to resemble, whether resemblance was such as might deceive a person. If both these things were found the labels and wrappers in this case would be counterfeit and the necesary intention or knowledge would be presumed unless the contrary was proved.

Now the Magistrate as well as the Sessions Judge examined the wrappers and labels in this case and compared them with the genuine labels and wrappers of the Sunlight and Lifebuoy soaps of the company and came to the conclusion that there was resemblance between the two sets of wrappers and labels and that that resemblance was so close that a person might be deceived. On that finding, they held that these wrappers and labels were counterfeit because the contrary was not proved before them. The High Court does not say that there is no resemblance between the two sets of wrappers and labels. The very fact that the High Court says that the wrappers and labels found in this case were colourable imitations of the genuine wrappers and labels shows that there was resemblance. The High Court however has stressed the difference in detail between the two sets of wrappers and labels but seems to have overlooked *Explanation* 1 of section 28 which says that it is not essential to counterfeiting that the imitation should be exact, even though the *Explanation* is quoted in the judgment of the High Court. What the High Court had to decide was whether even with these differences in detail which had also been noticed by the Magistrate and the Sessions Judge a person might be deceived by these wrappers and labels recovered from the respondents' shops. This aspect of the matter has not been considered by the High Court at all and it has contented itself by saying that the wrappers and labels recovered in this case were colourable

imitations of the genuine trade marks. That in our opinion does not dispose of the matter so far as section 28 is concerned. The High Court should have found whether the resemblance in this case was such as might deceive a person. The High Court had before it the opinions of the Magistrate and the Sessions Judge. Their opinion was to the effect that the resemblance was such as might deceive a person and that the differences in detail did not affect that resemblance. It was this aspect of the matter which the High Court failed to consider when it went on to hold that the labels and wrappers recovered along with the soaps from the shops of the respondents were not counterfeit. We have looked at the labels and wrappers on the soaps recovered from the shops of the respondents overselves and compared them with the labels and wrappers of the genuine Sunlight and Lifebuoy soaps and we agree with the opinions of the Magistrate and the Sessions Judge that the resemblance is such that a person may be deceived by it. In the circumstances, *Explanation* 2 to section 28 will apply and as the contrary was not proved it must be held that the necessary intention or knowledge was there and these wrappers and labels are counterfeit of the genuine wrappers and labels of the Sunlight and Lifebuoy soaps of the company.

The appeals must therefore be allowed; but as the High Court did not consider the points relating to jurisdiction and limitation and whether the respondents were protected under clause (*a*) and clause (*b*) or (*c*) of section 486, they will have to be remanded to the High Court for disposal according to law on these points. We therefore allow the appeals and setting aside the acquittal of the respondents under section 486 of the Indian Penal Code only send the case back to the High Court for disposal on the lines indicated above.

Appeals allowed and cases remanded.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA, J.C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

The State of Rajasthan and another .. *Appellants**

v.

Thakur Pratap Singh .. *Respondent.*

Police Act (*V of* 1861), *section* 15—*Notification quartering additional police in disturbed area, exempting "Muslim" and "Harijan" inhabitants from obligation to bear the cost—Exemption if discriminatory and violative of Article* 15 (1) *of the Constitution of India* (1950).

A notification under section 15 of the Police Act (V of 1861) quartering additional police in a disturbed area exempted the "Muslim" and "Harijan" inhabitants of the locality from the obligation to bear the cost of the additional police force. The State contended that the Harijan and Muslim inhabitants had been exempted not because of their religion, race or caste but because they were found to be peace-loving and law-abiding citizens in the villages where additional force had been posted.

Held :—As it was not the case of the State that there were no persons belonging to the other communities who were peace-loving and law-abiding (though it might very well be that a great majority of these other communities were inclined the other way) the notification has discriminated against law-abiding members of the other communities and in favour of the Muslim and Harijan communities (assuming that every one of them was "peace-loving and law-abiding") on the basis only of "caste" or "religion". Accordingly the impugned exemption is directly contrary to the terms of Article 15 (1) of the Constitution of India and must be struck down as violating a specific constitutional prohibition.

Appeal from the Judgment and Order, dated the 11th September, 1953, of the Rajasthan High Court (Jaipur Bench) at Jaipur, in Writ Application No. 141 of 1952.

M. S. K. Sastri and *T. M. Sen*, Advocates, for Appellants.

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* C.A. No. 231 of 1956. 18th August, 1960.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This appeal raises for consideration the constitutional validity of one paragraph of a notification issued by the State of Rajasthan under section 15 of the Police Act (Central Act V of 1861) under which "the Harijan" and "Muslim" inhabitants of the villages, in which an additional police force was stationed, were exempted from the obligation to bear any portion of the cost of that force.

It is stated that the inhabitants of certain villages in the district of Jhunjhunu in the State of Rajasthan, harboured dacoits and receivers of stolen property, and were besides creating trouble between landlords and tenants as a result of which there were serious riots in the locality in the course of which some persons lost their lives. The State Government therefore took action under section 15 of the Police Act. This section provides :

> " *Quartering of additional police in disturbed or dangerous districts.*—(1) It shall be lawful for the State Government, by proclamation to be notified in the official Gazette, and in such other manner as the State Government shall direct, to declare that any area subject to its authority has been found to be in a disturbed or dangerous state, or that, from the conduct of the inhabitants of such area, or of any class or section of them, it is expedient to increase the number of police.
>
> (2) It shall thereupon be lawful for the Inspector-General of Police, or other officer authorised by the State Government in this behalf, with the sanction of the State Government, to employ any police-force in addition to the ordinary fixed complement to be quartered in the areas specified in such proclamation as aforesaid.
>
> (3) Subject to the provisions of sub-section (5) of this section, the cost of such additional police-force shall be borne by the inhabitants of such area described in the proclamation.
>
> (4) The Magistrate of the district, after such enquiry as he may deem necessary, shall apportion such cost among the inhabitants who are, as aforesaid, liable to bear the same and who shall not have been exempted under the next succeeding sub-section. Such apportionment shall be made according to the Magistrate's judgment of the respective means within such area of such inhabitants.
>
> (5) It shall be lawful for the State Government by order to exempt any persons or class or section of such inhabitants from liability to bear any portion of such cost."

(Sub-section (6) is omitted as not relevant).

The notification by which these provisions were invoked and which is impugned in these proceedings was in these terms :—

> " Whereas the Rajpramukh is satisfied that the area shown in the schedule annexed hereto has been found to be in a disturbed and dangerous state ;
>
> Now, therefore, in the exercise of the authority vested in him under section 15 (1) of the Police Act (V of 1861), the Rajpramukh is pleased to declare that the 24 villages included in the said Schedule shall be deemed to be disturbed area for a period of six months from the date of this notification.
>
> Under sub-section (2) of the said section 15 of the Police Act (V of 1861), the Rajpramukh is pleased to authorise the Inspector-General of Police to employ, at the cost of the inhabitants of the said area any Police-force in addition to the ordinary fixed complement quartered therein.
>
> Under sub-section (5) of section 15 of the said Act the Rajpramukh is further pleased to exempt the Harijan and Muslim inhabitants of these villages from liability to bear any portion of the cost on account of the posting of the additional Police-force."

Then followed the names of the 24 villages.

The respondent—Thakur Pratap Singh being an inhabitant of Baragaon—one of these 24 villages, moved the High Court of Rajasthan for the issue of a writ or direction under Article 226 of the Constitution impugning the validity of section 15 of the Police Act and in particular of sub-section (5) thereof and of the notification and praying for appropriate reliefs. The High Court repelled the wider contentions urged regarding the invalidity of section 15 of the Police Act in general as also of the powers conferred on the State Government to order the exemption of " any person or classes or sections of such inhabitants " from liability to bear the cost of the additional Police-force. But the learned Judges held that paragraph 4 of the notification which exempted " Harijan and Muslim inhabitants of the villages " from the levy, was violative of the gurantee in Article 15 (1) of the Constitution against discrimination on the ground of caste or religion, etc., which reads:

> " The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them "

and struck it down as unconstitutional.

The State of Rajasthan who felt aggrieved by this order applied to the High Court for a certificate under Article 132 (1) to enable it to file an appeal to this Court and this having been granted, the appeal is now before us.

Learned Counsel for the State made a strenuous effort to show that the exemption of the Harijan and Muslim inhabitants of the villages, was, in the impugned notification, not based " only " on the ground of ' caste ' or ' religion ' or the other criteria set out in Article 15 (1), but on the ground that persons belonging to these two communities were found by the State not to have been guilty of the conduct which necessitated the stationing of the additional Police-force. It was the same argument as was addressed to the High Court and was rejected by the learned Judges who observed :

"Now this is a very strange argument that only persons of a certain community or caste were law-abiding citizens, while the members of other communities were not. Disturbing elements may be found among members of any community or religion just as much as there may be saner elements among members of that community or religion."

The view here expressed by the learned Judges is, in our opinion, correct. Even if it be that the bulk of the members of the communities exempted or even all of them were law-abiding, it was not contended on behalf of the State that there were no peaceful and law-abiding persons in these 24 villages belonging to the other communities on whom the punitive levy had been directed to be made. In paragraph 5 (*f*) of the petition filed before the High Court the respondent had averred :

"That the aforesaid Notification is *ultra vires* of the Constitution of India as it discriminates amongst the Citizens of a village on the basis of religion, race or caste, inasmuch as it makes a distinction between persons professing the Mohammadan religion and others and also between persons who are Muslims and Harijans by caste and the rest. It, therefore, contravenes the provisions of Article 15 of the Constitution of India."

The answer to this by the State was in these terms :

" The Harijan and Muslim inhabitants of these villages have been exempted from liability to bear any portion of the cost of the additional force not because of their religion, race or caste but because they were found to be peace-loving and law-abiding citizens, in the 24 villages where additional force has been posted."

It would be seen that it is not the case of the State, even at the stage of the petition before the High Court that there were no persons belonging to the other communities who were peace-loving and law-abiding, though it might very well be, that according to the State, a great majority of these other communities were inclined the other way. If so, it follows that the notification has discriminated against the law-abiding members of the other communities and in favour of the Muslim and Harijan communities,—(assuming that every one of them was " peace-loving and law-abiding ") on the basis only of " caste " or " religion ". If there were other grounds they ought to have been stated in the notification. It is plain that the notification is directly contrary to the terms of Article 15 (1) and that paragraph 4 of the notification has incurred condemnation as violating a specific constitutional prohibition. In our opinion, the learned Judges of the High Court were clearly right in striking down this paragraph of the notification.

The appeal fails and is dismissed. As the respondent has not appeared there will be no order as to costs.

Appeal dismissed.

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SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, P. B. GAJENDRAGADKAR AND K. N. WANCHOO, JJ.

Paras Nath Thakur .. *Appellant**

v.

Smt. Mohani Dasi (deceased) and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 63—Suit by defeated decree-holder—Onus of proof.

Practice—Second Appeal—Concurrent "findings of fact"—Powers of High Court.

The appellant herein claimed the attached properties under a deed of trust and also to be in possession thereof and the claim was allowed by the executing Court. The decree-holders filed a suit under Order 21, rule 63, Civil Procedure Code (V of 1908), against the said claim order. This appeal by Special Leave is directed against the Judgment and Decree of the High Court in Second Appeal which reversed the concurrent decisions of the Courts below dismissing that suit under Order 21, rule 63.

Held :—The High Court appears to have lost sight of the well-established rule applicable to suits of the kind it was dealing with, that the burden of proof is heavy on the plaintiff who sues for a declaration of a document solemnly executed and registered as a fictitious transaction. The burden becomes doubly heavy when he seeks to set aside the order of the civil Court passed in execution proceedings, upholding the claim of a third party to the property sought to be proceeded against. The plaintiff has to show affirmatively that the order passed was erroneous.

The question decided by the Courts below and the only question in controversy before the High Court (whether the trust deed was a fictitious transaction) is essentially one of fact—even if it is an inference from other facts found on evidence. (Vide *Meenakshi Mills, Madurai* v. *The Commissioner of Income-tax, Madras*, (1957) S.C.J. 1 : (1957) 1 M.L.J. (S.C.) 1 : (1957) 1 An. W.R. (S.C.) 1 : 1956 S.C.R. 691). It is well-established by a long series of decision of the Judicial Committee of the Privy Council and of the Supreme Court, that a High Court on Second Appeal cannot go into questions of fact however erroneous the findings of fact recorded by the Courts of fact may be.

In the instant case, the decision of the High Court on the Second Appeal, reversing the concurrent findings of fact of the two Courts below is based upon inferences drawn from evidence oral and documentary after misplacing the onus of proof (on the appellant herein). This the High Court was not entitled to do. Besides, even on the merits, its findings are open to serious criticism and must be held to be unsound.

Appeal by Special Leave from the Judgment and Decree, dated the 22nd April, 1954, of the Orissa High Court in Second Appeal No. 174 of 1948 arising out of the Judgment and Decree, dated the 12th January, 1948, of the District Judge, Cuttack, in Munsif Appeal No. 309 of 1946 against the Judgment and Decree of the Second Munsiff, Cuttack, dated the 31st August, 1946, in Title Suit No. 120 of 1943.

A. V. Viswanatha Sastri, Senior Advocate (*B. P. Maheswari*, Advocate, with him), for Appellant.

S. P. Sinha, Senior Advocate (*R. Patnaik*, Advocate, with him), for Respondents Nos. 2, 3 and 4.

The Judgment of the Court was delivered by

Sinha, J.—This appeal by Special Leave is directed against the Judgment and Decree, dated April 27, 1954, of the Orissa High Court, passed on Second Appeal, reversing the concurrent decisions of the Courts below, dismissing the plaintiff's suit instituted under the provisions of rule 63 of Order 21 of the Code of Civil Procedure (hereinafter referred to as 'the Code'). The suit had been instituted by the respondents for a declaration that the deed of trust, dated December 15, 1926, in favour of the first defendant, Paras Nath Thakur, installed in the Digamber Jain Temple, in the town of Cuttack in Orissa, was sham and fraudulent and had not been meant to be acted upon, and that the properties covered by the said deed of trust, belonged to the defendants 2 to 4, and were liable to be sold in execution of the decree obtained by the plaintiffs against the defendants-second party (defendants 2 to 4). The deity, the first defendant, was sued under the guardianship of the trustees.

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* C.A. No. 655 of 1957. 12th May, 1959.

The facts of this case, leading up to this appeal, in so far as they are necessary for the determination of this appeal, are as follows : The plaintiffs are the assignees of the mortgagee's interest in respect of a simple mortgage bond, dated April 14, 1927, executed by the predecessors-in-interest of the defendants-second party aforesaid. The mortgagees instituted a suit in the Court of the Subordinate Judge at Cuttack to enforce the mortgage. They obtained a preliminary decree on June 11, 1933, which was made final on October 13, 1936. In due course, the mortgaged properties were sold and purchased by the decree-holders, but as the decretal dues were not satisfied by the sale of the mortgage properties, a money decree was obtained against the defendants 2 to 4 for Rs. 11,000 odd, on April 29, 1940 The disputed properties covered by the deed of trust aforesaid, had been attached before judgment, on September 23, 1934. When the decree-holder proceeded against the properties covered by the deed of trust, the defendant-first party, through the trustees, preferred a claim to the properties under rule 58 of Order 21 of the Code, claiming the properties as belonging to the deity and not to the judgment-debtors. The executing Court, after holding an inquiry under the Code, passed an order in favour of the claimant. Hence, the plaintiffs instituted the suit under the provisions of rule 63 of Order 21 of the Code alleging that the trust deed aforesaid, by virtue of which the claim had been allowed by the Court, as aforesaid, was a sham and fraudulent transaction which did not convey any title to the property covered by the deed of trust and the subject-matter of the suit. The two Courts of fact agreed in holding that there was an idol in fact, and that the deed of dedication was effective to transfer title from the donors to the donee, and that the donors, who were the predecessors-in-title of the defendants-second party, had completely divested themselves of any interest in the properties which were the subject-matter of the deed of trust. It was also found that the disputed properties did not belong to the family of the mortgagors, and that the deed of trust had been executed only with a view to putting the title to the property beyond all doubt or dispute. The plaintiffs, being unsuccessful in the first two Courts, preferred a Second Appeal to the High Court of Judicature at Cuttack. The appeal was heard by a Division Bench, consisting of Panigrahi, C.J., and Narasimham, J. The judgment of the Court was delivered by the learned Chief Justice who set aside the decisions of the Courts below and allowed the appeal with costs throughout. As the defendant-first party failed to obtain from the High Court the necessary leave to appeal to this Court, it moved this Court for Special Leave which was granted. Hence this appeal.

It is manifest that the question to be determined by the High Court on the Second Appeal, was essentially one of fact. That the High Court was cognizant of this aspect of the case, appears from the following observation with which the decision of the High Court begins :—

> "In Second Appeal the substantial point urged before us is whether the evidence, both oral and documentary, would warrant an inference that the properties had in fact been dedicated to the deity."

It is well-settled by a long series of decisions of the Judicial Committee of the Privy Council and of this Court, that a High Court, on Second Appeal, cannot go into questions of fact, however erroneous the findings of fact recorded by the Courts of fact, may be. It is not necessary to cite those decisions. Indeed, the learned counsel for the plaintiff-respondents did not and could not contend that the High Court was competent to go behind the findings of fact concurrently recorded by the two Courts of fact. The High Court then set out to examine the evidence, both oral and documentary, and after an elaborate examination of the large volume of evidence adduced by the parties, recorded the finding that :

> "defendant No. 1 has failed to prove his title and that the plaintiffs are entitled to have the suit properties sold with a view to satisfy the decree obtained by them against the judgment-debtors."

In our opinion, the High Court has completely misdirected itself both in law and on facts, as will presently appear, even assuming that it was open to it to go behind findings of facts.

In the first place, the High Court has misplaced the onus of proof, as will appear from the conclusion just quoted above. The onus of proof loses much of its im-

portance where both the parties have adduced their evidence. But the High Court seems to have laid some emphasis on onus of proof, with a view to examining for itself whether that onus had been discharged by the contesting defendant, the deity. This becomes clear from the following observation of the High Court:—

"Judged by these principles Exhibit F, the deed of trust by itself creates no endowment; and it is necessary for the defendants to show by evidence *aliunde* that there had been an existing endowment in favour of this particular idol to which the description 'Devottar' can be applied."

Further down, the High Court observed, as follows, after referring to what is characterized as "innumerable decisions":—

"Applying the above principles to the facts of this case, we find that no evidence has been given with regard to the formal dedication of the properties to the deity except what is recited in Exhibit F. This recital is insufficient to support a finding that there had been a real dedication of these properties."

With due respect to the High Court, it must be remarked that it appears to have lost sight of the well-established rule applicable to suits of the kind it was dealing with, that the burden of proof is heavy on a plaintiff who sues for a declaration of a document solemnly executed and registered, as a fictitious transaction. The burden becomes doubly heavy when the plaintiff seeks to set aside the order of the civil Court, passed in execution proceedings, upholding the claim of a third party to a property sought to be proceeded against in execution. The plaintiff, who seeks to get rid of the effect of the adverse order against him, has to show affirmatively that the order passed on due inquiry by the executing Court, was erroneous. Hence, in this case, apart from the fact that the respondents were the plaintiffs, there was an initial heavy burden on them not only to show that the order of the Civil Court in the claim case, was erroneous, but also that the deed of trust relied upon by the contesting defendant, was fictitious. The two Courts of fact had discussed all the relevant evidence in great detail, and had agreed in finding that the plaintiffs had failed to prove their case. The question which the Courts below decided and which was the only question in controversy before the High Court, was whether the trust deed was a fictitious transaction. Such a question is essentially one of fact. *See* the latest decision of this Court in the case of *Meenakshi Mills, Madurai* v. *The Commissioner of Income-tax, Madras*[1], where it has been laid down, *inter alia*, that a finding of fact, even when it is an inference from other facts found on evidence, is not a question of law, except in certain specified cases. The case before us certainly is not one of those specified cases. These observations are sufficient completely to displace the decision of the High Court, but we shall examine the reasons of the High Court for setting aside the concurrent findings of fact of the Courts below, to see whether the High Court was right in its conclusions, assuming all the time that the High Court was competent to go into those questions of fact. The High Court was considerably influenced by certain recitals in the deed, as will appear from the following observations:—

"Above all, there is a futher significant recital which appears to have escaped the notice of both the Courts below, and that is that 'the trustees can dispose of the properties if ever they think it necessary, and may also appoint a Pujari for conducting the daily worship of the deity'."

In making these observations, the High Court has completely missed the real significance of the following paragraph towards the end of the deed:—

"Be it stated that if it will be required at any time, you the trustees according to your unanimous opinion will sell the property situated at Mouzas Baramunda, Siripur and Muapalli, etc., in Killa Khurda and Zilla Dandimal out of the immoveable properties described in schedule '*kha*' of this deed and will appoint any servant, etc., for the purpose of worship."

It will be noticed from the above-quoted provision in the deed that the trustees were specifically empowered by the deed to alienate certain specific properties which, according to the evidence, were very inconveniently situated. The properties in dispute in this case, are not in that category. The properties are land and house in the town of Cuttack, where the deity is located. Hence, in the first instance, the specific power of alienation granted to the trustees, did not apply to the properties in dispute

1. (1957) S.C.J. 1: (1957) 1 M.L.J. (S.C.) 1: (1957) 1 An.W.R. (S.C.) 1: (1956) S.C.R. 691.

Secondly, such a provision in a deed of trust is not wholly out of place, which could lend itself to the inference that the document was not intended to be acted upon.

The High Court then examined in detail the evidence of D.W. 3 who, on its own findings, is a respectable person. About this witness, the High Court observed:—

"Undoubtedly, the testimony of this witness is entitled to great respect and the Courts below have accepted it as reliable."

While dealing with the evidence of this witness, the High Court proceeded to make the further remarks :—

"We are here concerned with the determination of the sole question as to whether there has in fact, been a dedication in favour of the deity. No witness has been called to prove the gift of any single item of the properties in suit. Even the evidence relating to the installation of the idol is extremely obscure."

Here again, the High Court appears to have overlooked the evidence of D.W. 1, Kunjabehari Lal, who has stated as follows :—

"The disputed shop house belongs to the Thakur. In 1870 or 1872, one person probably of the name of Maniklal gifted the disputed shop house to the Thakur."

While dealing with the question whether the deed of trust had been given effect to the High Court made the following significant observations :—

"There is no evidence of the appropriation of the rents and profits of the properties up to the year 1938, and even the accounts, which are alleged to have been maintained, have not been produced."

The High Court, here again, appears to have overlooked some material evidence, bearing on this aspect of the matter. Particularly significant, is the evidence of one Dhaneswar Lal who was examined by the executing Court in the claim case aforesaid, on behalf of the claimant. The following statement in his evidence, which was marked as Exhibit-M at the trial because the witness was dead, is pertinent:

"I look after the Thakur's affair. I am a Panchayat member of the Thakur. I also perform its Puja and get a pay of Rs. 12 for it. Since 1934, I work as Thakur's Pujhari, and look after the Thakur's land since 1936. I regularly maintain accounts. These accounts have been filed in the 2nd Munsiff's Court in connection with Suit No. 94 of 1941. The disputed property relates to lots 1 and 2 of the trust deed. Plot 216 is Thakur's temple. It is a two-storeyed building."

The witness had been cross-examined by the plaintiffs who were opposing the claim, and in his cross-examination, it was brought out that the accounts which the witness stated had been filed in the 2nd Munsif's Court, also included expenditure made in the temple. In this connection, it is noteworthy that the plaintiffs had not called upon the contesting defendant to produce those account-books in respect of the properties in dispute. If that party had been called upon to produce those documents and it had failed to produce them, an adverse inference might have been permissible to a Court of fact. But apparently, the High Court was inclined, on the Second Appeal, to draw such an adverse inference even though no foundation had been laid at the trial for justifying such an inference. To the same effect, are the following observations of the High Court :—

"On the other hand, the other facts and circumstances of the case raise a strong presumption that there had, in fact, been no such endowment."

It is clear, therefore, that the decision of the High Court on the Second Appeal, reversing the concurrent findings of fact of the two Courts below, is based upon inferences drawn from evidence oral and documentary, after mis-placing the onus of proof. This, the High Court was not entitled to do. Besides, as we have already indicated, even on the merits, the findings of the High Court are open to serious criticism and must be held to be unsound.

For the reasons aforesaid, it is clear that the judgment of the High Court cannot be supported. The appeal is, accordingly, allowed with costs throughout, and the suit will stand dismissed.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA, J.C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

The Bhopal Sugar Industries Ltd. .. *Appellant**

v.

The Income-tax Officer, Bhopal .. *Respondent.*

Constitution of India (1950), *Article* 226—*Writ of* mandamus—*Issue of—Directions of superior Tribunal exercising appellate powers—Failure of inferior Tribunal to carry out—If can be condoned on the ground that the directions were wrong.*

The Income-tax Appellate Tribunal, Bombay, on appeal from the Order of Appellate Assistant Commissioner, Jubbalpore, gave certain directions to the Income-tax Officer (the assessing authority in the case) to arrive at the market value of sugarcane grown by the assessee and grant relief, if necessary, on such computation. The Income-tax Officer did not carry out the directions and passed orders on different basis.

On a petition for writ under Article 226 of the Constitution of India, the Judicial Commissioner of Bhopal, acting as the High Court found that the respondent, Income-tax Officer, had acted arbitrarily and in clear violation of the directions given by the Appellate Tribunal but refused to issue the writ of *mandamus* on the ground that the Tribunal went wrong in giving the directions and therefore there was no manifest injustice.

Held : The Judicial Commissioner was not sitting in judgment over the order of the Appellate Tribunal which has become final. The respondent failed to carry out a legal duty imposed upon him and such failure was destructive of a basic principle of justice ; a writ of *mandamus* should issue *ex debito justiciae* to compel the respondent to carry out the directions given to him by the Appellate Tribunal.

Appeal from the Judgment and Order, dated the 14th February, 1956, of the former Judicial Commissioner's Court, Bhopal, in Misc. Civil Case No. 24 of 1955.

S. P. Mehta, Advocate and *S. N. Andley*, Advocate of *Messrs. Rajinder Narain and Co.*, for Appellant.

K. N. Rajagopal Sastri, Senior Advocate (*D. Gupta*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

S. K. Das, J.—This is an appeal on a certificate under Article 133 of the Constitution. The short question for decision is whether the learned Judicial Commissioner of Bhopal rightly dismissed a petition under Article 226 of the Constitution made by the Bhopal Sugar Industries, Limited, hereinafter referred to as the appellant-company, praying for the issue of an appropriate order or direction in the nature of a writ of *mandamus* to compel the Income-tax Officer, Bhopal, respondent herein, to carry out certain directions given by the Income-tax Appellate Tribunal, Bombay, to the said Officer in an appeal preferred by the appellant-company from an order of assessment made against it by the respondent.

The relevant facts are these : The appellant-company carries on the business of manufacturing and selling sugar in various grades and quantities. It has its factory at Sehore which was formerly in the Bhopal State and is now situate in the State of Madhya Pradesh. It purchased sugarcane from local cultivators and also grew its own sugarcane in farms situate in that State, such sugarcane being used for its manufacture of sugar. During the year of account ending on September 30, 1950, the appellant-company purchased 7,72,217 maunds of sugarcane from local cultivators at various purchasing centres, 14 in number, situate at a distance of about 8 to 22 miles from its factory. The price paid was Rs. 1-4-6 per maund, that being the price fixed by the then State of Bhopal. The average cost of transporting the sugarcane from the various centres to the factory was stated to be Rs. 0-4-9 per

* Civil Appeal No. 407 of 1956. 2nd September, 1960.

maund. During the same period the appellant-company grew its own sugarcane to the extent of 6,78,490 maunds and brought the same along with the cultivators' sugarcane to its factory for manufacturing sugar. For the sugarcane grown on its own farms the appellant-company claimed Rs. 1-13-0 per maund as its market value (including Rs. 0-4-9 as average transport charges), the total market value for 6,78, 490 maunds thus coming to Rs. 12,29,763. The appellant-company deducted from the aforesaid market value a sum of Rs. 9,77,772 as agricultural expenses, namely, expenses of harvesting, loading, etc., and claimed the balance of Rs. 2,51,991 as agricultural income to be deducted from the computation of its total income for the assessment year 1951-52. The respondent accepted the figure of Rs. 9,77,772 as agricultural expenses but computed the market value of 6,78,490 maunds of sugarcane grown on the appellant-company's own farms at Rs. 9,33,000 at the rate of Rs. 1-6-0 per maund; thus according to this computation there was a loss of Rs. 44,772 and the respondent held in his assessment order that the appellant-company was not entitled to claim any deduction of agricultural income for the assessment year.

The appellant-company then appealed to the Appellate Assistant Commissioner, Jubbalpore, who determined the market value of the sugarcane grown on the appellant-company's own farms at Rs. 10,07,132 at the rate of Rs. 1-7-9 per maund. This resulted in an agricultural income of Rs. 29,360 which the Appellate Assistant Commissioner allowed to be deducted from the total income of the appellant-company.

Not satisfied with the order of the Appellate Assistant Commissioner, the appellant-company preferred an appeal to the Income-tax Appellate Tribunal, Bombay, and claimed that the market value of the sugarcane grown on its farms should be Rs. 1-13-0 per maund and not Rs. 1-7-9. There was no dispute before the Tribunal as to the agricultural expenses, and the question which the Tribunal had to decide related to the market value of 6,78,490 maunds of sugarcane grown on the appellant-company's own farms. After referring to rule 23 of the Income-tax Rules and certain other matters, the Tribunal said:

> "We are, therefore, inclined to think that 'market' within the meaning of rule 23 is not the centres but the factory where the assessee-company manufactures sugar. This being the position in order to find out the market value, we have to add the transport charges from the centres to the factory. We were told that the transport charges amounted to Rs. 0-4-9 per maund. We have not been able to verify this figure. In our opinion, therefore, the sugarcane produced by the assessee-company in its own farms as to be valued at Rs. 1-4-6, per maund plus the average transport charges per maund from the centres to the factory."

The Tribunal then gave the following directions to the respondent:

> "We would, therefore, direct the Income-tax Officer to ascertain the average transport charges per maund from the centres to the factory and to add to it the rate of Rs. 1-4-6 per maund and on that basis work out the market value of the sugarcane grown by the assessee-company in its own farms. If the market value comes to more than Rs. 1-7-9 per maund further relief to the necessary extent will be given by the Income-tax Officer. If, however, the market value is less than Rs. 1-7-9 the appeal must fail."

The Commissioner of Income-tax then applied to the Tribunal for a reference under section 66 (1) of the Income-tax Act, stating that a question of law arose out of the Tribunal's order inasmuch as the Tribunal was not justified, in the opinion of the Department, to add average transport charges to the price of Rs. 1-4-6 per maund of sugarcane grown by the appellant-company. This application was, however, withdrawn on August 4, 1954. The order of the Tribunal thus became final and was binding on the parties.

In the meantime, the appellant-company moved the respondent to give effect to the directions of the Tribunal. After some abortive correspondence between the respondent and his higher officers on one side and the appellant-company on the other, the respondent informed the appellant-company on March 24, 1955, that no relief could be given to it. In his letter of that date the respondent said;

"In this connection your attention is invited to the order of the Tribunal to ascertain the cost of transportation of the sugarcane from the farms to the factory which could only be considered in working out the market value of the agricultural produce. As is evident from your account books you are found to have debited a sum of Rs. 59,116 only out of the total transportation expenses to your agricultural produce account. Naturally, therefore, only the expenses so incurred by you can be considered in working out the market value of the agricultural sugarcane. By adding the transportation charges to the valuation of sugarcane at Rs. 1-4-6 on 6,78,490 maunds of agricultural produce the total cost of the agricultural produce would be Rs. 9,28,431. Against this by the order of the Appellate Assistant Commissioner the value of the farm cane was taken at Rs. 10,07,132 and thus the excess allowance of Rs. 78,701 has already been allowed to you. Thus as the market value of the agricultural produce does not in any case exceed Rs. 1-7-9 as held by the Appellate Assistant Commissioner the result of the Tribunal's order as per their finding given in paragraph 8 of the order results in no relief being given to you."

It is worthy of note here that while the Tribunal had directed the respondent to ascertain the average transport charges from the *centres to the factory*, the respondent referred to the cost of transportation from the *farms to the factory*. Clearly enough, the respondent misread the direction of the Tribunal and failed to carry it out. He proceeded on a basis which was in contravention of the direction of the Tribunal.

In these circumstances, the appellant-company moved the Judicial Commissioner, Bhopal, then exercising the powers of a High Court for that area, for the issue of a writ to compel the respondent to carry out the directions given by the Tribunal. The learned Judicial Commissioner found in express terms that the respondent had acted arbitrarily and in clear violation of the directions given by the Tribunal; in other words, he found that the respondent had disregarded the order of the Tribunal, failed to carry out his duty according to law and had acted illegally. Having found this, the learned Judicial Commissioner went on to examine the correctness or otherwise of the order of the Tribunal and found that the Tribunal went wrong in not treating the centres as 'markets' within the meaning of Rule 23 of the Income-tax Rules. He then came to the conclusion that in view of the error committed by the Tribunal, there was no manifest injustice as a result of the order of the respondent; accordingly, he dismissed the application for the issue of a writ made by the appellant-company.

We think that the learned Judicial Commissioner was clearly in error in holding that no manifest injustice resulted from the order of the respondent conveyed in his letter, dated March 24, 1955. By that order the respondent virtually refused to carry out the directions which a superior Tribunal had given to him in exercise of its appellate powers in respect of an order of assessment made by him. Such refusal is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administration of justice based as it is in this country on a hierarchy of Courts. If a subordinate Tribunal refuses to carry out directions given to it by a superior Tribunal in the exercise of its appellate powers, the result will be chaos in the administration of justice and we have indeed found it very difficult to appreciate the process of reasoning by which the learned Judicial Commissioner while roundly condemning the respondent for refusing to carry out the directions of the superior Tribunal, yet held that no manifest injustice resulted from such refusal.

It must be remembered that the order of the Tribunal, dated April 22, 1954, was not under challenge before the Judicial Commissioner. That order had become final and binding on the parties, and the respondent could not question it in any way. As a matter of fact the Commissioner of Income-tax had made an application for a reference, which application was subsequently withdrawn. The Judicia Commissioner was not sitting in appeal over the Tribunal and we do not think that in the circumstances of this case it was open to him to say that the order of the Tribunal was wrong and, therefore, there was no injustice in disregarding that order. As we have said earlier, such a view is destructive of one of the basic principles of the administration of justice.

In fairness to him it must be stated that learned counsel for the respondent did not attempt to support the judgment of the Judicial Commissioner on the ground that no manifest injustice resulted from the refusal of the

respondent to carry out the directions of a superior Tribunal. He conceded that even if the order of the Tribunal was wrong, a subordinate and inferior Tribunal could not disregard it; he readily recognised the sanctity and importance of the basic principle that a subordinate Tribunal must carry out the directions of a superior Tribunal. He argued, however, that the order of the Tribunal was unintelligible and the respondent did his best to understand it according to his light. This argument advanced on behalf of the respondent appears to us to be somewhat disingenuous. We find no difficulty in understanding the order of the Tribunal; it directed the respondent "to ascertain the average transport charges per maund from the centres to the factory and add to it the rate of Rs. 1-4-6 per maund of sugarcane". The direction is clear and unambiguous. The respondent instead of ascertaining the average transport charges per maund from the centres to the factory, referred to the transport charges from the farms to the factory and on that footing disregarded the directions of the Tribunal; for the respondent to say thereafter that the order of the Tribunal was not intelligible betrays a regrettable lack of candour. We must, therefore, reject the argument of learned counsel for the respondent.

The learned Judicial Commissioner referred to three decisions in support of the proposition that a direction or order in the nature of a writ of *mandamus* cannot be claimed as of right, nor need such a writ issue for every omission or irregularity, *Bimal Chand* v. *Chairman, Jiagunj Azimgunj Municipality and another*[1]; *Gram Panchayat, Vidul of Vidul* v. *Multi Purpose Co-operative Society of Vidul and another*[2], and *Messrs. Senairam Doongarmall* v. *Commissioner of Income-tax, Assam*[3]. In the view which we have expressed, namely, that by the impugned order the respondent failed to carry out a legal duty imposed on him and such failure was destructive of a basic principle of justice, a writ of *mandamus* should issue *ex debito justiciae* to compel the respondent to carry out the directions given to him by the Income-tax Appellate Tribunal, Bombay, and it is unnecessary to consider the decisions referred to above except merely to state that in none of them arose any question of condoning a refusal by an inferior Tribunal to carry out the directions given to that Tribunal by a superior Tribunal in the undoubted exercise of its appellate powers, on the ground that the order of the superior Tribunal was wrong.

We must, therefore, allow this appeal, set aside the judgment and order of the Judicial Commissioner, dated February 14, 1956, and issue an order directing the respondent to carry out the directions given by the Income-tax Appellate Tribunal, Bombay, in its judgments and order, dated April 22, 1954. The appellant-company will be entitled to its costs in the proceedings before the Judicial Commissioner and in this Court.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, A.K. SARKAR AND RAGHUBAR DAYAL, JJ.

Purushottam Umedbhai & Co. (In both the Appeals) .. *Appellants**

v.

M/s. Manilal & Sons (In both the Appeals) .. *Respondents.*

Civil Procedure Code (V of 1908), section 153, Order 30, Order 1, rule 10 and Order 6, rule 17—Plaint by foreign firm in its firm name in Indian Court—Defence plea that it was not valid—Amendment seeking to enter the individual partners as plaintiffs—Permissibility.

Partnership—Power of attorney by one partner—Sufficiency to confer authority on behalf of all the partners.

Since a firm is not a legal entity the privilege of suing in the name of the firm is permissible under Order 30, Civil Procedure Code only to those persons who, as partners, are doing business in India,

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1. A.I.R. 1954 Cal. 285.
2. A.I.R. 1954 Nag. 82.
3. A.I.R. 1955 Assam 201.

* C.A. Nos. 178 and 179 of 1960. 7th October, 1960.

Such privilege is not extended to persons who are doing business as partners outside India. In their case they still have to sue in their individual names. If, however, under some misapprehension, persons doing business as partners outside India do file a plaint in the name of their firm they are misdescribing themselves, as the suit instituted is by them, they being known collectively as a firm. Therefore, a plaint filed in a Court in India in the name of a firm doing business outside India is not by itself a nullity. It is a plaint by all the partners of the firm with a defective description of themselves for the purposes of the Code of Civil Procedure. In these circumstances a Civil Court could permit under the provisions of section 153 of the Code (or possibly under Order 6, rule 17), an amendment of the plaint to enable a proper description of the plaintiff to appear in it in order to assist the Court in determining the real question or issue between the parties. In order to clarify matters a Court would permit an amendment by striking out the name of the firm and replacing it with the name of the persons forming the partnership. It would be a case of misdescription. Even if the provisions of Order 1, rule 10 and Order 6, rule 17, did not strictly apply the amendment could be permitted under section 153 of the Civil Procedure Code because it was not a case of either adding parties or substituting parties.

Where a partner who is also the manager of the firm executes a power of attorney to an individual authorising him to institute a suit on behalf of the firm, the power is valid and it was not necessary that the power should have been signed by all the partners of the firm. Further one partner is the agent of the others and could execute such a power of attorney.

Appeals by Special Leave from the Judgment and Decree dated the 18th December, 1958, of the Calcutta High Court in Appeals from Original Orders Nos. 108 and 138 of 1957 respectively.

B. R. L. Iyengar, Advocate for the Appellants (In both the Appeals).

N. C. Chatterjee, Senior Advocate (*D. N. Mukherjee*, Advocate, with him), for Respondents (In both the Appeals).

The Judgment of the Court was delivered by

Imam, J.—These are appeals by Special Leave against the order of a Division Bench of the Calcutta High Court dated December 18, 1958, setting aside the order of P. B. Mukherjea, J. dated February 8, 1957, whereby he rejected the petition of the respondent for amendment of the plaint, filed in Suit No. 1452 of 1951 in the High Court, in exercise of its Ordinary Original Civil jurisdiction.

The plaint in Suit No. 1452 of 1951 was filed in the name of Manilal & Sons, a firm carrying on business at No. 11-A, Malacca Street, Singapore. The partners of this firm were five in number. They were (1) Manubhai Maganbhai Amin, (2) Pravinbhai Dahyabhai Patel, (3) Ganga Bhai Iswar Bhai Patel, (4) Bachu Bhai Mani Bhai Amin and (5) Dahya Bhai, Trikam Bhai. The defendant was the firm of Purushottam Umedbhai & Co. (now the appellant)—a firm registered under the Indian Partnership Act, 1932—carrying on business at No. 55, Canning Street, Calcutta. In July, 1949, there was a contract between the plaintiff and the defendant under which the defendant was to sell to the former, subject to certain conditions, 950 bales of Heavy Cees gunny bags *C. I. F.* Singapore to be shipped from Calcutta in August, 1949. It was also agreed between the plaintiff and the defendant in July August, 1949 that the latter would sell subject to certain conditions, 600 bales of Heavy Cees gunny bags *C.I.F.* Hong Kong to be shipped from Calcutta in August, 1949. According to the plaintiff, the defendant did not perform the contract entered into by the parties and as a result of the default on the part of the defendant the plaintiff had suffered loss. The plaintiff accordingly claimed compensation to the extent of Rs. 2,73,864 and Rs. 7,850 towards expenses incurred, in all Rs. 2,81,714. The breach of the contract is alleged to have taken place in October and November, 1949. The suit was instituted on April 2, 1951. The defendant's written statement was filed on or about May 21, 1951. The petition for amendment of the plaint was filed on January 31, 1957. The amendment sought was to the effect that the name of the firm Manilal & Sons as plaintiff be struck off and in its place and stead the names of the five persons who were the partners of the firm may be entered in the plaint as plaintiffs. The petitioner also sought the necessary consequential amendments in the body of the plaint. According to the petition praying for amendment, on January 29, 1957, the solicitors of the plaintiff received a letter from the attorney of the

defendant to the effect that inasmuch as the firm Manilal & Sons was carrying on business at Singapore, an objection would be taken on behalf of the defendant that the suit, as framed, was null and void and not maintainable. The suit had been pending in the Court of P.B. Mukherjea, J., and appeared on the peremptory list, for the first time, on January 3, 1957. According to the petition, the petitioner was advised that as the misdescription of the plaintiff was a *bona fide* one, the names of the partners of the firm Manilal & Sons should be brought on to the record in order to bring the controversy between the proper parties into clear relief. Accordingly, the petitioner filed the petition for amendment.

On a Chamber Summons being taken out, Mukherjea, J., heard the matter and rejected the petition for amendment. He was of the opinion that the original plaint was no plaint in law and therefore was a mere nullity of a process. The proper course, when there is such a mistake, is not to amend, disregarding the conditions of Order 1, rule 10 of the Civil Procedure Code, but to seek the Court's permission to withdraw the suit with liberty to file a fresh suit under Order 23, rule 1 of the Civil Procedure Code on the ground of formal defect and which should be done before limitation. In his opinion, it was not a case of misnomer or a misdescription. It was not a case of a non-existent firm or a non-existent person or of a wrong description but of a legal bar ; and when a plaint is filed showing that the plaintiff was not a legally recognised person at all such a plaint must be regarded as a nullity. He was also dissatisfied with the explanation given for filing the petition for amendment some six years after the institution of the suit.

In appeal, the Division Bench of the High Court came to the conclusion on a consideration of various decisions of the High Courts in India and the Courts England that

"the description of a plaintiff by a firm name in a case where the Code of Civil Procedure does not permit a suit to be brought in the firm name should properly be considered a case of description of the individual partners of the business and as such a misdescription, which in law can be corrected and should not be considered to amount to a description of a non-existent person."

It also rejected the contention on behalf of the defendant that the Power of Attorney in favour of Dunderdale was insufficient. The contention had been that this Power of Attorney did not authorize Dunderdale to act on behalf of the firm far less the individual members of the firm. The Division Bench accordingly allowed the amendment prayed for and permitted the names of the individual partners of the firm Manilal & Sons to be substituted as plaintiffs in the plaint in the place of Manilal & Sons. The individual partners were permitted either to sign the plaint themselves or through their constituted attorneys. The Division Bench allowed this amendment on the condition that all the costs of the appellant before us incurred upto the date of the judgment must be paid to it.

The Division Bench also allowed the appeal against the decree of P.B. Mukherjea, J., dismissing the suit, which it set aside. Appeal No. 179 of 1960 is by Special Leave against the aforesid order of the Division Bench.

It was urged on behalf of the appellants that (1) the plaint as filed was a nullity. The suit, therefore, was incompetent. To bring on the record the partners of the firm amounted to addition of new parties and if on the date these partners are added as parties the period of limitation had elapsed then the entire suit would be time barred ; (2) even if it be held that the plaint is not a nullity, neither the provisions of Order 1, rule 10 nor those of Order 6, rule 17 have any application to the case ; (3) having regard to the provisions of section 45 of the Indian Contract Act a suit by only one partner or one promisee is bad to start with. There being within the period of limitation no suit by all the partners, any amendment, if allowed, would convert the old suit into a new suit and the new suit would be barred by limitation if the amendment was allowed on a date which was beyond the period of limitation prescribed for such a suit ; (4) if the amendment was allowed it would be a case of adding or substituting new plaintiffs and as regards them it would be deemed to have been instituted when they were made parties. Reference to section 22 (1),

Indian Limitation Act, was made in this connection. In the present case, so far as the new plaintiffs were concerned, the suit was barred by time at the date when they were sought to be made parties; (5) the circumstances of the case indicated that there was no suit in the eyes of the law, nor was the plaint verified or signed as required by law. Consequently, there was no proceeding before the Court in which any amendment could be sought and (6) even if it was held that the plaint was not a nullity the plaint had been signed and verified on behalf of the firm Manilal & Sons by Dunderdale on a Power of Attorney executed by one of the partners only. It was therefore not manifest that all the partners intended to sue. Furthermore, the Power of Attorney executed in favour of Dunderdale by one of the partners could not be regarded as authorizing him to act on behalf of the firm of Manilal & Sons.

Very great reliance was placed on the decision of Blackwell, J. in the case of *Vyankatesh Oil Mill Co.* v. *N. V. Velamahomed*[1], where the learned Judge held that the suit was brought by an entity which had no legal existence in the eyes of Indian law and there being no mode of procedure whereby such an entity was permitted to sue in India, the suit, as framed, was not maintainable at all. It followed therefore that the amendment asked for could not be treated as an amendment following upon a mere misdescription but must be treated as an application for the substitution of the individual persons who composed the entity which the law did not recognize. This view of Mr. Justice Blackwell was not accepted by Beaumont, C.J. in the case of *Amulakchand Mewaram and others* v. *Babulal Kanalal Taliwalal*[2], where he expressed himself as follows :

" I must confess that I have some difficulty in following both the reasons and the conclusions of the learned Judge in that case. It was a case of a suit brought in the name of a firm carrying on business outside British India, and therefore not justified by the terms of Order 30, Civil Procedure Code and the learned Judge expressed the view that the plaintiff firm was a non-existent entity. But the order which he subsequently made giving leave to amend seems inconsistent with that finding"

He further held :

" But I do not see how Order 30 can affect the question of fact, whether a suit brought in the name of a firm in a case not within Order 30 is in fact a case of misdescription of existing persons, or a case of a suit brought by a non-existent entity."

In the case of *Hajee Sattar Hajee Peer Mohamad* v. *Khusiram Benarsilal*[3], the Calcutta High Court did not accept the view expressed by Blackwell, J. It referred to the following observation of Farwell, L.J., in *Sadler* v. *Whiteman*[4] :—

" In English law a firm as such has no legal existence ; partners carry on business both as principals and as agents for each other within the scope of the partnership business ; the firm name is mere expression, not a legal entity, although for convenience under Order 48 A it may be used for the sake of suing and being sued."

In the case of *Mura Mohideen* v. *V. O. A. Mohamed and others*[5] the Madras High Court dissented from the opinion espressed by Blackwell, J. and the learned Judges stated :

" We are unable to agree with Blackwell, J., in his view that a foreign firm not being a legal entity which could as such file a suit under the Civil Procedure Code by itself determines the question whether the impleading of the members of that firm is the addition of a new party. The view of Blackwell, J., appears to have been concurred in by two decisions reported in—'*Neogi Ghose & Co.* v. *Nehal Singh*[6]', and '*L N. Chettiar Firm* v. *M..P.R.M. Firm*[7], but we are unable to agree with the soundness of the reasoning in these decisions either of which do not furnish any further reasons in support of the view of Blackwell, J. "

The Madras High Court then concluded as follows :—

" If, however, imperfectly and incorrectly a party is designated in a plaint the correction of the error is not the addition or substitution of a party but merely clarifies and makes apparent what was previously shrouded in obscurity by reason of the error or mistake. The question in such a case is one of intention of the party and if the Court is able to discover the person or persons intended to sue or to be sued a mere misdisdescription of such a party can always be corrected provided the mistake

1. A.I.R. 1928 Bom. 191.
2. A.I.R. (1933) Bom. 304.
3. I.L.R. (1952) Cal. 153.
4. L.R. (1910) 1 K.B. 868.
5. (1955) 1 M.L.J. 337 : I.L.R. (1955) Mad. 1293 : A.I.R. 1955 Mad. 294.
6. A.I.R. 1931 Cal. 770.
7. A.I.R. 1935 Rang. 240.

was *bona fide—vide* Order 1, rule 10, Civil Procedure Code. Such an amendment does not involve the addition of a party so as to attract section 22 (1), Limitation Act. Suits by or on behalf of dead persons stand in a differenct category. The principle that a misdescription could be corrected by amendment could not obviously be applied to such a case but this is far from saying that merely because the law does not recognise the firm as being a legal entity, the firm name could not indicate or designate the individuals composing the firm".

"To sum up, the situation is analogous to a case where an individual who has an alias or an abbreviated name by which he is sometimes called initially describes himself in that name but subsequently applies to have it rectified so as to describe in the manner in which he is most generally known. There cannot be any doubt that by the correction in the name, a new plaintiff is not added so as to attract section 22 (1), Limitation Act. A trade name either of a person or a group of individuals carrying on business in partnership is in truth an alias for the person or the group."

Before the introduction of Order 30 in the Code of Civil Procedure apparently suits were instituted, particularly in the mofussil Courts, in the name of a firm or were instituted against a firm in the firm name and no objection was generally taken. Presumably this practice was largely based on the assumption that the suit concerned was either by all the partners of the firm or against all the partners of the firm. If, however, an objection were to be taken that a suit in the name of a firm was not maintainable because it had no legal entity, the Courts would have to decide whether the suit had been instituted by non-existent persons. If so, the suit was not maintainable. In the case of *Kasturchand Bahiravdas* v. *Sagarmal Shriram*[1], which was before the introduction of Order 30 in the Code, the suit had been brought in the name of the firm Kondanmal Sagarmal by its manager Sagarmal Shriram. The defendants objected that one Malamchand was also a partner in the firm and should be made a party. He was accordingly added as a plaintiff on the 27th of January, 1888. The defendant then contended that the suit was barred under section 22, Limitation Act. It was held by the Bombay High Court that it was a case of misdescription and not of non-joinder for the action was brought in the name of the firm by its manager. The introduction of Order 30 into the Code prevents such an objection being taken because it permits two or more persons carrying on business of the firm to sue or be sued in the name of the firm but the firm must be carrying on business in India. The introduction of this provision in the Code was an enabling one which permitted partners constituting a firm to sue or be sued in the name of the firm. This enabling provision, however, accorded no such facility or privilege to partners constituting a fiem doing business outside India. The existence of the provisions of Order 30 in the Code does not mean that a plaint filed in the name of a firm doing business outside India is not a suit in fact by the partners of that firm individually.

Section 4 of the Indian Partnership Act, 1932, hereinafter referred to as the Act, states that :

"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm" and the name under which their business is carried on is called the "firm name".

It is clear from this provision of the Act that the word "firm" or the "firm name" is merely a compendious description of all the partners collectively. It follows, therefore, that where a suit is filed in the name of a firm it is still a suit by all the partners of the firm unless it is proved that all the partners had not authorized the suit. A firm may not be a legal entity in the sense of a corporation or a company incorporated under the Indian Companies Act but it is still an existing concern where business is done by a number of persons in partnership. When a suit is filed in the name of a firm it is in reality a suit by all the partners of the firm. If Order 30 had not been introduced into the Code and a suit had been filed in the name of a firm it would not be a case of a suit filed by a non-existent person. It would still be a suit by the partners of a firm, the defect being that they were described as a firm. In order to clarify matters a Court would permit an amend-

1. I.L.R. 17 Bom. 413.

ment by striking out the name of the firm and replacing it with the name of the persons forming the partnership. It would be a case of misdescription. Even if the provisions of Order 1, rule 10 and Order 6, rule 17, did not strictly apply the amendment could be permitted under section 153 of the Civil Procedure Code because it was not a case of either adding parties or substituting parties. The High Court referred to a number of decisions to which no particular reference need be made but they do support the view taken by the High Court that in the present case the plaintiff described in the plaint as the firm of Manilal & Sons was a mere description capable of amendment and not a case where a plaint had been filed by a non-existent person and therefore a nullity.

We now refer to certain provisions of Order 30, Civil Procedure Code. Order 30, rule 1, Civil Procedure Code, states:

"(1) Any two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm if any of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed verified, or certified by any one of such persons."

This rule enables any party to a suit filed in the name of a firm doing business in India to apply to the Court for a statement of the names and addresses of the persons who were at the time of the accruing of the cause of action partners in the firm to be furnished and verified in such manner as the Court may direct. Order 30, rule 2, states:

"(1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or an behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the name of the partners are described in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint.

Provided that all the proceedings shall nevertheless continue in the name of the firm".

This makes it obligatory, in the case of a suit instituted by the partners in the name of the firm, on demand in writing by or on behalf of any defendant, to declare in writing the names and places of residence of all persons constituting the firm on whose behalf the suit is instituted. If the plaintiffs fail to comply with the demand made under sub-rule (1) of this rule, all the proceedings in the suit may be stayed on such terms as the Court may direct. Under sub-rule (3) if the names of the partners are declared in the manner referred to in sub-rule (1) the suit shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named in the plaint, provided that all the proceedings shall nevertheless be continued in the name of the firm. Rule 1 of Order 30 is a general provision. Rule 2, however, is confined to a suit instituted by partners in the name of the firm. It is clear from this rule that although the suit is filed in the name of the firm a disclosure has to be made, on demand in writing by or on behalf of any defendant, of names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted. The provisions of rule 2 would indicate that although the suit is filed in the name of a firm, it is none the less a suit by all the partners of the firm because if a disclosure of the names of the partners is asked for by any defendant, on such disclosure, the suit shall proceed as if the partners had been named as plaintiffs in the suit, even though the proceedings shall nevertheless be continued in the name of the firm. It is clear, therefore, that the provisions of Order 30, rule 1 and rule 2 are enabling provisions to permit several persons who are doing

business as partners to sue or be sued in the name of the firm. Rule 2 would not have been in the form it is if the suit instituted in the name of the firm was not regarded as, in fact, a suit by the partners of the firm. The provisions of these rules of Order 30, being enabling provisions, do not prevent the partners of a firm from suing or being sued in their individual names. These rule also do not prohibit the partners of a firm suing in India in their names individually although they may be doing business outside India. Indeed, this was not disputed on behalf of the appellant. Since, however, a firm is not a legal entity the privilege of suing in the name of a firm is permissible only to those persons who, as partners are doing business in India. Such privilege is not extended to persons who are doing business as partners outside India. In their case they still have to sue in their individual names. If, however, under some misapprehension, persons doing business as partners outside India do file a plaint in the name of their firm they are misdescribing themselves, as the suit instituted is by them, they being known collectively as a firm. It seems, therefore, that a plaint filed in a Court in India in the name of a firm doing business outside India is not by itself a nullity. It is a plaint by all the partners of the firm with a defective description of themselves for the purposes of the Code of Civil Procedure. In these circumstances, a Civil Court could permit, under the provisions of section 153 of the Code (or possibly under Order 6, rule 17, about which we say nothing), an amendment of the plaint to enable a proper description of the plaintiffs to appear in it in order to assist the Court in determining the real question or issue between the parties. Strictly speaking Order 1, rule 10 (1) has no application to a case of this kind because the suit has not been instituted in the name of a wrong person, nor is it a case of there being a doubt whether it has been instituted in the name of the right plaintiff. The provisions of Order 1, rule 10 (2) also do not apply because it is not a case of any party having been improperly joined whose name has to be struck out or a case of adding a person or a party who ought to have been joined or whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The suit has been from its very inception a suit by the partners of the firm and no question of adding or substituting any person arises, the partners collectively being described as a firm with a particular name.

One of the partners Manubhai Maganbai Amin was the Manager of the firm Manilal & Sons. He had executed a Power of Attorney in favour of four persons including one Dunderdale. By this Power he authorized any one of these persons to sue for recovery of moneys due to the firm from the firm Purushottam Umedbhai & Co., the appellant. It also empowered these persons to appear and to represent the firm in any Court, in any jurisdiction—Civil, Criminal, Insolvency, Original, Appellate or otherwise—and before any official in any suit or proceeding or matter and to make, sign, verify, present and file any plaint. Dunderdale had signed and verified the plaint in the present case. We have no doubt, on a perusal of the Power of Attorney, that it authorized Dunderdale to file the plaint on behalf of the firm Manilal & Sons and also to verify it. It was suggested that this was a Power of Attorney by Manubhai Maganbhai Amin for himself and not for the firm of Manilal & Sons. As we understand the Power of Attorney that is not so. No doubt the Power of Attorney is not signed by all the partners of Manilal & Sons but only by Manubhai Maganbhai Amin. In our opinion it was not necessary that the Power should have been signed by all the partners of the firm because Manubhai Maganbhai Amin was the Manager of the firm. Under section 18 of the Act a partner is an agent of the firm for the purposes of the business of the firm. Manubhai Maganbhai Amin was therefore the agent of the firm as well as its Manager. It is to be noticed that under section 19 (2) of the Act instances are stated where, in the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to do matters mentioned in clauses (*a*) to (*h*). It is significant that in these clauses there is no prohibition to a partner executing a Power of Attorney in favour of an individual authorizing him to institute a suit on behalf of the firm. In these circumstances, it cannot be

said that at the time the plaint was filed it was defective because the Power of Attorney in favour of Dunderdale was not a Power of Attorney on behalf of the firm and its partners. As the High Court has pointed out, there is on the record now Powers of Attorney on behalf of all the partners of the firm.

It seems to us that the Division Bench of the High Court took a correct view in holding that the plaint was not a nullity. It was a case of a suit instituted by all the partners of a firm who were misdescribed as Manilal & Sons, a firm carrying on business at No. 11-A, Malacca Street, Singapore and accordingly the learned Judges rightly allowed the plaint to be amended on terms and conditions stated in their order.

It follows therefore that the High Court was also right in setting aside the decree of P. B. Mukherjea, J. dismissing the suit.

These appeals accordingly fail and must be dismissed but, in the circumstances, without costs.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Messrs. Tungabhadra Industries Ltd., Kurnool .. *Appellants**

v.

The Commercial Tax Officer, Kurnool .. *Respondent.*

Madras General Sales Tax (Turnover and Assessment) Rules, 1939—*Rule* 18 (2)—*Scope—"Groundnut oil" If includes "Vanaspati" or hydrogenated groundnut oil and refined groundnut oil—Rule* 5 (1) (g)—*Deduction for freight—Conditions.*

It cannot be said that refined groundnut oil is not "groundnut oil" for the purpose of rule 18 (2) of the Madras General Sales Tax (Turnover and Assessment) Rules 1939. Hydrogenated groundnut oil or " Vanaspati" still continues to be "groundnut oil " notwithstanding the processing which is merely for the purpose of rendering the oil more stable thus unproving its keeping qualities for those who desire to consume groundnut oil. A factory purchasing groundnut kernels and manufacturing refined groundnut oil and Hydrogenated groundnut oil is entitled to the benefit of the deduction of the purchase price of the kernel—or groundnut, under rule 18 (2), which went into the manufacturing of the hydrogenated groundnut oil from the sale turnover of such oil.

Where a price inclusive of freight is charged the dealer is not entitled to claim deduction in respect of freight charges.

Appeal from the Judgment and Order dated the 11th February, 1955, of the Andhra Pradesh High Court in T.R.C. No. 120 of 1953 †arising out of the Judgment, and Order dated the 29th December, 1952, of the Sales Tax Tribunal, Madras, in Tribunal Appeal No. 857 of 1951.

A. V. Viswanatha Sastri, Senior Advocate, (*M. Ranganatha Sastri* and *M. S. K. Sastri,* Advocates, with him), for Appellants.

D. Narasaraju, Advocate-General for the State of Andhra Pradesh (*T. V. R. Tatachari, D. Venkatappayya Sastri* and *T. M. Sen,* Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This appeal on a certificate under Article 133 of the Constitution granted by the High Court of Andhra Pradesh raises for consideration prinicipally the question whether hardened or hydrogenated groundnut oil (commonly called Vanaspati) is " groundnut oil " within the meaning of Rule 18 (2) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939.

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*C.A. No. 498 of 1958. † (1955) An. W. R. 328. 18th October, 1960.

Tungabhadra Industries Ltd.—the appellant in this appeal—has a factory of considerable size at Kurnool in the State of Andhra Pradesh. The company purchases groundnuts and groundnut kernels within the State and manufactures groundnut oil and also refined oil as well as hydrogenated oil all of which it sells. The appeal is concerned with the assessment to sales-tax of this company for the year 1949-50.

Section 3 of the Madras General Sales-Tax Act, 1939, enacts :

" 3. (1) Subject to the provisions of this Act,—

(*a*) every dealer shall pay for each year a tax on his total turnover for such year ; and

(*b*) the tax shall be calculated at the rate of three pies for every rupee in such turnover.

(2) ....

(3) ....

(4) For the purposes of this section and the other provisions of this Act, turnover shall be determined in accordance with such rules as may be prescribed :

Provided that no such rules shall come into force unless they are approved by a resolution of the Legislative Assembly.

(5) The taxes under sub-sections (1) and (2) shall be assessed, levied and collected in such manner and in such instalments, if any, as may be prescribed :

Provided that—

(i) in respect of the same transaction of sale, the buyer or the seller, but not both, as determined by such rules as may be prescribed, shall be taxed ;

(ii) where a dealer has been taxed in respect of the purchase of any goods in accordance with the rules referred to in clause (*i*) of this proviso, he shall not be taxed again in respect of any sale of such goods effected by him ".

Rules were made by virtue *inter alia* of these provisions entitled " The Madras General Sales-Tax Turnover and Assessment Rules 1939". Of these, those relevant to the present context are rules 4 and 5. Rule 4 reads :

" 4. (1) Save as provided in sub-rule (2) the gross turnover of a dealer for the purposes of these rules shall be the amount for which goods are sold by the dealer.

(2) In the case of the undermentioned goods the gross turnover of a dealer for the purposes of these rules shall be the amount for which the goods are bought by the dealer—

(*a*) groundnut—"

The result of the combined operation of section 4 (1) and (2) in the case of those who purchased groundnut and having crushed them sold the oil obtained was, that they had to pay tax on both their purchases of groundnut and their sales of oil produced therefrom. This was considered by the rule making authority to be an unfair burden and relief was accordingly provided by rules 5 and 18 of the same rules, the material portions of which ran :

"5. (1) The tax or taxes under section 3........shall be levied on the net turnover of a dealer. In determining the net turnover the amounts specified in clauses (*a*) to (*l*) shall, subject to the conditions specified therein, be deducted from the gross turnover of a dealer."

Clause (*k*) of this rule reads :

"(*k*) in the case of a registered manufacturer of groundnut oil and cake, the amount which he is entitled to deduct from his gross turnover under rule 18 subject to the conditions specified in that rule."

(This rule was amended by a notification dated November 9, 1951, by the addition of the words "(other than refined groundnut oil)" after the word "groundnut oil " but this modification of the rule is not relevant to the present case which is concerned with the assessment of a period anterior to the modification). Rule 18 referred to here reads, to quote only the material words :

"18. (1) Any dealer who manufactures groundnut oil and cake from groundnut and/or kernel purchased by him may, on application to the assessing authority having jurisdiction over the area in which he carries on his business, be registered as a manufacturer of groundnut oil and cake.

(2) Every such registered manufacturer of groundnut oil will be entitled to a deduction under clause (*k*) of sub-rule (1) of rule 5 equal to the value of the groundnut and/or kernel, purchased by him and converted into oil and cake if he has paid the tax to the State on such purchases :

Provided that the amount for which the oil is sold is included in his net turnover :

Provided further that the amount of the turnover in respect of which deduction is allowed shall not exceed the amount of the turnover attributable to the groundnut and/or kernel used in the manufacture of oil and included in the net turnover.

Explanation.—For the purpose of this sub-rule—

(*a*) 143 lb. of groundnut shall be taken to be equivalent to 100 lb. of kernel ;

(*b*) 143 lb. of groundnut or 100 lb. or kernel when converted into oil will normally be taken to yield 40 lb. of oil ; and

(*c*) one candy of oil shall be taken to be equivalent to 500 lb. of oil".

Then follow other provisions not relevant for the purposes of the present appeal.

The appellant was registered as a manufacturer of groundnut oil under rule 18 (1). That the appellant purchased the groundnuts, the value of which was claimed as a deduction in the turnover within the State and paid tax on such purchase to the State was not in dispute. Nor was there any controversy that the sale price of the oil expressed out of and sold either as raw groundnut oil, refined oil or hydrogenated oil was included in the turnover of the appellant.

The Deputy Commercial Tax Officer, Kurnool, who completed the assessment of the appellant accepted the figures of purchases and sales submitted by it, and dealing with the claim for the deduction of the purchase price of the groundnuts from the proceeds of the sale of all oil by the company—raw, refined and hydrogenated—granted a deduction in respect of the purchase price of the groundnuts attributable to the unrefined oil sold by the appellant; but held that the appellant was not entitled to the deduction claimed in respect of the refined and hydrogenated oil for the reason that it was only unrefined or unprocessed groundnut oil that was connoted by the expression 'groundnut oil' in rules 5 (1) (*k*) read with rule 18 (1) and (2) of the Turnover and Assessment Rules. This order of the Deputy Commercial Tax Officer was affirmed by the Commerical Tax Officer on appeal and the appellant filed a further appeal to the Sales-Tax Appellate Tribunal. The second appellate authority upheld the contention of the appellant in regard to the sale of refined oil but rejected it in so far as it related to the sales of hydrogenated oil. The matter was thereafter brought up before the High Court of Andhra Pradesh by a Tax Revision Case filed under section 13 (*b*) (1) of the Act and the learned Judges upheld the view of the Tribunal and disallowed the claim of the appellant to the deduction claimed in regard to the sales turnover of hydrogenated oil.[1] They granted the certificate under Article 133 which has enabled the appellant to file an appeal to this Court.

The claim of the appellant to the deduction under rule 18 (2) on the sales of refined groundnut oil is no longer in dispute. The ground upon which both the Tribunal as well as the High Court decided against the allowance of the deduction in respect of the sales of hydrogenated oil, while upholding the appellants' case as regards refined oil may be briefly stated thus : The exemption or deduction from the sale-turnover under rule 18 (2), is on its terms applicable only to the sale of the oil in the form in which it is when extracted out of the kernel. When raw groundnut oil is converted into refined oil, there is no doubt processing, but this consists merely in removing from raw groundnut oil that constituent part of the raw oil which is not really oil. The elements removed in the refining process consist of free fatty acids, phosphotides and unsaponifiable matter. After the removal of this non-oleic matter therefore the oil continues to be groundnut oil and nothing more. The matter removed from the raw groundnut oil not being oil cannot be used, after separation, as oil or for any purpose for which oil could be used. In other words, the processing consists in the non-oily content of the raw oil being separated and removed, rendering the oily content of the oil 100 per cent. For this reason refined oil continues to be groundnut oil within the meaning of rules 5 (1) (*k*) and 18 (2) notwithstanding that such oil does not possess the characteristic colour, or taste, odour, etc., of the raw groundnut oil.

1. (1955) An. W.R. 328.

But in the case of hydrogenated oil which is prepared from refined oil by the process of passing hydrogen into heated oil in the presence of a catalyst (usually finely powdered nickel), two atoms of hydrogen are absorbed. A portion of the oleic acid which formed a good part of the content of the groundnut oil in its raw state is converted, by the absorption of the hydrogen atoms, into stearic acid and it is this which gives the characteristic appearance as well as the semi-solid condition which it attains. In the language of the chemist, an intermolecular or configurational chemical change takes place which results in the hardening of the oil. Though it continues to be the same edible fat that it was before the hardening, and its nutritional properties continue to be the same, it has acquired new properties in that the tendency to rancidity is greatly removed, is easier to keep and to transport. Both the Tribunal as well as the learned Judges of the High Court held that the hydrogenated oil (or Vanaspati) ceased to be groundnut oil by reason of the chemical changes which took place which resulted in the acquisition of new properties including the loss of its fluidity. In other words, they held that Vanaspati or hydrogenated oil was not "groundnut oil" but a product of groudnut oil manufactured out of groundnut oil and therefore not entitled to the benefit of the deduction under rule 18(2).

The arguments of Mr. Viswanatha Sastri for the appellants were briefly two: (1) The reasons behind the rules 5 (*k*) and 18 (2) which were designed to afford relief against what would amount practically to double taxation of the same assessee both when he purchased and when he sold the goods, required that the appellants' claim should be allowed. (2) Hydrogenated groundnut oil was no less groundnut oil than either refined or even unrefined oil. The fact that the quality of the oil had been improved does not negative its continuing to be oil and the materials before the departmental authorities and the Court established that it continued to be oil and was nothing more.

The argument based on the reason of the rule cannot carry the appellant far, since in the present case it is an exemption from tax which he invokes and of which he seeks the benefit. If the words of the rule are insufficient to cover the case, the reason behind the rule cannot be availed of to obtain the relief. Nor could it be said to be a case of double taxation of the same goods at the purchase and sale points which is forbidden by section 3 (5) of the Act. If the view adopted by the learned Judges of the High Court that hydrogenated groundnut oil is not "groundnut oil" but a product of groundnut oil were correct, learned Counsel cannot urge that he would still be entitled to the deduction for which provision is made in rule 18 (2).

Consequently it is the second of the submissions alone which really requires to be examined. In doing so it would be convenient to consider the reasoning on the basis of which the view that hydrogenated oil was not "groundnut oil" was sought to be sustained before us.

The learned Advocate-General of Andhra Pradesh who appeared for the respondent-Commercial Tax Officer sought to support the decision of the High Court by two lines of reasoning. The first was that the exemption applied only to the sale of the oil as it emerged from the presser and that any processing of the oil including refining, in order to remove even the impurities and free fatty acids, took it out of the category of "groundnut oil" as used in the rule. In support of this submission he referred us to the Table of Conversion of groundnuts and kernel into oil set out in the *Explanation* to rule 18 (2), extracted earlier, and submitted that the 40 lb. of oil for every 100 lb. of kernel was based on the yield of raw groundnut oil and that this was an indication that nothing other than raw groundnut oil was intended to be covered by the expression "groundnut oil" in the rule.

We must however point out that this last submission has no factual basis to support it. It is not known whether the proportion of 40 lb. of oil for every 100 lb. of kernel represents the average weight of oil extractable from different varieties of groundnut kernels or is the averge of the different types of oils which may be produced out of different varieties of kernels. In the absence of any definite data in this re-

gard it is impossible to accept the argument that the Table of Conversion justifies any particular construction of what was meant by "groundnut oil" in the main part of the rule.

Nor is the learned Advocate-General well-founded in his submission that the processing of the oil in order to render it more acceptable to the customer by improving its quality would render the oil a commodity other than "groundnut oil" within the meaning of the rule. For instance, if the oil as extracted were kept still in a vessel for a period of time, the sediment normally present in the oil would settle at the bottom leaving a clear liquid to be drawn out. The learned Advocate-General, cannot go so far as to say, that, if this physical process was gone through, the oil that was decanted from the sediment which it contained when it issues out of the expresser, ceased to be "groundnut oil" for the purposes of the rule. If the removal of impurities by a process of sedimentation does not render groundnut oil any the less so, it follows that even the process of refining, by the application of chemical methods for removing impurities in the oil, would not detract from the resulting oil being "groundnut oil" for the purpose of the rule. It may be mentioned that processes have been discovered by which even on extraction from the oil mill, the oil issues without any trace of free fatty acids. It could hardly be contended that if such processes were adopted what comes out of the expresser is not groundnut oil. The submission of the learned Advocate-General based on a contention that the Tribunal and the learned Judges of the High Court erred in holding that even refined groundnut oil was "groundnut oil" for the purpose of the rule, must be rejected.

The next question is whether if beyond the process of refinement of the oil, the oil is hardened, again by the use of chemical processes it is rendered any the less "groundnut oil". In regard to this, the learned Advocate-General first laid stress on the fact that while normally oil was a viscous liquid, the hydrogenated oil was semi-solid and that this change in its physical state was itself indicative of a substantial modification of the identity of the substance. We are unable to accept this argument. No doubt, several oils are normally viscous fluids, but they do harden and assume semi-solid condition on the lowering of the temperature. Though groundnut oil is, at normal temperature, a viscous liquid, it assumes a semi-solid condition if kept for a long enough time in a refrigerator. It is thereforce not correct to say that a liquid state is an essential characteristic of a vegetable oil and that if the oil is not liquid, it ceases to be oil. Mowrah oil and Dhup oil are instances where vegetable oils assume a semi-solid state even at normal temperatures. Neither these, nor cocoanut oil which hardens naturally on even a slight fall in temperature, could be denied the name of oils because of their not being liquid. Other fats like ghee are instances where the physical state does not determine the identity of the commodity.

The next submission of the learned Advocate-General was that in the course of hydrogenation the oil absorbed two atoms of hydrogen and that there was an inter-molecular change in the content of the substance. This however is not decisive of the matter. The question that has still to be answered is whether hydrogenated oil continues even after the change to be "groundnut oil". If it is, it would be entitled to the benefit of the deduction from the turnover, or to put it slightly differently, the benefit of the deduction from the turnover cannot be denied unless the hydrogenated groundnut oil has ceased to be "groundnut oil". To be groundnut oil, two conditions have to be satisfied. The oil in question must be from groundnut and secondly the commodity must be "oil". That the hydrogenated oil sold by the appellants was out of groundnut not being in dispute, the only point is whether it continues to be oil even after hydrogenation. Oil is a chemical compound of glycerine with fatty acids, or rather a glyceride of a mixture of fatty acids—principally oleic, linoleic, stearic and palmitic, the proportion of the particular fat varying in the case of the oil from different oil-seeds and it remains a glyceride of fatty acids even after the hardening process, though the relative proportion of the different types of fatty acids undergoes a slight change. In its essen-

tial nature therefore no change has occurred and it remains an oil—a glyceride of fatty acids—that it was when it issued out of the press.

In our opinion, the learned Judges of the High Court laid an undue emphasis on the addition by way of the absorption of the hydrogen atoms in the process of hardening and on the consequent inter-molecular changes in that oil. The addition of the hydrogen atoms was effected in order to saturate a portion of the oleic and linoleic constituents of the oil and render the oil more stable thus improving its quality and utility. But neither mere absorption of other matter, nor inter-molecular changes necessarily affect the identity of a substance as ordinarily understood. Thus for instance there are absorptions of matter and inter-molecular changes which deteriorate the quality or utility of the oil and it might be interesting to see if such additions and alterations could be taken to render it any the less "oil". Groundnut oil when it issues out of the expresser normally contains a large proportion of unsaturated fatty acids—oleic and linoleic—which with other fatty acids which are saturated are in combination with glycerine to form the glyceride which is oil. The unsaturated fatty acids are unstable, *i.e.*, they are subject to oxidative changes. When raw oil is exposed to air particularly if humid and warm, *i.e*, in a climate such as obtains in Madras, oxygen from the atmosphere is gradually absorbed by the unsaturated acid to form an unstable peroxide (in other words the change involves the addition of two atoms of oxygen) which in its turn decomposes breaking up into aldehydes. It is this oxidative change and particularly the conversion into aldehydes that is believed to be responsible for the sharp unpleasant odour and the characteristic taste of rancid oil. If nothing were done to retard the process the rancidity may increase to such extent as to render it unfit for human consumption. The change here is both additive and inter-molecular, but yet it could hardly be said that rancid groundnut oil is not groundnut oil. It would undoubtedly be very bad groundnut oil but still it would be groundnut oil and if so it does not seem to accord with logic that when the quality of the oil is improved in that its resistance to the natural processes of deterioration through oxidation is increased, it should be held not to be oil.

Both the Tribunal as well as the High Court have pointed out that except for its keeping quality without rancidity and ease of packing and transport without leakage, hydrogenated oil serves the same purpose as a cooking medium and has identical food value as refined groundnut oil. There is no use to which the groundnut oil can be put for which the hydrogenated oil could not be used, nor is there any use to which the hydrogenated oil could be put for which the raw oil could not be used. Similarly we consider that hydrogenated oil still continues to be "groundnut oil" notwithstanding the processing which is merely for the purpose of rendering the oil more stable thus improving its keeping qualities for those who desire to consume groundnut oil. In our opinion, the assessee-company was entitled to the benefit of the deduction of the purchase price of the kernel—or groundnut, under rule 18 (2), which went into the manufacture of the hydrogenated groundnut oil from the sale turnover of such oil.

One other point which is involved in the appeal relates to the claim of the appellant-company to a deduction in respect of the freight-charges included in the price of the commodity. Under rule 5 (1) (*g*) of the Turnover and Assessment Rules, in determining the net turnover of a dealer he is entitled to have deducted from his gross turnover

" all amounts falling under the following two heads, *when specified and charged for by the dealer separately, without including them in the price of the goods sold*:

(i) freight ;

(ii) ...."

The appellant claimed exemption on a sum of Rs. 3,88,377-13-3 on the ground that it represented the freight in respect of the goods sold by the appellant, asserting that they had been charged for separately. The assessing-officer rejected the claim and this rejection was upheld by the departmental authorities and by the High Court.

in Revision. It would be seen that in order to claim the benefit of this exemption the freight should (i) have been specified and charged for by the dealer separately, and (ii) the same should not have been included in the price of the goods sold. The learned Judges of the High Court held that neither of these conditions was satisfied by the bills produced by the appellant. We consider, the decision of the High Court on this point was correct. In the specimen bill which the learned Counsel for the appellants has placed before us, after setting out the quantity sold by weight (23,760 lb.), the price is specified as 15 annas—9 pies per lb. and the total amount of the price is determined at Rs. 23,388-12-0. From this the railway freight of Rs. 1,439-12-0 is deducted and the balance is shown as the sum on which sales tax has been computed. From the contents of this invoice it would be seen that the appellant has charged a price inclusive of the railway freight and would therefore be outside the terms of rule 5 (1) (*g*) which requires that in order to enable a dealer to claim the deduction it should be charged for separately and not included in the price of goods sold. The conditions of the rule not having been complied with, the appellant was not entitled to the deduction in respect of freight.

The result therefore is that the appeal is allowed in part and the order of the High Court in so far as it denied to the appellant the benefit of the deduction in the turnover provided by rule 18 (2) of the Turnover and Assessment Rules is set aside.

In view of the appellant having succeeded only in part, there will be no order as to costs in this appeal.

Appeal allowed in part.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—B. P. SINHA, *Chief Justice*, J. L. KAPUR, P. B. GAJENDRAGADKAR, K. SUBBA RAO AND K. N. WANCHOO, JJ.

The State of Madras and another .. *Appellants**

v.

Messrs. M. A. Noor Mohammed and Co. .. *Respondents.*

Ambur Tanners Association and others .. *Interveners.*

Madras General Sales Tax Act (IX of 1939), *sections* 3 *and* 5 *and Madras General Sales Tax (Turnover and Assessment) Rules,* 1939, *rule* 16 (5)—*Vires and scope of.*

A consideration of the relevant provisions of the Madras General Sales Tax Act and the Rules made thereunder shows that the charging section is section 3 (1) of the Act and the general rule is taxation at multiple points on the total turnover of the dealer, but in the case of sale of certain specified articles a departure has been made and tax at single point is leviable provided certain conditions and restrictions as to licences which are envisaged in section 5 and laid down in the Rules are complied with and, that rule 16 (5) of the Turnover and Assessment Rules is not *ultra vires.*

Appeal by Special Leave from the Judgment and Order dated the 2nd April, 1956, of the Madras High Court in Writ-Petition No. 313 of 1954.

R. Ganapathy Iyer and *T. M. Sen,* Advocates, for Appellants.

C. K. Daphtary, Solicitor-General of India (*S. Venkatakrishnan,* Advocate, with him), for Respondents.

A. V. Viswanatha Sastri, Senior Advocate (*S. Venkatakrishnan,* Advocate, with him), for Intervener No. 1.

R. Gopalakrishnan, Advocate, for Interveners Nos. 2 and 3.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal by Special Leave against the judgment and order of the High Court of Madras allowing a petition under Article 226 of the Consti-

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*C.A. No. 38 of 1959. 12th August, 1960.

tution. The question there raised was the legality of the assessment of Sales Tax by appellant No. 2, the Deputy Commercial Sales Tax Officer, Saidapet under the Madras General Sales Tax Act (Act IX of 1939) hereinafter termed the Act.

The respondent was a partnership firm carrying on tannery business at Chromepet near the city of Madras. Before the year of assessment, *i.e.*, 1952-53, it was taking out licences under the relevant provisions of the Act but it did not renew the licence for the assessment year. When called upon to make a return it did not do so nor did it raise any objection to the notice served on it on February 28, 1954. It was assessed to sales tax of Rs. 10,584 on a turnover of Rs. 6,77,374-4-4. It filed a petition under Article 226 to quash the assessment order on the ground that the order was illegal and not supported by the authority of law. This contention was accepted by the High Court and the petition was allowed with costs. The consequence of the judgment is that the respondent firm which is not a licensed dealer under the Act is not liable to any sales tax in respect of its dealings in hides and skins. Against this judgment and order the appellants have come to this Court by Special Leave.

The contention of the respondent firm in the High Court was that under section 5, clause (vi) of the Act, the liability to pay sales tax in respect of hides and skins could only be at a single point; that the rule limiting the operation of this mode of taxation to licensed dealers was *ultra vires* and therefore rule 16 (5) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, hereinafter called the Turnover and Assessment Rules, was void and inoperative and had been so held by the Supreme Court in *V. M. Syed Mohammed & Co.* v. *The State of Madras*[1]; that accepting this interpretation the State of Madras had deleted clause (5) of rule 16 by Government Order 450, Revenue, dated February, 26, 1954, *i.e.*, two days before the making of the assessment order under dispute; that rule 16 (5) of the Turnover and Assessment Rules was the only provision imposing a multiple tax in respect of sales of hides and skins by unlicensed dealers and that the imposition of the sales tax after the repeal of that rule was illegal and the tax was without the authority of law. It was also contended that in the taxation scheme under the Act, hides and skins, because of their importance in the international market, were excluded from the direct operation of section 3 (1) of the Act which was the general charging section and were given special protection of the single point taxation under section 5 (vi). The argument, therefore, was that in the case of sales of hides and skins the general provision was inapplicable and a special rule for taxation was laid down by section 5 (vi) of the Act.

The High Court held that in the case of hides and skins:

> "the charge levied by section 3 is subject to the provisions of section 5 and in the case of licensed dealers in hides and skins, the charging provision is rule 16 of the Turnover and Assessment Rules."

The High Court further held that rule 16 (5) of the Turnover and Assessment Rules which restricted the benefit of single point taxation to licensed dealers was *ultra vires* as it contravened section 5 (vi) of the Act and section 6-A was not applicable to the case of a dealer who did not take out a licence for dealing in hides and skins and further that if rule 16 (5) was *ultra vires* as being in contravention of section 5 (vi), rule 5 of the Madras General Sales Tax Rules (hereinafter called the Sales Tax Rules) which requires the taking out of the license in order to be able to get the benefit of single point taxation would also be *ultra vires* Thus on a true construction of section 3 (1) and section 5 (vi) it was of the opinion that rule 5 of the Sales Tax Rules and rule 16 (5) of the Turnover and Assessment Rules were *ultra vires* and section 6-A was inapplicable to a person who had not taken out a licence. As a consequence it quashed the order of assessment of the respondent firm.

In order to decide this appeal it is necessary to refer to and consider the relevant provisions of the Act and the two sets of Rules made thereunder. They are as follows:—

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1. (1954) S.C.J. 390: (1954) 1 M.L.J. 619: 1954 S.C.R. 1117.

Section 3 (1) "Subject to the provisions of this Act,—

(*a*) every dealer shall pay for each year a tax on his total turnover for such year ; and

....

(3) A dealer whose total turnover in any year is less than ten thousand rupees shall not be liable to pay any tax for that year under sub-section (1) or sub-section (2).

(4) for the purposes of this section and the other provisions of this Act, turnover shall be determined in accordance with such rules as may be prescribed.

(5) The taxes under sub-sections (1) and (2) shall be assessed, levied and collected in such manner and in such instalments, if any, as may be prescribed ;

Section 5: Subject to such restrictions and conditions as may be prescribed, including conditions as to licences and licence fees.

....

(vi) the sale of hides and skins, whether tanned or untanned shall be liable to tax under section 3, sub-section (1) only at such single point in the series of sales by successive dealers as may be prescribed

Section 6-A. If any restrictions or conditions prescribed under section 5 or notified under section 6 are contravened or are not observed by a dealer, or in case a condition so prescribed or notified requires that a licence shall be taken out or renewed, if a licence is not taken out or renewed, by the dealer or if any of the conditions of a licence taken out or renewed by him are contravened or are not observed, the sales of the dealer, with effect from the commencement of the year in which such contravention or non-observance took place, may be assessed to tax or taxes under section 3, as if the provisions of section 5 or of the notification under section 6, as the case may be, did not apply to such sales and notwithstanding that a licence, if any, taken out or renewed by the dealer continued or continues to be in force during the year."

Madras General Sales Tax (Turnover and Assessment) Rules.

Rule 4 (1). " Save as provided in sub-rule (2) the gross turnover of a dealer for the purposes of these rules shall be the amount for which goods are sold by the dealer.

(2) In the case of the undermentioned goods turnover of a dealer for the purposes of these rules shall be the amount for which the goods are bought by the dealer.

....

(*c*) untanned hides and skins bought by a licensed tanner in the State, and

(*d*) untanned hides and skins exported outside the State by a licensed dealer in hides or skins.

Rule 15 (1). Rules 6 to 13 shall not apply to licensed tanners and other licensed dealers in hides or skins in respect of their dealings in hides or skins ; but the provisions of this and the following rule shall apply to them in respect of such dealings.

Rule 16 (1). In the case of hides and skins, the tax payable under section 3 (1) shall be levied in accordance with the provisions of this rule.

(2) No tax shall be levied on the sale of untanned hides or skins by a licensed dealer in hides or skins except at the stage at which such hides or skins are sold to a tanner in the State or are sold for export outside the State ;

(i) In the case of all untanned hides or skins sold to a tanner in the State, the tax shall be levied from the tanner on the amount for which the hides or skins are bought by him ;

(ii) In the case of all untanned hides or skins which are not sold to a tanner in the State but are exported outside the State, the tax shall be levied from the dealer who was the last dealer not exempt from taxation under section 3 (3), who buys them in the State on the amount for which they were bought by him.

....

(5) Sale of hides or skins by dealers other than licensed dealers in hides or skins shall, subject to the provisions of section 3, be liable to taxation on each occasion of sale ".

Rule 5 (1) of the Sales Tax Rules provides:—

" Every person who..

....

....

(*d*) deals in hides and/or skins whether as a tanner or otherwise, or

....

shall, if he desires to avail himself of the exemption provided in sections 5 and 8 or of the concession of single point taxation provided in section 6, submit an application in Form 1 for a licence in respect of each of his places of business to the authority specified in sub-rule (2) so as to reach him not later than the 15th day of October, 1939."

The scheme of taxation under the Act is this. Section 3 is the general charging section under which tax is levied in the manner prescribed in the turnover of a dealer, except that a dealer whose turnover is less than Rs. 10,000 is exempted from sales tax, section 3 envisages multi-point taxation on the total turnover of a dealer. In the case of the sale transactions of certain specified goods set out in section 5 of the Act an exception is made. That section provides for single point taxation subject to certain prescribed restrictions and conditions. By sub-section (vi) of that section sales of hides and skins are liable to tax under section 3, sub-section (1) at one single point in the series of sales by successive dealers. The language of the section (section 5) shows however that this exemption applies subject to certain restrictions and conditions which includes conditions as to licenses. The rule, which deals with licences is rule 5 of the Sales Tax Rules, the relevant portion of which has already been set out. It lays down that if a dealer desires to avail himself of the exemption provided in sections 5 and 8 or of the concession as to taxation in section 5 only at a single point, then he must obtain a licence as prescribed in that rule. If the restrictions and conditions contemplated by section 5 read with the rules are not complied with, certain consequences follow as a result of section 6-A of the Act which specifically states that where a condition prescribed or notified requires the taking out or the renewal of a licence, then in the case of contravention of such conditions or restrictions the tax is to be levied under section 3 as if the provisions of section 5 did not apply to such sales. This, therefore, is a clear provision which makes the single point imposition of sales tax on hides and skins to be conditional on observing the condition of taking a licence.

The argument of inconsistency between rule 16 (5) of the Turnover and Assessment Rules and section 5 (vi) of the Act which was accepted in the High Court receives no support from the language of that section which is a concessional provision for making the sales of hides and skins liable to taxation at a single point; but that, as the opening words of the section show, is subject to restrictions and conditions prescribed in the rules and one of these conditions is the taking of a licence. All that rule 16 (5) does is to emphasise the consequences of non-observance of the conditions which sections 5 (vi) and 6-A have in clear terms prescribed. We find no inconsistency between the section and the Act. But it was submitted that this Court on appeal from a judgment of the Madras High Court had held rule 16 (5) to be *ultra vires* the Act. That contention is based on the judgment of the Madras High Court in *V. M. Syed Mohammed and Company* v. *The State of Madras*[1], which on appeal was affirmed by this Court in *V. M. Syed Mohammed & Co.* v. *The State of Madras*[2]. This contention is not well-founded. In that case, when it was in the Madras High Court, it was contended that the rules did not properly carry out the policy underlying the Act, which was to keep the price of hides and skins at a competitive level for the world market. It was there argued that hides and skins were articles much in demand in the foreign markets and their export was one of the main items of the foreign trade of the State of Madras which enjoyed considerable natural advantage in tanning because of the plentiful supply of "*Avaram bark*" which was specially suited for the purpose. It was also argued that untanned hides and skins were acquired locally or by import from other States and were either tanned in the State or exported and therefore the scheme of taxation was to levy the tax at a single point, *i.e.*, at the stage when articles were tanned in the State or exported to foreign countries for tanning. For this reason multiple taxation was violative of section 5 (vi) of the Act. This it appears, was not disputed by the Government and it was therefore held that rule 16 (5) of the Turnover and Assessment Rules was *ultra vires*. But the question was really not relevant to the issue as was pointed out by Venkatarama Ayyar, J., at page 394 where he said:—

"Now the contention of the petitioners is that where there are sales by unlicensed dealers to unlicensed tanners or unlicensed dealers, there is the possibility of multiple taxation and that would

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1. (1952) 2 M.L.J. 598 : 3 S.T.C. 367 : A.I.R. 1953 Mad. 105.

2. (1954) S.C.J. 390 : (1954) 1 M.L.J. 619 : (1954) S.C.R. 1117.

be in violation of section 5 (vi). It is not disputed on behalf of the Government that rule 16 (5) is repugnant to section 5 (vi). It must therefore be held to be *ultra vires*. But this can bring no relief to the petitioners, as they are all licensed tanners and are in no manner hurt by the operation of rule 16 (5). This was conceded by the learned Advocate for the petitioners ".

This case was then brought in appeal to this Court and S. R. Das, J., (as he then was) observed, at page 1121 :—

> " Lastly, the learned advocate urges that rule 16 (5) clearly contravenes the provisions of section 5 (vi) of the Act. This sub-rule has been held to be *ultra vires* by the High Court, and indeed, the learned Advocate-General of Madras did not in the High Court, as before us, dispute that rule 16 (5) was repugnant to section 5 (vi). That sub-rule, however affects only unlicensed dealers and the appellants who are admittedly licensed dealers are not affected by that sub-rule."

This judgment does not show that the repugnancy of the rule was in controversy or the Court pronounced its opinion upon the merits or it was necessary to do so.

The learned Solicitor-General then contended before us that in their counter-affidavit filed in the High Court the appellants had accepted the position that rule 16 (5) of the Turnover and Assessment Rules was *ultra vires*. But that will not carry the matter any further, because on a construction of the provisions of the Act t is argument of repugnancy is not sustainable.

The Andhra Pradesh High Court rightly did not accept the view that rule 16 (5) was *ultra vires* of the rule making authority : *V. M. Syed Mohammed &* v. *State of Andhra*[1]. The same view was taken by the Mysore High Court in the *State of Mysore* v. *Sarvatula & Co.*[2].

A consideration of the relevant provisions of the Act and the Rules made thereunder shows that the charging section is section 3 (1) and the general rule in taxation at multiple points on the total turnover of the dealer, but in the case of sale of certain specified articles a departure has been made and tax at single point is leviable provided certain conditions and restrictions as to licences which are envisaged in section 5 and laid down in the rules are complied with and that rule 16 (5) of the Turnover and Assessment Rules is not *ultra vires*.

It was then contended that the provision as to licensing and taxation in the case of licensed dealers and tanners at a single point and a taxation at multiple points in the case of unlicensed dealers were violative of Article 14 of the Constitution. But we did not allow this point to be taken because it was not raised in the High Court and was raised for the first time in this Court. In our opinion the judgment of the High Court in regard to the *ultra vires* nature of rule 16 (5) and the inapplicability of section 6-A of the Act was erroneous and the appeal must, therefore, be allowed, the judgment and order of the High Court set aside and the respondent's petition dismissed. The respondent will pay the costs of the appellants in this Court and in the Courts below.

Appea l allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT : J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

The Travancore Rubber and Tea Co., Ltd. (In all the Appeals) .. *Appellant**

v.

The Commissioner of Agricultural Income-tax, Kerala (In all the Appeals) .. *Respondent.*

Travancore-Cochin Agricultural Income-tax Act (XXII of 1950), *section* 5 (J)—*Expenses incurred for upkeep and maintenance of immature rubber plants which yield no income in the assessment year—If permissible deduction in calculating assessable income of a rubber estate containing both mature and immature rubber trees.*

Sums expended for purposes of superintendence weeding, forking, manuring, etc., of immature rubber trees which have not come into bearing and the annual expenses incurred for the upkeep and

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1. (1956) An.W.R. 298 : A.I.R. 1957 A.P. 408 : 1956 S.T.C. 465 at 472.
2. 9 S.T.C. 593.

* Civil Appeal Nos. 290 to 292 of 1959.

15th December, 1960.

maintenance of such rubber plants are permissible deductions in calculating the assessable agricultural income of a rubber estate already planted and containing both mature yielding rubber trees and also immature plants which have not come into bearing. It is no answer to the claim for a deduction that the expenses in connection with the mature trees produced no return in that year.

Appeals by Special Leave from the Judgment and Order, dated the 6th December, 1957, of the Kerala High Court in Agricultural Income-tax, Referred Cases Nos. 15, 18 and 19 of 1955.

C. K. Daphtary, Solicitor-General of India (*Thomas Vellapally* and *M. R. K. Pillai*, Advocates, with him), for Appellant (In all the Appeals.)

Sardar Bahadur, Advocate for Respondent (In all the Appeals.)

The Judgment of the Court was delivered by

Kapur, J.—These three appeals are brought by Special Leave against the Judgment and Order of the High Court of Kerala and arise out of a common judgment of that Court given in three Agricultural Income-tax References Nos. 15, 18 and 19 of 1955. In the first reference the question raised was:

"Whether under the Travancore-Cochin Agricultural Income-tax Act, 1950, in calculating the assessable agricultural income of a rubber estate already planted and containing both mature yielding rubber trees and also immature rubber plants which have not come into bearing, the annual expenses incurred for the upkeep and maintenance of such rubber plants, are not a permissible deduction, and if so, whether the sum of Rs. 42,660-4-1 expended by the assessee in the relevant accounting year 1952, under this head may be deducted;"

and in the other two the question referred was:

"Whether the expenses incurred for the maintenance and upkeep of immature rubber trees constitute a permissible deduction within the meaning of section 5 (*j*) of Act XXII of 1950; ?"

In all the references the questions were answered in the negative and against the appellant.

The appeals relate to three accounting years 1950, 1951 and 1952 (assessment years 1951-52, 1952-53 and 1953-54). The appellants have rubber plantations and in the accounting year 1950, corresponding to the assessment year 1951-52, the appellants had under cultivation 3,558.84 acres out of which 334.64 acres had immature rubber trees growing and the rest, *i.e.*, 3,224.20 acres mature rubber yielding trees under cultivation. In that year a sum of Rs. 1,90,56-0-9, which was expended for the upkeep and maintenance of immature portion of the rubber plantation, was allowed by the Agricultural Income-tax Tribunal and at the instance of the respondent a reference was made to the High Court under section 60 (1) of the Agricultural Income-tax Act (XXII of 1950) hereinafter termed the 'Act' and that was reference No. 18 of 1955.

During the accounting year 1951 corresponding to the assessment year 1952-53 the appellant had under cultivation a total area of 3,426.55 acres of which 3,091.91 acres were mature rubber yielding trees and 334.64 acres had immature rubber trees. In that year a sum of Rs. 59,271-9-5 was the expenditure incurred for the upkeep and maintenance of immature portion of the rubber estate. That sum was allowed by the Agricultural Income-tax Tribunal and at the instance of the respondent a reference was made under section 60(1) of the Act to the High Court and that was reference No. 19 of 1955.

In Agricultural Income-tax Reference No. 15 of 1955 which related to accounting year 1952 and the assessment year 1953-54, the area under cultivation was 3,453.65 out of which 2,967.91 acres had mature rubber yielding trees and 485.74 acres had immature rubber growing trees. In that year the amount expended on the maintenance and tending of the immature rubber trees was Rs. 42,660-4-1. In that case, however, the Agricultural Income-tax Tribunal rejected the appellant's claim and disallowed the expenditure. At the instance of the appellant a case was stated to the High Court under section 60(1) of the Act and was answered in the negative and against the appellant. In all the cases the assessee company is the appellant and the main question for decision is whether the amount expended

for the upkeep and maintenance of the immature rubber trees is a permissible deduction under section 5(*j*) of the Act.

The charging section under the Act is section 3 and section 5 relates to computation of agricultural income. It provides :—

Section 5: " The agricultural income of a person shall be computed after making the following deductions namely:—

....

(*j*) any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of deriving the agricultural income;".

In regard to this income the High Court held :

"We find it impossible to say that the amounts spent on the upkeep and maintenance of the immature rubber plants were laid out or expended "for the purpose of deriving the agricultural income ", much less that they were laid out or expended " wholly and exclusively for that purpose." "The agricultural income ", in the context, can only mean the agricultural income obtained in the accounting year concerned and not the agricultural income of any other period."

In our opinion the High Court has taken an erroneous view of the relevant provision. It is not denied that the expenditure claimed as a deduction was wholly and exclusively laid out for the purpose of deriving income but the use of the definite article " the " before agricultural income has given rise to the interpretation that the deduction is to be from the income of the year in which the trees on which the amount claimed was expended bore any income. In a somewhat similar case in *Vallambrosa Rubber Co., Ltd.* v. *Farmer*[1] the expenditure of the kind now claimed was allowed under the corresponding provision of the English Income-tax Act. In that case a rubber company had an estate in which in the year of assessment only $\frac{1}{7}$ produced rubber and the other $\frac{6}{7}$ was in process of cultivation for the production of rubber. It may be added that rubber trees do not yield any rubber until they are about six years old. The expenditure for the superintendence, weeding, etc., incurred by the company in respect of the whole estate including the non-bearing rubber estate was allowed on the ground that in arriving at the assessable profits the assessee was entitled to deduct the expenditure for superintendence, weeding, etc., on the whole estate and not only on the $\frac{1}{7}$ of such expenditure. Lord President said at page 534 :

" Well that is for the case quite correct; but it must be taken, as you must always take a Judge's dicta, *secundum materiam subjectum* of the case that is decided. But to say that the expression of Lord Esher's lays down that you must take each year absolutely by itself and allow no expense except the expense which can be put against the profit which is reaped for the year is in my judgment to press it much further than it will go."

Counsel for the respondent relied upon a judgment of this Court in *Assam Bengal Cement Co., Ltd.* v. *The Commissioner of Income-tax, West Bengal*[2] and particularly on a passage at page 983 where Bhagwati, J., observed :

" The distinction was thus made between the acquisition of an income-earning asset and the process of the earning of the income. Expenditure in the acquisition of that asset was capital expenditure and expenditure in the process of the earning of the profits was revenue expenditure."

But that case has no relevancy to the facts of the present case nor has that passage any applicability to the facts of the present case. The question there was whether certain payments made were by way of capital expenditure or revenue expenditure. The assessee acquired a lease from Government for twenty years and in addition to paying the rent and royalties for the lease the assessee had to pay two further sums as 'protection fees' under the terms of the lease. Those sums were held to be capital expenditure inasmuch as they were incurred for the acquisition of an asset or an advantage of enduring nature and were no part of the working or operational expenses for carrying on the business of the assessee.

1. 5 T.C. 529.
2. (1955) 1 M.L.J. (S.C.) 118 : (1955) S.C.J. 205 : (1955) 1 S.C.R. 972.

In our opinion the amount expended on the superintendence, weeding, etc., of the whole estate should have been allowed against the profits earned and it is no answer to the claim for a deduction that part of those expenses produced no return in that year because all the trees were not yielding rubber in that year.

We therefore allow these appeals, set aside the judgments and orders of the High Court and answer the questions in favour of the appellant in all the three Agricultural Income-tax References. The appellant will have its costs in this Court and the High Court. One hearing fee in this Court.

Appeals allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

The Commissioner of Agricultural Income-tax, Trivandrum .. *Appellant**

v.

The Calvary Mount Estates (Private) Ltd. .. *Respondent.*

Madras Plantations Agricultural Income-tax Act (V of 1955), section 5 (e)—Expenses incurred for upkeep and maintenance of immature rubber plants which yield no income in assessment year—If permissible deduction in calculating assessable income of a rubber estate.

The amount spent on the upkeep and maintenance of immature rubber trees in a rubber plantation is a deductible expenditure under section 5 (*e*) of the Madras Plantation Agricultural Income-tax Act (V of 1955).

Appeal by Special Leave from the Judgment and Order, dated the 18th March, 1958, of the Kerala High Court in Tax Revision Case No. 12 of 1957.

Dr. V. A. Seyid Muhamad and *Sardar Bahadur*, Advocates, for Appellant.

C. K. Daphtary, Solicitor-General of India (*Thomas Vellapally*, Advocate and *S. N. Andley*, *J. B. Dadachanji*, *Rameshwar Nath* and *P. L. Vohra*, Advocates of *M/s. Rajinder and Co.*, with him) for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal by Special Leave against the judgment and order of the High Court of Kerala in Tax Revision No. 12 of 1957.

The respondent who is the assessee owned an estate of 590 acres in south Malabar district, now in Kerala State. Out of that area 85 acres were covered by Pepper, Arecanut, Paddy and Coconut cultivation while the rest, *i.e.*, 505 acres had rubber plantations upon it. Of that area 235 acres were occupied by immature non-bearing rubber trees and 270 acres had mature rubber trees. The assessment relates to the year 1955-56, the accounting year being the year ending March 31, 1955. The respondent claimed from out of the income expenses relating to the maintenance and upkeep of immature non-bearing rubber trees. The Agricultural Income-tax Tribunal held that the expenses incurred on the whole area under rubber plantations were deductible expenses and remanded the case for ascertaining the expenses incurred in forking and manuring of the "non-bearing and immature" rubber grown areas also. The appellant then preferred a revision application to the High Court under section 54 (1) of the Madras Plantations Agricultural Income-tax Act (V of 1955). The High Court held that the amount spent on the upkeep and maintenance of immature rubber trees was a deductible expenditure under section 5 (*e*) of that Act which provides :

Section 5 "*Computation of agricultural income* : The agricultural income of a person shall be computed after making the following deductions, namely :—

....

*Civil Appeal No. 145 of 1960. 15th December, 1960.

(*e*) any expenditure incurred in the previous year (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of the plantation ;".

The provisions of section 5 (*e*) of the Madras Act, applicable to the present case, are the same as those of section 5 (*j*) of the Travancore-Cochin Agricultural Income-tax Act (XXII of 1950). The only difference is in the last few words. In place of " for the purpose of the plantation" in the former, the words "for the purpose of deriving the agricultural income " are used in the latter. If anything the words of the former Act are more favourable to the respondent.

In Civil Appeals Nos. 290-292 of 1959, which was an assessment under the Travancore Cochin Act, we have decided the question of deductibility of sums expended for purposes of forking, manuring, etc., of immature rubber trees.[1] That judgment will govern this case also. This appeal therefor fails and is dismissed with costs in this Court and the High Court.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT :—S. K. DAS, M. HIDAYATULLAH AND N. RAJAGOPALA AYYANGAR, JJ

The State of Bombay (now Gujerat) .. *Appellant**

v.

Parshottam Kanaiyalal .. *Respondent.*

Prevention of Food Adulteration Act (XXXVII of 1954), *section* 20 (1)—*Construction—' Written consent'—Who can give—If should name person to whom it is granted.*

As held by the High Court in this case, the plain grammatical meaning of section 20 (1) of Prevention of Food Adulteration Act (XXXVII of 1954) is that the written consent may be of the State Government or a local authority or a person authorised in that behalf by the State Government or a local authority. The prosecution can be instituted (i) by the State Government, (ii) by a local authority, (iii) by a person authorised by the State Government in that behalf or (iv) by a person similarly authorised by a local authority. Further the prosecution can also be instituted with the ' written consent ' of any of these four authorities.

Cannanore Milk Supply Co-operative Society, In re,, (1956) 2 M.L.J. 465, overruled.

The Statute does not in terms prescribe that the complainant should be named in the 'written consent'. The reason of the rule could not suggest or imply such a condition. In the cases of written consent of the four categories, who can institute prosecution themselves, the emphasis is on the consent to the filing of the prosecution and not to the person filing it. The preliminary examination of the facts to ascertain the desirability and propriety of the prosecution is on the person or authority giving the consent—not of the person who figures as a complainant. The specification of the name of the complainant is not a statutory requirement.—the consent being to a *specified prosecution* granted by a competent person or authority. The fact that the person to whom it is granted might not be a servant of the authority and therefor not subject to its control is not a circumstance which of necessity leads to the contrary conclusion.

In the instant case the prosecution by the Food Inspector though not named in the ' written consent' granted by the Chief Officer of the Municipality authorised by it to grant the sanction fulfils the requirements of section 20 (1) of the Act.

Appeal by Special Leave from the Judgment and Order, dated 18th December, 1957, of the former Bombay High Court in Criminal Revision No. 1671 of 1957, arising out of the Judgment and Order, dated the 7th June, 1957, of the Sessions Judge, Baroda, in Criminal Appeal No. 33 of 1957.

H. R. Khanna and *D. Gupta*, Advocates, for Appellant.

G. C. Mathur, Advocate (*Amicus Curiae*), for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This appeal by Special Leave of this Court raises a very short point regarding the construction of section 20 (1) of the Prevention of Food Adulteration Act, 1954 (Central Act XXXVII of 1954).

1. Since reported in *Travancore Rubber and Tea Co., Ltd.* v. *Commissioner of Agricultural Income Tax, Kerala*, (1961) 1 S.C.J. 306 : (1961) 1 M.L.J. (S.C.) 55 : (1961) An.W.R. (S.C.) 55.

*Criminal Appeal No. 56 of 1959. 31st August, 1960.

The respondent owned a milk shop within the Municipal limits of the city of Baroda. The Food Inspector of the Municipality visited the shop on July 9, 1956, and purchased milk for analysis. This was sent to the Public Analyst and when his report was to the effect that the sample was adulterated, the Inspector applied to the Chief Officer, Borough Municipality, Baroda, for the latter's consent, for instituting criminal proceedings under the Prevention of Food Adulteration Act, 1954 (referred to hereafter as the Act) against the respondent. A consent in writing to the initiation of this prosecution was given by the Chief Officer and thereafter the complaint out of which this appeal arises was instituted charging the respondent with an offence under section 16 read with section 7 of the Act for selling adulterated food.

The case was tried by the Special Judicial Magistrate, First Class, Baroda. Besides denying his guilt, the accused raised various technical objections, the principal of which was that the prosecution was incompetent because of non-compliance with the terms of section 20 (1) of the Act. This provision, omitting the Proviso to which it is unnecessary to refer, runs :

" No prosecution for an offence under this Act shall be instituted except by, or with the written consent of, the State Government or a local authority or a person authorised in this behalf by the State Government or a local authority."

The Magistrate overruled these objections and holding the accused guilty of the offence charged sentenced him to pay a fine of Rs. 300 and in default to rigorous imprisonment for three months. Dealing with the objection based on section 20 (1) of the Act with which alone we are concerned, the learned Magistrate said:

" In the present case Baroda Municipal Borough is the local authority and it has authorised the Chief Officer and the Health Officer of the Municipality to grant sanction to institute proceedings under this Act by its Resolution No. 222 dated 7th May, 1956, the Chief Officer has given consent in writing to lodge this complaint against the present accused under the Act on 13th October, 1956. The said consent in writing is on record at Exhibit 10/7 and the copy of the Resolution of the Municipality empowering the Chief Officer and the Health Officer is also on record at Exhibit 18/8. Thus in the present case there is a valid consent in writing given by the Chief Officer who has been duly authorised in this behalf by the Baroda Municipal Borough, to institute proceeding against the present accused under the Act. . . . . . . The Food Inspector can lodge the complaints under the Act if consent in writing is given by a local authority or a person empowered in this behalf by the local authority. The Food Inspector had in the present case submitted all the papers to the Chief Officer who has been invested with the powers by the Municipality to give consent in order to seek his necessary consent in writing before lodging the complaint against the present accused. And after going through the said papers the Chief Officer had duly given consent to him to lodge this complaint. It is true that the consent does not bear the name of the Food Inspector but it impliedly follows that the consent was given by the Chief Officer to the person. *viz.*, the complainant Food Inspector who sought the permission and none else."

Against his conviction and sentence the respondent filed an appeal to the Court of the Sessions Judge at Baroda. The appellate Court set aside the order of conviction and sentence on the ground that the Food Inspector was not competent to institute the prosecution under section 20 (1) of the Act. Relying on the decision of a single Judge of the Madras High Court in *Cannanore Milk Supply Co-operative Society, In re*[1], the learned Sessions Judge held that under the terms of the section, the only authority with whose "written consent" a prosecution could be instituted was the State Government and that neither " the local authority " nor " the person authorized in that behalf by the State Government or the local authority " were competent to grant " written consents " for the initiation of prosecutions. He, therefore, set aside the conviction and sentence and discharged the respondent.

The matter was thereafter brought up before the High Court of Bombay by the State by an appeal later converted into a Criminal Revision Petition. The learned Judges of the High Court affirmed the order passed by the learned Sessions Judge. They disagreed with the Sessions Judge in his interpretation of section 20 (1) that a prosecution could not be instituted with "the written consent" of any authority other than the State Government. They, however, held that " the written

1. (1956) 2 M.L.J. 465.

consent" should name the person who could institute the complaint and that as "the consent" in the present case had not named the Food Inspector as the person authorized to file the complaint, the prosecution was not legally initiated. It is from this decision of the High Court that the State of Bombay, having obtained Special Leave of this Court, has brought this matter up before us.

There is here no dispute that "the local authority"—the Baroda Municipality had authorized the Chief Officer of the Municipality to grant consents under section 20 (1) of the Act for the filing of complaints in regard to offences under the Act. There is no dispute either that the Chief Officer granted on October 13, 1956, his "written consent" to the filing of this complaint against the respondent. The "consent" is in the following terms:

"Under authority vested in the Chief Officer of the Baroda Borough Municipality . . . . . sanction is hereby given for instituting prosecution against the following milk vendors for contravening the provisions of Government of India's Prevention of Food Adulteration Act, 1954."

The name of the respondent, his address and the date of the offence are then set out and it is followed by a paragraph which runs :-

"This sanction is accorded after going through Milk Analysis Report and other pertinent documents and the nature of offence committed by each of the above persons as required by section 20 of the Prevention of Food Adulteration Act, 1954."

We may, at the outset, point out that we entirely agree with the learned Judges of the High Court in their view that on the terms of section 20 (1) a prosecution could be instituted with the written consent not merely of the State Government but "of a local authority" or "a person authorized in this behalf by the State Government or a local authority". In our opinion, on the language of the sub-section no other construction appears possible. The learned Judges of the High Court said :—

"The construction which has been put by the learned Sessions Judge obviously ignores the two commas, which appear in the section before and after the clause "or with the written consent of" One of the commas precedes, and the other follows the clause "or with the written consent of". The plain grammatical meaning of this section is that the written consent may be of the State Government, or a local authority, or a person authorised in that behalf by the State Government or local authority. In our view, under this section, the prosecution can be instituted (1) by the State Government, (2) by a local authority, (3) by a person authorised in that behalf by the State Government, or (4) by a person similarly authorised by a local authority. Further, a prosecution can also be instituted with the consent of any of these four authorities."

Even apart from the two commas, the construction which found favour with the learned Judge of the Madras High Court in *Cannanore Milk Supply Co-operative Society*, In re[1], is not possible without the sub-section being rewritten in these terms :

" . . . . shall be instituted by or with the written consent of the State Government or *by* a local authority or a person authorised in this behalf by the State Government or a local authority."

Without the insertion of the word "by" before the words "a local authority," it would not be possible to exclude the written consents of local authorities, etc., from the content of the sub-section.

As already stated, the reasoning, however, by which the learned Judges of the High Court held the prosecution to be incompetent was that "the written consent" did not in terms, name the person "in whose favour" the sanction or "written consent" was given. The learned Judges stated :

"A written sanction of the nature which we have in the present case, or a written consent, without mentioning the person to whom such consent or sanction is given, would, in our view, not be a sufficient compliance with the terms of the sanction. . . . . . The present written consent does not mention the name of the Food Inspector as the person competent to institute the prosecution and therefore we must hold that the institution of the prosecution, was without jurisdiction."

The learned Counsel for the appellant-State challenged the correctness of this construction. He referred us to the analogy of the decisions rendered on sec-

1. (1956) 2 M.L.J. 465.

tion 197 of the Criminal Procedure Code where it has been held that "the sanction" referred to need not name the person who could institute the prosecution. We consider it unnecessary to canvass the relative scope of the language of section 197 of the Criminal Procedure Code and of section 20 (1) of the Prevention of Food Adulteration Act. We prefer to rest our decision on the terms section 20(1) itself. To start with, the Statute does not in terms prescribe that the complainant shall be named in the "written consent". The only question, therefore, is whether such a limitation or condition could be gathered as a necessary intendment of the provision. In the first place, the reason of the rule could not suggest or imply such a condition. The rule has undoubtedly been designed to prevent the launching of frivolous or harassing prosecutions against traders. It therefore provides that the complaint should be filed, either by a named or specified authority or with the written consent of such authority. To read by implication that before granting a written consent, the authority competent to initiate a prosecution should apply its mind to the facts of the case and satisfy itself that a *prima facie* case exists for the alleged offender being put up before a Court appears reasonable, but the further implication that the complainant must be named in the written consent does not, in our opinion, follow. In the present case, the Analyst's Report was before the Chief Officer of the Municipality and it was after considering that report and the connected documents that the written consent or sanction was given. In the second place, the sub-section itself contains an indication that the written consent is for the launching of a specified prosecution, and not one "in favour".of a complainant authorising him to file the complaint. Omitting for the moment the State Government and "the local authority" which are specified in the provision as competent by themselves to initiate prosecutions, persons "authorised by" these two authorities are further included. The expression "person authorised in this behalf" obviously refers to a named person who is so authorised. In the case of these four categories, the authority or person filing the complaint has itself or himself to consider the reasonableness and propriety of the prosecution and be satisfied that the prosecution is not frivolous and is called for. Turning next to the other class, the relevant words are "no prosecution........shall be instituted except........with the written consent of........". Here the emphasis is on the consent to the filing of the prosecution, not to the person filing it. The preliminary examination of the facts to ascertain the desirability and propriety of the prosecution is in this last case, the responsibility of the person or authority giving the written consent—not of the person who figures as the complainant. The two classes are distinct and the employment of different phraseology to designate the two types of devolution of authority, constitutes an indication that in the second class of cases—where prosecutions are filed on the basis of written consents granted by the competent person or authority, the specification of the name of the complainant is not a statutory requirement—the consent being to a *specified prosecution.* We, therefore, consider that the prosecution in the present case was instituted on a complaint which fulfilled the requirements of section 20 (1) of the Act.

One part of the reasoning of the learned Judges of the High Court was, that in the absence of persons being named in the written consent, a complaint, might be lodged by persons over whom "the local authority" would have no control and that for this reason it was necessary to adopt the construction which they did of section 20 (1), namely, that the written consent should name the person authorised to file the complaint. In our opinion, this apprehension is not justified, for the written consent has to be filed by the complainant in order to enable the complaint to be entertained, and it is not as if the written consent will be available to all and sundry to be filed before the Magistrate. Besides, even on the reasoning of the learned Judges of the High Court there is no restriction as to the person who might be named as authorised to file the complaint. Normally, of course, the person named would be an officer of the Municipality, but theoretically there is a possibility that the person named might not be a Municipal servant, and if "the written consent" is in favour of such a person, the Muncipal authority would have no administrative control over him. The complication referred to by the

learned Judges would still be there, even though a person be named in the written consent given by the local authority. We, therefore, consider that this is not a circumstance which of necessity leads to the construction that the complainant ought to be named in the "written consent" under section 20 (1).

The respondent was not represented before this Court, and in view of the importance of the matter, Mr. G. C. Mathur was requested by the Court to appear as *amicus curiae* and we express our thanks to him for the assistance he rendered us.

The appeal is accordingly allowed, the order of the High Court is set aside, and that of the Magistrate restored.

Appeal allowed; order of the Magistrate restored.

SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Gazula Dasaratha Rama Rao .. *Petitioner**

v.

The State of Andhra Pradesh and others .. *Respondents.*

Madras Hereditary Village Offices Act (III of 1895), *section* 6 (1)—*If void as infringing fundamental rights under Articles* 14 *and* 16 *of the Constitution of India* (1950).

The Office of Village Munsif under the Madras Hereditary Village Offices Act, 1895, is an office under the State within the meaning of clauses (1) and (2) of Article 16 of the Constitution. Article 16 (1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State; and clause (2) prohibits discrimination on certain grounds in respect of any such employment or appointment. Article 16 mentions "descent" as one of the prohibited grounds of discrimination.

There can be no doubt that section 6 (1) of the Madras Village Offices Act does embody a principle of discrimination on the ground of descent only. It says that in choosing the persons to fill the new offices, the Collector shall select the person whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished. This is discrimination on the ground of descent only and is in contravention of Article 16 (2) of the Constitution and renders section 6 (1) of the Village Offices Act void to that extent.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

A. V. Viswanatha Sastri, Senior Advocate (*G. Gopalakrishnan*, Advocate of *M/s. Gagrat & Co.*, Advocate, with him), for Petitioner.

D. Narasa Raju, Advocate-General of Andhra Pradesh, (*D. Venkatappayya Sastry* and *J. M. Sen*, Advocates, with him), for Respondents Nos. 1-3.

T. V. R. Tatachari, Advocate, for Respondent No. 4.

The Judgment of the Court was delivered by

S. K. Das, J.—This is a writ petition under Article 32 of the Constitution. Gazula Dasaratha Rama Rao is the petitioner. The respondents are (1) the State of Andhra Pradesh, (2) the Board of Revenue, Andhra Pradesh, (3) the Collector of Guntur in Andhra Pradesh and (4) Vishnu Molakala Chandramowleshwara Rao. The petitioner prays that this Court must declare section 6 of the Madras Hereditary Village-Offices Act, 1895 (Madras Act III of 1895), hereinafter called the Act, as void in so far as it infringes the fundamental right of the petitioner under Articles 14 and 16 of the Constitution, and further asks for an appropriate writ or direction quashing certain orders passed by respondents 1 to 3 in favour of respondent No. 4 in the matter of the latter's appointment as Village Munsif of a newly constituted

*Petition No. 133 of 1959. 6th December, 1960.

village called Peravalipalem. When this petition first came up for hearing we directed a notice to go to other States of the Union inasmuch as the question raised as to the constitutional validity of the law relating to a hereditary village office was of a general nature and might arise in relation to the existing laws in force in other States. Except the State of Andhra Pradesh which has entered appearance through its Advocate-General, none of the other States have entered appearance. The Advocate-General of Andhra Pradesh has appeared for respondents 1 to 3, and respondent 4 has been separately represented before us. These respondents have contested the application and have pleaded that section 6 of the Act does not violate any fundamental right, nor are the impugned orders of respondents 1 to 3 invalid in law.

The short facts are these: Village Peravali in Tenali taluq of the district of Guntur in the State of Andhra Pradesh was originally comprised of a village of the same name and a fairly large hamlet called Perivalipalem. The two were divided by a big drainage channel. It is stated that for purposes of village administration the villagers felt some difficulties in the two being treated as one unit. So the villagers, particularly those of the hamlet, put in an application to the Revenue authorities for constituting the hamlet into a separate village. This application was recommended by the Tehsildar and was accepted by the Board of Revenue and the State Government. By an order dated August 25, 1956, Peravali village was bifurcated and two villages were constituted. The order was published in the District Gazette on October 15, 1956, and was in these terms:

"The Board sanctions the bifurcation of Peravali village of Tenali taluk, Guntur district, into two villages, *viz.*, (1) Peravali and (2) Peravalipalem along the boundary line shown in the map submitted by the Collector of Guntur with his letter Re. A-4. 28150/55, dated 30th June, 1956. These orders will come into effect from the date of publication in the District Gazette.

2. The Board sanctions the following establishments on the existing scale of pay for the two villages:

Peravali:—

1 Village Munsif.
1 Karnam.
1 Talayari.
3 Vettians.

Peravalipalem:—

1 Village Munsif.
1 Karnam.
1 Talayari.
1 Vettian."

It is convenient to read at this stage sub-section (1) of section 6 of the Act under which the bifurcation was made:

"*Section* 6 (1). In any local area in which this Act is in force the Board of Revenue may, subject to rules made in this behalf under section 20, group or amalgamate any two or more villages or portions thereof so as to form a single new village or divide any village into two or more villages and, thereupon, all hereditary village offices (of the classes defined in section 3, clause (1), of this Act) in the villages or portions of villages or village grouped, amalgamated or divided as aforesaid, shall cease to exist and new offices, which shall also be hereditary shall be created for the new village or villages. In choosing persons to fill such new offices, the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished."

On the division of the village into two villages, all the hereditary village offices of the original village ceased to exist under the aforesaid sub-section, and new offices were created for the two villages. We are concerned in this case with the appointment to the office of Village Munsif in the newly constituted village of Peravalipalem. In accordance with the provisions of sub-section (1) of section 6 and certain Standing Orders of the Board of Revenue, the Revenue Divisional Officer, Tenali, invited applications for the post of Village Munsif of Peravalipalem. Eight applications were made including one by the petitioner and another by respondent 4. Respondent 4, be it noted, is a son of the Village Munsif of the old village Peravali. By an order dated October 18, 1956, the Revenue Divisional

Officer, appointed the petitioner as Village Munsif of Peravalipalem. From the order of the Revenue Cevisional Officer, respondent 4 and some of the other unsuccessful applicants preferred appeals to respondent 3, the Collector of Guntur. By an order dated April 1, 1957, respondent 3 allowed the appeal of respondent 4 and appointed him as Village Munsif of Peravalipalem. In his order respondent 3 said :

"Shri V. Chandramowleswara Rao is qualified for the post. He is the son of the present Village Munsif of Peravali and is, therefore, heir to that post. . . . . . Section 6 (1) of the Hereditary Village Offices Act states that in choosing a person to fill a new office of this kind the Collector shall select the person whom he may consider best qualified from among the family of the last holder of the office which has been abolished. The Village Munsif's post of the undivided village of Peravali was abolished when the village was divided and the new post of Village Munsif of Peravalipalem has to be filled up from among the family of the previous Village Munsif. The same instructions are contained in Board's Standing Order 148 (2)."

The petitioner then carried an appeal from the order of respondent 3 to the Board of Revenue. By an order dated April 24, 1958, the Board dismissed the appeal and stated :

"According to section 6, in choosing the person to fill in a new office like this, the Collector shall select the person whom he considers best qualified from among the families of the last holders of the new office, which have been abolished. Here the office of the Village Munsif was abolished and two offices have been created. As the last holder of the office was appointed to the new village, Peravali, after bifurcation, the Collector has appointed the son of the last office holder as Village Munsif of Peravalipalem, as he is the nearest heir. The appellant before the Board cannot claim any preference over the son of the last office holder. The Board, therefore, holds that the Collector's order is in accordance with the law on the subject. No interference is, therefore, called for."

The petitioner then moved respondent 1, but without success. Thereafter, he filed the present writ petition.

The petitioner relies mainly on clauses (1) and (2) of Article 16 of the Constitution. We may read those clauses here :

"*Article* 16 (1). There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State."

On behalf of the petitioner it has been contended that (1) the office of Village Munsif of Peravalipalem is an office under the State, and (2) respondents 1 to 3 in passing their orders in favour of respondent 4 expressly stated that they proceeded on the basis of the hereditary principle laid down in section 6 (1) of the Act and discriminated against him as a citizen on the ground of descent only. This discrimination, it is argued, violates the guarantee of equal opportunity enshrined in Article 16, clauses (1) and (2) ; and section 6 (1) of the Act to the extent that it permits such discrimination is void under Article 13 (1) of the Constitution.

The first question before us is if the office of Village Munsif under the Act is an office under the State within the meaning of clauses (1) and (2) of Article 16 of the Constitution. For determining that question it is necessary to examine the scheme and various provisions of the Act. The Long Title shows that it was an Act made to repeal Madras Regulation VI of 1831 and for other purposes. The purposes mentioned in the Preamble are

" to provide more precisely for the succession to certain hereditary Village Offices in the State ; for the hearing and disposal of claims to such offices or the emoluments annexed thereto ; for the appointment of persons to hold such offices and the control of the holders thereof ; and for certain other purposes."

Section 3 of the Act refers to classes of village offices to which the Act applies and Village Munsif is one of such offices. Under section 4 " emoluments " of the office means and includes (*i*) lands ; (*ii*) assignment of revenue payable in respect of lands ; (*iii*) fees in money or agricultural produce ; and (*iv*) money-salaries and all other kinds of remuneration granted or continued in respect of, or annexed to, any office by the State. Section 5 lays down that the emoluments of village offices, whether such offices be or be not hereditary, shall not be liable to be transferred or encumbered in any manner whatsoever and it shall not be lawful for any Court to attach or sell such emoluments or any portion thereof. Sub-section (1) of section 6 relates to the grouping or division of villages ; this sub-section we have already read. Sub-section (2)

of section 6 gives a right to the Board of Revenue, subject to the approval of Government, to reduce the number of village offices, and on such reduction the Collector is empowered to dispense with the services of the officers no longer required. Sub-section (3) of section 6, which was subsequently added in 1930 says that a minor shall not be ineligible for selection by reason of his minority only. Section 7 states the circumstances in which the Collector may, of his own motion or on complaint and after enquiry suspend, remove or dismiss, etc., some of the village officers mentioned in section 3. A similar power of punishment is also given to the Tehsildar. Under these provisions the Collector may suspend, remove or dismiss the Village Munsif. Section 10 lays down certain rules which are to be observed in making appointments to some of the village offices and these rules lay down, among other things, the general qualifications requisite for appointment to the offices in question. For example, for the appointment to the office of Village Munsif no person is eligible unless he has attained the age of majority, is physically and mentally capable of discharging the duties of the office, has qualified according to the educational test prescribed for the office by the Board of Revenue, has not been convicted by a Criminal Court of any offence which, in the opinion of the Collector, disqualifies him for holding the office and has not been dismissed from any post under the Government on any ground which the Collector considers sufficient to disqualify him for holding the office. One of the qualifications prescribed by section 10 as it originally stood required that the applicant must be of the male sex. This requirement was deleted by the Adaptation (Amendment) Order of 1950, presumably to bring the section into conformity with Articles 15 and 16 of the Constitution which prohibit discrimination on the ground of sex. Sub-section 10 says that the succession shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindaris in Southern India. Sub-section (3) of section 10 says that where the next heir is not qualified, the Collector shall appoint the person next in order of succession who is so qualified, and, in the absence of any such person in the line of succession, may appoint any person duly qualified. Sub-sections (4), (5) and (6) of section 10 deal with matters with which we are not directly concerned. Section 11 lays down the rules to be observed in making appointments to certain offices in proprietary estates and one of the rules is that succession shall devolve in accordance with the law or custom applicable to the office in question. Section 13 in effect says that any person may sue before the Collector for any of the village offices specified in section 3 or for the recovery of the emoluments of any such office on the ground that he is entitled to hold such office and enjoy such emoluments There are some provisos to the section which lay down limitations on the right of suit. With those limitations we are not concerned in the present case. Section 14 lays down the period of limitation for bringing a suit. Sections 15, 16 and 17 relate to the transfer and trial of such suit and the decrees or orders to be passed therein. Section 20 empowers the Board of Revenue to make rules and section 21 bars the jurisdiction of Civil Courts. Section 23 provides for appeals.

The above gives in brief the scheme and provisions of the Act. These provisions show, in our opinion, that the office of Village Munsif under the Act is an office under the State. The appointment is made by the Collector, the emoluments are granted or continued by the State, the Collector has disciplinary powers over the Village Munsif including the power to remove, suspend or dismiss him, the qualifications for appointment can be laid down by the Board of Revenue—all these show that the office is not a private office under a private employer but is an office under the State. The nature of the duties to be performed by the Village Munsif under different provisions of the law empowering him in that behalf also shows that he holds a public office. He not only aids in collecting the revenue but exercises power of a magistrate and of a Civil Judge in petty cases. He has also certain police duties as to repressing and informing about crime, etc.

The learned Advocate-General appearing for respondents 1 to 3 has contended that the expression " office under the State " in Article 16 has no referenc to an office like that of the Village Munsif, which in its origin was a customary village office later recognised and regulated by law. Hi contention is that the express.

sion has reference to a post in a Civil Service and an ex-cadre post under a contract of service, as are referred to in Articles 309 and 310 in Part XIV of the Constitution relating to the Services under the Union and the States. He has referred in support of his contention to Ilbert's Supplement to the Government of India Act, 1915, page 261, where a similar provision with regard to the Indian Civil Service has been referred to as laying down that

> " no native of British India.........is by reason only of his religion, place of birth, descent, or colour, or any of them disabled from holding any place, office or employment under His Majesty in India "

and has pointed out that the aforesaid provision reproduced section 87 of the Act of 1833 and historically the office to which the provision related was an office or employment in a Service directly under the East India Company or the Crown. He also referred to section 298 of the Government of India Act, 1935, which said *inter alia* that

> " no subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India ".

The argument of the learned Advocate-General is that Article 16 embodies the same principle as inspired the earlier provisions referred to above, and like the earlier provisions it should be confined to an office or post in an organised public service or an ex-cadre post under a contract of service directly under the Union or the State. He has further suggested that the deletion of the requirement as to sex in section 10 of the Act was by reason of Article 15 and not Article 16 of the Constitution. The argument is plausible, but on a careful consideration we are unable to accept it as correct. Even if we assume for the purpose of argument that Articles 309 and 310 and other Articles in Chapter I, Part XIV, of the Constitution relate only to an organised public Service like the Indian Administrative Service, etc., and ex-cadre posts under a direct contract of service which have not yet been incorporated into a Service, we do not think that the scope and effect of clauses (1) and (2) of Article 16 can be cut down by reference to the provisions in the Services Chapter of the Constitution.

Article 14 enshrines the fundamental right of equality before the law or the equal protection of the laws within the territory of India. It is available to all, irrespective of whether the person claiming it is a citizen or not. Article 15 prohibits discrimination on some special grounds—religion, race, caste, sex, place of birth or any of them. It is available to citizens only, but is not restricted to any employment or office under the State. Article 16, clause (1), guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State ; and clause (2) prohibits discriminatin on certain grounds in respect of any such employment or appointment. It would thus appear that Article 14 guarantees the *general* right of eqality ; Articles 15 and 16 are instances of the same right in favour of citizens in some special circumstances. Article 15 is more general than Article 16, the latter being confined to matters relating to employment or appointment to any office under the State. It is also worthy of note that Article 15 does not mention 'descent' as one of the prohibited grounds of discrimination, whereas Article 16 does. We do not see any reason why the full ambit of the fundamental right guaranteed by Article 16 in the matter of employment or appointment to any office under the State should be cut down by a reference to the provisions in Part XIV of the Constitution which relate to Services or to provisions in the earlier Constitution Acts relating to the same subject. These Service provisions do not enshrine any fundamental right of citizens ; they relate to recruitment, conditions and tenure of service of person, citizens or otherwise, appointed to a Civil Service or to posts in connection with the affairs of the Union or any State. The word 'State'!, be it noted h s a different connotation in Part III relating to Fundamental Rights : It includes the Government and Parliament of India, the Government and Legislature of each of the States and all local or other authorities within the territory of India, etc. Therefore, the scope and ambit of the Service provisions are to a large extent distinct and different from the scope and

ambit of the fundamental right guaranteeing to all citizens an equality of opportunity in matters of public employment. The Premble to Constitution states that one of its objects is to secure to all citizens equality of status and opportunity ; Article 16 gives equality of opportunity in matters of public employment. We think that it would be wrong in principle to cut down the amplitude of a fundamental right by reference to provisions which have an altogether different scope and purpose. Article 13 of the Constitution lays down *inter alia* that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with fundamental rights, shall to the extent of the inconsistency be void. In that Article 'Law' includes custom or usage having the force of law. Therefore, even if there was a custom which has been recognised by law with regard to a hereditary village office, that custom must yield to a fundamental right. Our attention has also been drawn to clause (4) of Article 16 which enables the State to make provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The argument is that this clause refers to appointments or posts and further talks of inadequate representation in the services, and the learned Advocate-General has sought to restrict the scope of clauses (1) and (2) of Article 16 by reason of the provisions in clause (4). We are not concerned in this case with the true scope and effect of clause (4) and we express no opinion with regard to it. All that we say is that the expression ' office under the State ' in clauses (1) and (2) of Article 16 must be given its natural meaning.

We are unable, therefore, to accept the argument of the learned Advocate-General that the expression 'office under the State' in Article 16 has a restricted connotation and does not include a village office like that of the Village Munsif. In *M. Ramappa* v *Sangappa and others* [1], the question arose whether certain village offices governed by the Mysore Villages Offices Act, 1908, were offices of profit under the Government of any State within the meaning of Article 191 of the Constitution. This Court held that the offices were offices of profit under the Government and said :

" An office has to be held under someone for it is impossible to conceive of an office held under no one. The appointment being by the Government, the office to which it is made must be held under it, for there is no one else under whom it can be held. The learned Advocate said that the office was held under the village community. But such a thing is an impossibility for village communities have since a very long time, ceased to have any corporate existence."

Learned Counsel for respondent 4 has presented a somewhat different argument on this question. He has submitted that the office of Village Munsif is not merely an office simpliciter ; but it is an office *cum* property. His argument is that Article 16 does not apply to a hereditary village office because a person entitled to it under the Act has a pre-existing right to the office and its emoluments, which he can enforce by a suit. We now proceed to consider this argument.

Learned Counsel for respondent 4 has relied on the decision of this Court in *Angurbala Mullick* v. *Debabrata Mullick*[2], where it was held that in the conception of shebaiti under Hindu law, both the elements of office and property, of duties and personal interest, are mixed up and blended together ; and one of the elements cannot be detached from the other. He has argued that on the same analogy the office of a Village Munsif must be held to be an office *cum* property. We do not think that the analogy holds. As this Court pointed out in *Kalipala Chakraborti and another* v *Palani Bala Devi and others*[3], shebaitship is property of a peculiar and anomalous character and it is difficult to say that it comes under the category of immovable property as it is known to law. As to the office of a Village Munsif under the Act, the provisions of the Act itself and a long line of decisions make it quite clear that what go with the office are its emoluments, whether in the shape of land, assignment of revenue, agricultural produce, money, salary or any other kind of remuneration. These emoluments

1. (1959) S.C.J. 167 : (1959) S.C.R. 1167.
2. (1951) S.C.R. 1125 : (1951) S.C.J. 394.
3. (1953) S.C.J. 209 : (1953) 1 M.L.J. 597 : (1953) S.C.R. 503.

are granted or continued in respect of, or annexed to, the office by the State. This is made clear by section 4 of the Act. Apart from the office there is no right to the emoluments. In other words, when a person is appointed to be a "Village Munsif" it is an appointment to an office by the State to be remunerated either by the use of land or by money, salary, etc.; it is not the case of a grant of land burdened with service, a distinction which was explained by the Privy Council in *Lakhamgouda Basavprabhu Sardesai* v. *Baswantrao and others*[1]. In *Venkata* v. *Rama*[2], where the question for decision was the effect of the enfranchisement of lands forming the emoluments of the hereditary village office of Karnam, it was pointed out :

> "Emoluments for the discharge of the duties of the office were provided either in the shape of land exempt from revenue or subject to a lighter assessment, or of fees in grain or cash, or of both land and fees.
>
> ....
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> ....
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> When the emoluments consisted of land, the land did not become the family property of the person appointed to the office, whether in virtue of an hereditary claim to the office or otherwise. It was an appanage of the office inalienable by the office holder and designed to be the emolument of the officer into whose hands soever the office might pass. If the Revenue authorities thought fit to disregard the claim of a person who asserted an hereditary right to the office and conferred it on a stranger, the person appointed to the office at once become entitled to the lands which constituted its emolument"

The same view was re-affirmed in *Musti Venkata Jagannada Sharma* v. *Musti Veerabhadrayya*[3], where the history of the office of Karnam was exmined and it was observed that the

> "Karnam of the village occupies his office not by hereditary or family right, but as personal appointee, though in certain cases that appointment is primarily exercised in favour of a suitable person who is a member of a particular family".

This latter decision was considered by a Full Bench of the Madras High Court in *Manubolu Ranga Reddi* v. *Maram Reddi Dasaradharami Reddi*[4], and it was pointed out that their Lordships of the Privy Council, though they indicated the nature of the right which the Karnam had, did not consider the question whether on the creation of an office under secion 6 (1), the members of the family of the last holder of the abolished office had the right to compel the Collector to carry out the duty cast upon him by the section. It was held that section 6 (1) creates a right in the family which can be enforced by suit. Learned counsel for respondent 4 has relied on this decision. It is worthy of note, however, that the decision was given on the footing that section 6 (1) was valid and mandatory in character. No question arose or could at that time arise of the contravention of a fundamental right guaranteed by the Constitution, by the hereditary principle embodied in section 6 (1) of the Act. The decision proceeded on the footing that the Act recognised a 'right vested in a family' to the office in question and contained provisions to enforce that right. It did not proceed upon the footing that the family had a right to the property in the shape of emoluments independent or irrespective of the office. In other words, the decision cannot be relied upon in support of the contention that a hereditary village office is like a shebaiti, that is, office *cum* property. That was not the ratio of the decision. The ratio simply was this that the Act had recognised the right vested in family to the office in question. That decision cannot assist respondent 4 in support of his contention that Article 16, clauses (1) and (2), do not apply to the office, even though the office is an office under the State. In *Ramachandurani Purshotham* v. *Ramachandurani Venkatappa and another*[5], the question was whether the office of Karnam was 'property' within the meaning of Article 19 (1) (*f* of the Constitution. It was held that it was not property within the meaning of that Article. The same view was expressed in

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1. (1931) 61 M.L.J. 449 : A.I.R. 1931 P.C. 157.
2. (1884) I.L.R. 8 Mad. 249.
3. 41 M.L.J. 1 : L.R. 48 I.A 244 : I.L.R. 44 Mad. 643.
4. I.L.R. (1938) Mad. 249.
5. (1951) 2 M.L.J. 561 : A.I.R. 1952 Mad. 150.

Pasala Rama Rao v. *Board of Revenue*[1], where it was observed that the right to succeed to a hereditary office was not property and the relation back of an adopted son's rights was only with regard to property. This view was not accepted in *Chandra Chowdary* v. *The Board of Revenue*[2], where it was observed that the fact that the adoption was posthumous did not make any difference and the adoption being to the last office holder the adopted son must be deemed to have been in existence at the time of the death of the male holder and had the right to succeed to the office. It was further observed that the office of a Village Munsif was 'property' so as to attract the operation of the rule that the adoption related back to the date of the death of the last male holder. We are not concerned in this case with the doctrine of relation back in the matter of a posthumous adoption. The simple question before us is whether the office, though it is an office under the State, is of such a nature that clauses (1) and (2) of Article 16 of the Constitution are not attracted to it. We are of the view that there is nothing in the nature of the office which takes it out of the ambit of clauses (1) and (2) of Article 16 of the Constitution. An office has its emoluments, and it would be wrong to hold that though the office is an office under the State, it is not within the ambit of Article 16 because at a time prior to the Constitution, the law recognised a custom by which there was a preferential right to the office in the members of a particular family. The real question is—is that custom which is recognised and regulated by the Act consistent with the fundamental right guaranteed by Article 16? We do not agree with learned counsel for respondent 4 that the family had any pre-existing right to property in the shape of the emoluments of the office, independent or irrespective of the office. If there was no such pre-existing right to property apart from the office, then the answer must clearly be that Article 16 applies and section 6 (1) of the Act in so far as it makes a discrimination on the ground of descent only, is violative of the fundamental right of the petitioner.

There can be no doubt that section 6 (1) of the Act does embody a principle of discrimination on the ground of descent only. It says that in choosing the persons to fill the new offices, the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished. This, in our opinion, is discrimination on the ground of descent only and is in contravention of Article 16 (2) of the Constitution.

Learned counsel for respondent 4 has also submitted that the petitioner cannot be permitted to assert the invalidity of section 6 (1) of the Act when he himself made an application for appointment as Village Munsif under the Act. He has drawn our attention to the decision in *Bapatla Venkata Subba Rao* v. *Sikharam Rama-Krishna Rao*[3]. That was a case where the appellant was appointed as a hereditary Karnam under the Act and but for the Act, he would not have had any claim to be appointed to the office of Karnam. It was held that he could not be permitted to contend for the first time in appeal that the very Act but for which he would not have had any right to the office, was unconstitutional. Apart from the question whether a fundamental right can be waived, a question which does not fall for consideration in this case, it is clear to us that the facts here are entirely different. The petitioner had the right to make an application for the new village office and he was accepted by the Revenue Divisional Officer. Respondents 1 to 3, however, passed orders adverse to him and in favour of respondent 4, acting on the principle of discrimination on the ground of descent only as embodied in section 6 (1) of the Act. It is, we think, open to the petitioner to say that section 6 (1) of the Act in so far as it violates his fundamental right guaranteed under Article 16 of the Constitution is void and his application for appointment must, therefore, be decided on merits.

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1. (1953) 2 M.L.J. 663 : A.I.R. 1954 Mad. 483.
2. (1959) 1 An. W.R. 295 : A.I.R. 1959 A. P. 322
3. (1958) 1 An. W.R. 331 : A.I.R. 1958 A. P. 343.

Finally, we must notice one other argument advanced by the learned Advocate-General on behalf of respondents 1 to 3. The argument is based on the distinction between Articles 15 and 16. We have said earlier that Article 15 is, in one respect, more general than Article 16 because its operation is not restricted to public employment; it operates in the entire field of State discrimination. But in another sense, with regard to the grounds of discrimination, it is perhaps less wide than Article 16, because it does not include 'descent' amongst the grounds of discrimination. The argument before us is that the provision impugned in this case must be tested in the light of Article 15 and not Article 16. It is submitted by the learned Advocate-General that the larger variety of grounds mentioned in Article 16 should lead us to the conclusion that Article 16 does not apply to offices where the law recognises a right based on descent. We consider that such an argument assumes as correct the very point which is disputed. If we assume that Article 16 does not apply, then the question itself is decided. But why should we make that assumption? If the office in question is an office under the State, then Article 16 in terms applies; therefore, the question is whether the office of Village Munsif is an office under the State. We have held that it is. It is perhaps necessary to point out here that clause (5) of Article 16 shows that the Article does not bear the restricted meaning which the learned Advocate-General has canvassed for because an incumbent of an office in connexion with the affairs of any religious or denominational institution need not necessarily be a member of the Civil Service.

For the reasons given above, we allow the petition. The orders of respondents 1 to 3 in repect of the appointment to the post of Village Munsif of Peravalipalem in favour of respondent 4 are set aside and we direct that the application of the petitioner for the said office be now considered on merits by the Revenue authorities concerned on the footing that section 6 (1) of the Act in so far as it infringes the fundamental right of the citizens of India under Article 16 of the Constitution is void. The petitioner will be entitled to his costs of the hearing in this Court.

Petition allowed.

SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction).

PRESENT:—S. K. DAS, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Guduthur Bros. .. *Appellants**

v.

The Income-tax Officer, Special Circle, Bangalore .. *Respondent.*

Income-tax Act (XI of 1922), section 28—Order imposing penalty for not filing return—Order passed without affording a hearing to the assessee—Appellate Assistant Commissioner setting aside order as illegal—Effect—Right of Income-tax Officer to proceed to give a hearing and levy the penalty.

Sub-section (3) of section 28 of the Income-tax Act requires that the penalty should not be imposed without affording to the assessee a reasonable opportunity of being heard. Where such opportunity was denied the order of the Income-tax Officer imposing penalty is vitiated by an illegality which supervened not at the initial stages of the proceedings, but during the course of it. Where the Appellate Assistant Commissioner points out the illegality and orders refund of the penalty, if recovered, it cannot but be interpreted as correcting the error and leaving it open to the Income-tax Officer to continue the prooceeding from the stage at which the illegality occurred; and correct the proceedings.

No express remand for this purpose was necessary. The notice issued to the assessee to show cause why penalty should not be imposed on them did not cease to be operative because the Appellate Assistant Commissioner pointed out an illegality which vitiated the proceeding, after it was lawfully initiated.

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*C. A. No. 261 of 1958. 22nd July, 1960.

Appeal by Special Leave from the Judgment and Order dated the 6th November, 1956, of the Mysore High Court in Writ Petition No. 215 of 1956.

Advocates of *Messrs. Rajinder Naain & Co.,* for Appellants.

S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra,*

K. N. Rajagopal Sastri, Senior Advocate (*D. Gupta,* Advocate with him), for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—This appeal has been filed with the Special Leave of this Court against a decision of the High Court of Mysore, by which it dismissed *in limine* an application by the appellants under Article 226 of the Constitution for a writ of prohibition or some other appropriate writ against the Income-tax Officer, Bellary, Special Circle, Bangalore.

The facts of the case are as follows. For the assesment year 1948-49, the appellants failed to file a return within the prescribed time and the Income-tax Officer, acting under section 28 (1) (*a*) of the Indian Income-tax Act, issued a notice to them to show cause why penalty should not be imposed. In answer to this notice, the appellants filed a written reply and the Income-tax Officer proceeded to levy a penalty of Rs. 16,000 without affording a hearing to them as required vy the third sub-section of section 28 of the Income-tax Act. The matter was taken up in appeal before the Appellate Assistant Commissioner of Income-tax, who, pointing out that an opportunity of being heard was not granted to the appellants, held that the oder was defective. He therefore set aside that order and directed the refund of the penalty if it had been recovered.

On receipt of the order, the Income-tax Officer issued a further notice calling upon the appellants to appear before him, so that they might be given an opportunity of being heard. He also intimated that if no appearance was made, then he would proceed to determine the question of penalty, taking into consideration only the written statement which had been filed earlier. Before, however, the Income-tax Officer could decide the case, the appellants fild a petition under Article 226 of the Constitution for the issuance of the writs mentioned above. This petition was dismissed *in limine* by the High Court holding that the contention raised by the appllants may perhaps be raised before the Income-tax authorities. The appellants thereupon applied for Special Leave to this Court and leave having been granted, this matter comes up before us.

There is no question here that the requirements of section 28 (1) (*a*) of the Income-tax Act were not completely fulfilled. If the appellants had not filed their return, as they were required by law to do, the omission would attract clause (*a*) of sub-section (1) of section 28. We say nothing as to that. Sub-section (3) of section 28, however, requires that the penalty shall not be imposed without affording to the assessee a reasonable opportunity of being heard. This opportunity was denied to the appellants and therefore the order of the Income-tax Officer was vitiated by an illegality which supervened, not at the initial stage of the proceedings, but during the course of it. The order of the learned Appellate Assistant Commissioner pointed out the ground on which the illegality proceeded and his order directing the refund of the penalty, if recovered, cannot but be interpreted as correcting the error and leaving it open to the Income-tax Officer to continue his proceedings from the stage at which the illegality occurred. No express remand for this purpose, as is contended was necessary.

Our attention was drawn to a decision of a learned Single Judge of the Kerala High Court reported in *Jos Chacko Poothokaran* v. *Income-tax Officer, Ernakulam Circle*[1], in which, in similar circumstances, it has been held that since an appeal was not taken by the Commissioner of Income-tax to the Appellate Tribunal under sub-section (2) of section 33, the order of the Appellate Assistant Commissioner became final and the Income-tax Officer could no longer proceed to reassess the penalty. The reason given is, in our opinion, beside the point. What the Appellate Assistant Commissioner did was to vacate the order and direct refund of the penalty in view of an illegality which had occurred during the course of the assessment proceedings. On receipt of the record it was open to the Income-tax Officer to take up the matter from the point at which the illegality supervened and to correct his proceedings. It was pointed out in the course of the statement of the case by the appellants that such proceedings could only be taken during the course of assessment proceedings and those proceedings are concluded. In our opinion, the notice issued to the appellants to show cause why penalty should not be imposed on them did not cease to be operative, because the Appellate Assistant Commissioner pointed out an illegality which vitiated the proceeding after it was lawfully initiated. That notice having remained still to be disposed of, the proceedings now started can be described as during the course of the assessment proceedings, because the action will relate back to the time when the first notice was issued.

In our opinion, the Income-tax Officer is well within his jurisdiction to continue the proceedings from the stage at which the illegality has occurred and to assess the appellants to a penalty, if any, which the circumstances of the case may require.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

Raja Narayanlal Bansilal .. *Appellant**

v.

Maneck Phiroz Mistry and another .. *Respondents.*

Companies Act (VII of 1913), *sections* 137, 138 *and* 140 *and Companies Act (I of* 1956), *sections* 239, 240 *and* 645—*Order of the Central Government under section* 239 (2) *of the New Act—Notices pursuant to the order—Validity—If Inspector appointed under the Old Act could exercise powers conferred under the New Act—If section* 240 *of the New Act offends against Articles* 14 *and* 20 (3) *of the Constitution of India* (1950).

The Inspector appointed under section 138 (4) of the old Companies Act (VII of 1913), must, by legal fiction, which is authorized by section 645 of the new Companies Act (I of 1956) be deemed to have been appointed under section 235 of the New Act and therefore such an Inspector had the authority to issue the impugned notices under section 240 of the New Act.

Taking into account the provisions of Article 20 (3) of the Constitution of India, the right accorded thereunder would be available only where the prior proceedings are of a criminal nature instituted or continued before a Court of law or a Judicial tribunal, in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. The investigation carried on by the inspectors is no more than the

1. (1957) 32 I.T.R. 648.

*C. A. No. 268 of 1959. 31st August, 1960.

work of a fact-finding commission and the fact that a prosecution may ultimately be launched against the alleged offender will not retrospectively change the complexion or character of the proceedings held by the Inspector when he makes the investigation.

If persons in charge of the management of the affairs of the company abuse their position that raises a problem, very different from ordinary misappropriation or breach of trust. Where the financial interest of a large number of citizens is left in charge of persons who manage the affairs of the company, it would be legitimate to treat such companies and their managers as a class by themselves (as distinct from other individual citizens) and to provide for necessary safeguards and checks against a possible abuse of power. What Article 14 prohibits is class legislation; it does not, however, forbid reasonable classification for the purpose of legislation. Thus Article 14 is not violated either by section 239 or section 240 of the New Act.

Appeal from the Judgment and Decree dated the 3d September, 1958, of the former Bombay High Court in Appeal No. 28 of 1958.

A. V. Viswanatha Sastri, Senior Advocate (*Ganpat Rai and I. N. Shroff*, Advocates, with him), for Appellant.

M. C. Setalwad, Attorney-General for India and *B. Sen*, Senior Advocate (*T. M. Sen*, Advocate, with them), for Respondents.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The appelant Raja Narayanlal Bansilal of Bombay is the Managing Agent of a Limited Company named the Harinagar Sugar Mills, Ltd. By virtue of the power conferred on him by section 137 of the Indian Companies Act, 1913 (VII of 1913) the Registrar wrote to the mills on November 15, 1954, that it had been represented to him under section 137 (6) that the business of the company was carried on in fraud, and so he called upon the company to furnish the information which he required as set out in a part of his letter (Exhibit-A). On April 15, 1955, the Registrar made a report (Exhibit-AA) to the Central Government under section 137 (5) of the said Act. This report showed that according to the Registrar the affairs of the company were carried on in fraud of contributories and they disclosed an unsatisfactory state of affairs. The report pointed out that the appellant was the Managing Agent of the company as well as its promoter and that it was suspected that under a fictitious name of Bansilal Uchant Account the company was advancing money to the several firms owned by the appellant which were ostensibly purchased from the company's funds. The report further stated that between the years ending in September 1942 and 1951 about Rs. 19,200 were paid for Harpur Farm and Rs. 39,300 for Bhavanipur Farm, and accounts disclosed that the Uchant Account was chiefly operated upon for purchasing such lands out of the funds of the company though the purchase in fact was for and on behalf of the appellant. The Registrar also added that he had reason to believe that the Managing Agent was utilising the property of the company in some cases for his personal gain and concluded that, in his opinion, a case had been made out for an investigation under section 138.

On receiving this report, on November 1, 1955, the Central Government passed an order under section 138 (4) of the said Act (Exhibit-B) appointing the first respondent Maneck P. Mistry, who is a Chartered Accountant, as an Inspector to investigate the affairs of the company from the date of its incorporation. The said Inspector was asked to point out all irregularities and contraventions of the provisions of the said Act or any other law, and make a full report as indicated in a communication which was separately sent to him. This separate communication (Exhibit-BB) prescribes the mode of enquiry which should be adopted by Inspectors. It requires that while investigating the affairs of companies the Inspectors should bear in mind that for a successful prosecution the evidence in support of a charge must be clear, tangible and cogent, and that their reports should specify with reference to the evidence collected

during investigations the points specified under paragraph 2 (*a*) to (*e*). In the course of their investigation the Inspectors are asked to make use of the powers available to them under section 140 of the said Act including the right to examine a person on oath. The investigation should be conducted in private and the inspectors are not entitled to make public the information received by them during the course of the investigation.

Pursuant to the powers conferred on him by the said order respondent 1 wrote to the appellant intimating to him that he would examine him on oath in relation to the business of the company under section 140 (2) of the said Act (Exhibit-C). Meanwhile on April 1, 1956, the Companies Act of 1913 (VII of 1913) was repealed by the Companies Act of 1956 (I of 1956). For the sake of convenience we would hereafter refer to the repealed Act as the old Act and the Act which came into force on April 1, 1956, as the new Act. On July 26, 1956, the Central Government purported to exercise its power under section 239 (2) of the new Act and accorded approval to respondent 1 exercising his powers of investigating into, and reporting on, the affairs of the appellant including his personal books of accounts as well as the affairs of the three concerns specified in the order. These three concerns are M|s. Narayanlal Bansilal, who are the Managing Agents of Harinagar Sugar Mills, the Shangrila Food Products, Ltd. and Harinagar Cane Farm. It appears that the appellant is the proprietor of the firm of Narayanlal Bansilal. After this order was passed respondent 1 served upon the appellant the four impugned notice (Exhibit-E collectively) on May 9, 1957; May 16, 1957; May 29, 1957; and June 29, 1957, respectively. These notices are substantially identical in terms, and so it would be sufficient for our purpose to set out the purport of one of them. The first notice called upon the appellant to attend the office of respondent 1 on the date and at the time specified for the purpose of being examined on oath in relation to the affairs of the company, and to produce before respondent 1 all the books of accounts and papers relating to the said company as mentioned in the notice. The appellant was further told that in default of compliance with the requisition aforesaid necessary legal steps would be taken without further reference to him. The notice contains a list of twelve items describing the several documents which the appellant was required to produce before respondent 1.

After these notices were served on the appellant he filed a petition (No. 201 of 1957) in the Bombay High Court and prayed that the High Court should issue a writ of *certiorari* or any other appropriate direction, order or writ under Article 226 of the Constitution calling upon respondent 1 to produce the records of the case relating to the notices in question and to set aside the said notices, the proposed examination of the appellant and the interim report made by him. It further prayed for a writ of prohibition or any other appropriate direction, order or writ restraining respondent 1 from making any investigation under the said notices and from exercising any powers of investigation under section 239 and|or section 240 of the new Act and or from investigating into the affairs of any persons or concerns specified in the petition. The petitioner claimed these writs mainly on two grounds. He first alleged that since respondent 1 had been appointed under the old Act he had no jurisdiction to exercise powers referable to the relevant provisions of the new Act. This ground assumed that the said relevant provisions of the new Act are valid, but it is urged that the powers referable to the said provisions are not available to respondent 1 since he was appointed under the old Act. The other ground on which the writs were claimed challenges the vires of sections 239 and 240 of the new Act. This challenge assumed an alternative form.

It is argued that section 240 offends against the constitutional guarantee provided by Article 20 (3) of the Constitution and it is also urged that certain portions of sections 239 and 240 offend against another constitutional guarantee provided by Article 14 of the Constitution. It is thus on these three contentions that the petitioner claimed appropriate writs by his petition before the Bombay High Court. These pleas were resisted by the Union of India which had been joined to the proceedings as respondent 2. Mr. Justice K. T. Desai, who heard the petition, rejected the contentions raised by the petitioner, and held that no case had been made out for the issue of any writ. This decision was challenged by the appellant before the Court of Appeal in the Bombay High Court; the Court of Appeal agreed with the view taken by Desai J., and dismissed the appeal. Thereupon the appellant applied for and obtained a certificate from the High Court, and it is with the said certificate that he has come to this Court by his present appeal. On his behalf Mr. Viswanatha Sastri has raised the same three points for our decision.

Let us first examine the question whether or not the first respondent has jurisdiction to exercise the powers under the relevant provisions of the new Act. It is common ground that if respondent 1's powers to hold the investigation in question are to be found in the relevant provisions of the old Act and not those of the new Act the impugned notices issued by him would be without authority and jurisdiction. In dealing with this question it is necessary to examine the broad features of the relevant sections of the two Acts.

We will begin with the old Act. Section 137 of the old Act deals with investigation by the Registrar. Section 137 (1) provides that where the Registrar on perusal of any document which a company is required to submit to him is of opinion that any information or explanation is necessary in order that such document may afford full particulars of the matter to which it purports to relate he may, by a written order, call on the company to furnish in writing the necessary information or explanation within the time to be specified in the order. Section 137 (5) requires the Registrar to make a report in writing to the Central Government if no information is supplied to him within the specified time, or if the information supplied to him appears to him to disclose an unsatisfactory state of affairs, or does not disclose a full and fair statement of the relevant matters. Thus section 137 (1) to (5) deal with the investigation which the Registrar is empowered to make on a perusal of the document submitted to him by a company under the provisions of this Act. Section 137 (6) deals with a case where if it is represented to the Registrar on materials placed before him by any contributory or creditor that the business of a company is carried on in fraud or in fraud of its creditors or in fraud of persons dealing with the company or for a fraudulent purpose, he may, after following the procedure prescribed in that behalf, call for information or explanation on matters to be specified in his order within such time as he may fix, and when such an order is passed the provisions of section 137 (2) to (5) would be applicable. This sub-section provides that if at the end of the investigation the Registrar is satisfied that the representation on which he took action was frivolous or vexatious he shall disclose the identity of the informant to the company. This provision is obviously intended as a safeguard against frivolous or vexatious representations in respect of the affairs of any company. The provisions of this section are substantially similar to the provisions of section 234 of the new Act.

Section 138, which deals with investigation of affairs of companies by Inspectors, authorises the Central Government to appoint one or more competent Inspectors to investigate the affairs of any company and report thereon in such manner as the said Government may direct. The appointment of competent Inspectors can be made by the Central Government in four classes of cases as specified in section 138 (1) to (4). It would be relevant to refer to two of these cases. Under section 138 (1) a competent Inspector can be appointed in the case of a banking company having a share capital on the application of members holding not less than one-fifth of the shares issued, and under section 138 (4) in the case of any company on a report by the Registrar under section 137 (5). This section substantially corresponds to section 235 of the new Act.

The other sections of the old Act to which reference must be made are sections 140, 141 and 141-A. Section 140 (1) imposes upon all persons who are or have been officers of the company an obligation to produce before the inspectors all books and documents in their custody or power relating to the company. Section 140 (2) empowers the inspector to examine on oath any such person, meaning a person who is or has been an officer of the company in relation to the business of the company and to administer an oath to him. Section 140 (3) provides that if a person refuses to produce a book or a document or to answer any question he shall be liable to a fine not exceeding Rs. 50 in respect of each offence. Section 141 provides that on the conclusion of an investigation the inspectors shall report their opinions to the Central Government, and shall forward a copy of their report to the registered office of the company; and it also provides that a copy of the said report can be delivered at their request to the applicants for the investigation. Then we have section 141-A which deals with the institution of prosecutions. Section 141-A (1) provides that if from any report made under section 138 it appears to the Central Government that any person has been guilty of any offence in relation to the company for which he is criminally liable, the Central Government shall refer the matter to the Advocate-General or the Public Prosecutor. Section 141-A (2) lays down that if the Law Officer who is consulted under (1) considers that there is a case in which prosecution ought to be instituted he shall cause proceedings to be instituted accordingly. That in brief is the scheme of the relevant provisions of the old Act.

We will now examine the scheme of the relevant provisions of the new Act. It has already been noticed that sections 234 and 235 of the new Act are substantially similar to sections 137 and 138 of the old Act. Section 239 of the new Act provides for the powers of the inspectors to carry on investigation into the affairs of related companies or of managing agent or associate. The sweep of the enquiry authorised by this section is very much wider than that under the corresponding section of the old Act. Sub-section (1) of this section authorises an inspector to investigate the affairs of a company and also the affairs of any other body corporate or person specified in clauses (*a*) to (*d*) if he thinks it necessary so to do. These clauses include several cases of body corporate which may have any connection direct or indirect, immediate or remote, with the affairs of the company whose affairs are under investigation. It is unnecessary for our purpose in the present appeal to enumerate the said cases serially or exhaustively. It is conceded that the three other persons who have been called upon by respondent 1 to produce documents and give evidence fall within the purview of section 239. As a result of the provisions of section 239 (1) the inspector has to report not only on the affairs of the company under investigation but also on the affairs of other bodies or

persons who have been compelled to give evidence and produce documents during the course of the enquiry. The only safeguard provided against a possible abuse of these extensive powers is that in the case of any body corporate or person referred to in clauses (*b*) (ii), (*b*) (iii), (*c*) or (*d*) of sub-section (1) the inspector shall not exercise his relevant power without first having obtained the prior approval of the Central Government thereto.

Section 240 of the new Act imposes an obligation on the corporate bodies and persons in respect of which or whom investigation is authorised by section 239 to produce all books and papers and to give all assistance in connection with the said investigation; that is the result of section 240 (1). Section 240 (2) empowers the inspector to examine on oath any of the persons referred to in sub-section (1) in relation to the relevant matters as specified. Section 240 (3) deals with a case where a person refuses to comply with the obligation imposed on him by section 240 (1) or (2); and it provides that in such a case the inspector may certify the refusal under his hand to the Court, and the Court may thereupon enquire into the case, hear witnesses who may be produced against or on behalf of the alleged offender, consider any statement which may be offered in defence, and punish the offender as if he had been guilty of contempt of the Court. Section 240 (4) deals with a case where the inspector thinks it necessary for the purpose of his investigation that a person whom he has no power to examine on oath should be examined, and it provides that in such a case he may apply to the Court, and the Court may, if it thinks fit, order that person to attend and be examined on oath before it on any matter relevant to the investigation. This sub-section provides for the procedure to be followed in examining such a witness. Section 240 (5) lays down that notes of any examination under sub-section (2) or (4) shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used as evidence against him. Having thus made elaborate provisions for the production of documents and evidence in the course of the investigation by the inspector, section 241 deals with the inspector's report, and provides that the inspectors may, and if so directed by the Central Government shall, make interim reports to that Government, and on the conclusion of the investigation shall make a final report to it. Section 241 (2) provides for the supply of the copy of the said report to the several parties concerned as specified in clauses (*a*) to (*e*).

That takes us to section 242 which deals with prosecution. Section 242 (1) provides *inter alia* that if from any report made under section 241 it appears to the Central Government that any person has in relation to the company been guilty of any offence for which he is criminally liable, the Central Government may, after taking such legal advice as it thinks fit, prosecute such person for the offence, and it imposes on all officers and agents of the company, except those prosecuted, to give the Central Government all assistance in connection with the prosecution which they are reasonably able to give. That broadly stated is the position with regard to the relevant provisions of the new Act.

Mr. Sastri has drawn our pointed attention to the fact that the scope and nature of the enquiry authorised by the new Act are very much wider than under the old Act, and he has characterised the relevant powers conferred on the investigating inspectors as draconian. He, therefore, contends that unless it is established that these powers are available to the inspector appointed under the relevant provisions of the old Act the impugned notices must be set aside; and his argument is that these powers are not available to the inspector appointed

under the old Act. The decision of this question will depend mainly on the construction of sections 645 and 646 of the new Act.

Section 644 provides for the repeal of the enactments mentioned in Schedule XII; the old Act is one of the enactments thus repealed. Odinarily the effect of the repeal of the old Act would have been governed by the provisions of section 6 of the General Clauses Act, X of 1897, but in the case of the new Act the application of the said section is subject to the provisions of sections 645 to 657 of the Act; that is the effect of section 658 which provides that the mention of particulars in sections 645 to 657 or in any other provisions of this Act shall not prejudice the general application of section 6 of the General Clauses Act, 1897, with respect to the effect of repeals. In other words, though section 6 of the General Clauses Act will generally apply, its application will be subject to the provisions contained in sections 645 to 657; this position is not disputed.

It is now necessary to consider section 645. It reads thus:

> "Nothing in this Act shall affect any order, rule, regulation, appointment, conveyance, mortgage, deed, document or agreement made, fee directed, resolution passed, direction given, proceeding taken, instrument executed or issued, or thing done, under or in pursuance of any previous companies law; but any such order, rule, regulation, appointment, conveyance, mortgage, deed, document, agreement, fee, resolution, direction, proceeding, instrument or thing shall, if in force at the commencement of this Act, continue to be in force, and so far as it could have been made, directed, passed, given, taken, executed, issued or done under or in pursuance of this Act, shall have effect as if made, directed, passed, given, taken, executed, issued or done under or in pursuance of this Act.".

The effect of this section is clear. If an inspector has been appointed under the relevant section of the old Act, on repeal of the old Act and on coming into force of the new Act, his appointment shall have effect as if it was made under or in pursuance of the new Act. Indeed it is common ground that if section 645 had stood alone and had not been followed by section 646 there would have been no difficulty in holding that the inspector appointed under the old Act could exercise his powers and authority under the relevant provisions of the new Act. and the impugned notices would then be perfectly valid. Incidentally we may refer to the provisions of section 652 in this connection. Under this section any person appointed to any office under or by virtue of any previous company law shall be deemed to have been appointed to that office under this Act.

It is, however, urged that the authority of the inspector which is in dispute is governed by section 646. This section provides:

> "Nothing in this Act shall affect the operation of section 138 of the Indian Companies Act, 1913 (VII of 1913), as respects inspectors, or as respects the continuation of an inspection begun by inspectors, appointed before the commencement of this Act; and the provisions of this Act shall apply to or in relation to a report of inspectors appointed under the said section 138 as they apply to or in relatinn to a report of inspectors appointed under section 235 or 237 of this Act."

The argument is that the expression "nothing in this Act" includes section 645 and so section 646 should be read as an exception or proviso to section 645; and if that is so, all matters covered by section 138 of the old Act must continue to be governed by the said Act and not by any of the provisions of the new Act. We are unable to accept this argument. In appreciating the effect of the provisions of section 646 it is necessary to bear in mind that it occurs in that part of the new Act which deals with repeals and savings. Sections 645 to 648 are the saving sections, and ordinarily and in the absence of any indication to the contrary these saving clauses should be read as independent of, and in addition to, and not as providing exceptions to, one another. It is significant that whereas section 646

provides for the continuance of the operation of section 138 it does not make a corresponding provision for the continuance of the operation of section 140 of the old Act which deals with the powers of the inspector to call for books and to examine parties. Besides, it may perhaps not be accurate to suggest that having regard to the provisions of section 645, section 646 is wholly redundant. It would be possible to take the view that cases falling under section 138 (1) of the old Act are intended to be covered by section 646 as they would not be covered by section 645. In regard to the case of a banking company covered by section 138 (1), section 646 will come into operation and that may be one of the reasons for which section 646 was enacted. It may be that the case of the banking company may also be covered by section 35 of the Banking Companies Act, X of 1949, but since section 138 (1) applied to the said case until the old Act was repealed the Legislature may have, as a matter of caution, thought it necessary to provide for the continuance of the operation of section 138 by enacting section 646. However that may be, we feel no difficulty in holding that section 646 should not be construed as a proviso to section 645 but as an additional saving provision. The words used in section 645 are so clear, and the policy and object of enacting the said provision are in our opinion so emphatically expressed, that it would be unreasonable to hold that section 646 was intended to provide for such a radical exception to section 645. Where the Legislature enacts a saving section as a matter of abundant caution the argument that the enactment of the said section was not wholly necessary cannot be treated as decisive or even effective. Therefore, in our opinion, the High Court was right in coming to the conclusion that the inspector appointed under section 138 (4) of the old Act must by legal fiction, which is authorised by section 645, be deemed to have been appointed under section 235 of the new Act, and if that is so, respondent 1 had authority and power to issue the impugned notices under section 240 of the new Act. The challenge to the validity of the impugned notices on the ground that respondent 1 had no authority to issue the said notices must, therefore, fail.

That takes us to the question as to whether the relevant provisions of section 240, which empower respondent 1 to issue the relevant notices by which the appellant was called upon to give evidence and to produce documents, offend against the fundamental constitutional right guaranteed by Article 20 (3). It has been strenuously urged before us that the main object of the present investigation is to discover whether the appellant has committed any offences, and so by compelling him to give evidence and produce documents he is denied the constitutional protection against self-incrimination.

Article 20 (3) provides that "no person accused of any offence shall be compelled to be a witness against himself". It may be assumed that the appellant is being compelled to be witness against himself in the present proceedings; but even so the question which arises for our decision is whether appellant can be said to be a person who is accused of any offence as required by Article 20 (3). Mr. Sastri has contended that the words "person accused of any offence" should not receive a narrow or literal construction; they should be liberally interpreted because the clause in which they occur enshrines a fundamental constitutional right and the scope and reach of the said right should not be unduly narrowed down. In support of this general argument Mr. Sastri has naturally relied on the historical background of the doctrine of protection against self-incrimination; and he has strongly pressed into service the decisions of the Supreme Court of the United States of America dealing with the Fifth Amendment to the Constitution of the United States. The said Amendment *inter alia* provides that "no person shall be compelled in any criminal

case to be a witness against himself". It would be noticed that in terms the Amendment refers to a criminal case, and yet it has received a very broad and liberal interpretation at the hands of the Supreme Court of the United States of America. It has been held that the said constitutional protection is not confined only to criminal cases but it extends even to civil proceedings. (Vide: *McCarthy* v. *Arndstein*[1].) As observed by Mr. Justice Blatchford in *Charles Counselman* v. *Frank Hitchcock*,[2]

> "it is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard".

In support of his plea that a liberal interpretation should be put on an article which enshrines a fundamental constitutional right Mr. Sastri has also invited our attention to the observation made by Mr. Justice Bradley in *Edward A. Boyd and George H. Boyd* v. *United States*.[3] Says Bradley, J.,

> "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed".

The learned Judge has also added that

> "any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government, and is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom".

In regard to this eloquent statement of the law it may, however, be permissible to state that under the English Law the doctrine of protection against self-incrimination has never been applied in the departments of Company Law and Insolvency Law. There is no doubt that under section 15 of the English Bankruptcy Act when a public examination of a debtor is held he is compelled to answer all questions as the Court may put, or allow to be put to him, and that the answers given have to be signed by him and can be used against him in evidence (Vide: *In re*: *Atherton*[4]), similar is the position under section 270 of the English Companies Act. However, the general argument for the appellant is that in construing Article 20 (3) we may take some assistance from the broad and liberal construction which has been placed on the apparently narrow and limited words used in the Fifth Amendment to the Constitution of the United States of America.

Thus presented the argument is no doubt attractive, and its validity and effectiveness would have had to be fully and carefully examined if the question raised in the present appeal had been a matter of first impression; but the construction of Article 20 in general and Article 20 (2) and (3) in particular has been the subject-matter of some decisions of this Court, and naturally it is in the light of the previous decisions that we have to deal with the merits of the appellant's case in the present appeal. In *Maqbool Hussain* v. *The State of Bombay*[5] this Court had occasion to consider the scope and effect of the constitutional guarantee provided by Article 20 (2). A person against whom pro-

1. 69 Law Ed. 158.
2. 35 Law Ed. 1110.
3. 29 Law Ed. 746 at 752.
4. L.R. (1912) 2 K.B. 251.
5. (1953) S.C.J. 456 : (1953) 2 M.L.J. 113 : (1953) S.C.R. 730.

ceedings had been taken by the Sea Customs Authorities under section 167 of the Sea Customs Act and an order for confiscation of goods had been passed was subsequently prosecuted before the Presidency Magistrate for an offence under section 23 of the Foreign Exchange Regulations Act in respect of the same act. It was urged on his behalf that the proceedings taken against him before the Sea Customs Authorities was a prosecution and the order of confiscation passed in the said proceedings was a punishment, and so it was argued that the constitutional guarantee afforded by Article 20 (2) made his subsequent prosecution under section 23 of the Foreign Exchange Regulation Act invalid. This plea was rejected. In dealing with the merits of the plea this Court had to consider the meaning of the words "prosecuted and punished" used in Article 20 (2). Article 20 (2) provides that no person shall be prosecuted and punished for the same offence more than once, and the question raised was whether the proceedings before the Sea Customs Authorities constituted prosecution, and whether the order of confiscation was punishment under Article 20 (2). In construing Article 20 (2) this Court considered Article 20 as a whole and examined the inter-relation of the relevant terms used in the three clauses of the said article. "The very wording or Article 20", observed Bhagwati, J.,

"and the words used therein—'convicted', 'commission of the act charged as an offence', "be subjected to a penalty", "commission of the offence", "prosecuted and punished", "accused of any offence" would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a Court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates procedure".

Having thus construed Article 20 (2) in the light of the relevant words used in the different clauses of the said article, this Court naturally proceeded to enquire whether the Sea Customs Authorities acted as a judicial tribunal in holding proceedings against the person. The scheme of the relevant provisions of the Act was then examined, and it was held that the said authorities are not a judicial tribunal with the result that the "adjudging increased rate of duty or penalty and confiscation" under the provisions of the said Act did not constitute a judgment or order of a Court or judicial tribunal necessary for the purpose of supporting the plea of double jeopardy. In the result the conclusion of this Court was that when the Customs Authorities confiscated the gold in question the proceedings taken did not amount to a prosecution of the party nor did the order of confiscation constitute a punishment as contemplated by Article 20 (2).

This decision has been affirmed by this Court in the case of *S. A. Venkataraman* v. *The Union of India & Anr.*[1] In that case an enquiry had been made against the appellant Venkataraman under the Public Servants (Inquiries) Act, 1850 (XXXVII of 1850). On receiving the report of the enquiry commissioner opportunity was given to the appellant under Article 311 (2) to show cause, and ultimately after consultation with the Union Public Service Comismission the appellant was dimissed by an order passed by the President. The order of dismissal was passed on September 17, 1953. Soon thereafter on February 23, 1954, the police submitted a charge-sheet against him charging him with having committed offences under sections 161-165 of the Indian Penal Code and section 5 (2) of the Prevention of Corruption Act. The validity of the subsequent prosecution was challenged by the appellant on the ground that it contravened the constitutional guarantee enshrined in Article 20 (2). The appellant's plea was, however, rejected on the ground that the proceedings taken

1. (1954) S.C.J. 461 : (1954) 1 M.L.J. 702: 1955 S.C.R. 1150.

against him before the commissioner under the Inquiries Act did not amount to a proscution. The relevant provisions of the said Act were examined, and it was held that in an inquiry under the said Act there is neither any question of investigating an offence in the sense of an act or omission punishable by any law for the time being in force nor is there any question of imposing punishment prescribed by the law which makes that act or omission an offence. Mukherjea, J., as he then was, who delivered the judgment of the Court, has referred to the earlier decision in the case of *Maqbool Hussain*[1], and thus observed that

"the effect of the said decision was that the proceedings in connection with the prosecution and punishment of a person must be in the nature of a criminal proceeding before a court of law or a judicial tribunal, and not before a Tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but which is not required by law to try a matter judicially and on legal evidence".

Thus these two decisions can be said to have considered incidentally the general scope of Article 20 though both of them were concerned directly with the construction and application of Article 20 (2) alone.

Article 20 (3) was considered by the Full Court in *M. P. Sharma & Ors.* v. *Satis Chandra, District Magistrate, Delhi & Ors.*[2] The question about the scope and effect of Article 20 (3) was raised in that case by a petition filed under Article 32 of the Constitution. It appears that the Registrar of the Joint Stock Companies, Delhi State, lodged information with the Inspector-General, Delhi Special Police Establishment, against the petitioners alleging that they had committed several offences punishable under the Indian Penal Code. The lodging of this information was preceded by an investigation into the affairs of the petitioners' company which had been ordered by the Central Government under section 138 of the old Act, and the report received at the end of the said investigation indicated that a well-planned and organised attempt had been made by the petitioners to misappropriate and embezzle the funds of the company by adopting several ingenious methods. On receipt of the said First Information Report the District Magistrate ordered investigation into the offences and issued warrants for simultaneous searches at as many as thirty-four places. By their petitions the petitioners contended that the search warrants were illegal and they prayed that the same may be quashed as being in violation of Article 20 (3). The plea thus raised by the petitioners was ultimately rejected on the ground that the impugned searches did not violate the said constitutional guarantee. Jagannadhadas, J., who spoke for the Court, observed that

"since Article 20 (3) provides for a constitutional guarantee against testimonial compulsion its words should be liberally construed, and that there was no reason to confine the content of the said guarantee to its barely literal import".

He, therefore, held that the phrase "to be a witness" means nothing more than to furnish evidence, and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes. He also pointed out that the phrase was "to be a witness" and not "to appear as a witners", and so the protection afforded was not merely in respect of testimonial compulsion in the Court room but may well extend to compel testimony previously obtained from him. The conclusion of the Court on this part of the construction was thus stated. The constitutional guarantee

"is available to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution; whether it is available to other persons in other situations does not call for a decision in this case".

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1. (1953) S.C.J. 456 : (1953) 2 M.L.J. 113 : (1953) S.C.R. 730.

2. (1954) S.C.J. 428 : (1954) 1 M.L.J. 680 : (1954) S.C.R. 1077.

Since the First Information Report had been recorded against the petitioners in that case it followed that the first test that a formal accusation relating to the commission of an offence must have been levelled was satisfied. The question which was then considered was whether there was any basis in the Indian Law for the assumption that ta search or seizure of a thing or document is in itself to be treated as compelled production of the same; and it was held that that there would be no justification for treating the said search or seizure as compelled production; that is why the challenge to the validity of the search warrants issued against the petitioners war repelled. The effect of this decision thus appears to be that one of the essential conditions for invoking the constitutional guarantee enshrined in Article 20 (3) is that a formal accusation relating to the commission of an offence, which would normally lead to his prosecution, must have been levelled against the party who is being compelled to give evidence against himself; and this conclusion, in our opinion, is fully consistent with the two other decisions of this Court to which we aave already referred.

There are two other subsequent decisions of this Court to which reference may be made. In *Thomas Dana* v. *State of Punjab*[1], according to the majority decision "prosecution" in Article 20 (2) means a proceeding either by way of indictment or information in a criminal Court in order to put un offender upon his trial. It would be noticed that this conclusion is wholly consistent with the view taken by this Court in the case of *Maqbool Hussain*[2] and *S. A. Venkataraman*[3]. In *Mahommed Dartagir* v. *The State of Madras*[4], this Court had to consider Article 20 (3). The appellant in that case had gone to the bungalow of the Deputy Superintendent of Police to offer him a bribe which was covered in a closed envelope with a request that he might drop the action registered against him. The police officer threw the envelope at the appellant who took it up. While the appellant was still in the bungalow he was asked by the police officer to produce the envelope and he took out from his pocket some currency notes and placed them on the table without the envelope. The notes were then seized by the police officer and a rubber stamp of his was placed on them. On these facts it was urged that in relying upon the evidence of compelled production of notes the prosecution had violated the provisions of Article 20 (3). In support of this contention the general observations made by this Court in the case of *M. P. Sharma & Ors.*[5] were strongly pressed into service. This Court, however, rejected the appellant's arguments and held that the prosecution did not suffer from any infirmity. On the facts it was found that though the offence had in fact been already committed by the appellant, he had not been accused of it at the stage when the currency notes were produced by him; it was also held that it could not be said that he was compelled to produce the said currency notes, because he might easily have refused to produce them, and so there was no occasion for him to invoke the constitutional protection against self-incrimination.

What then is the result of these decisions? They show that in determining the complexion and reach of its respective sub-clauses the general scheme of Article 20 as a whole must be considered, and the effect of the interaction of the relevant words used in them must be properly appreciated. Thus considered

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1. (1959) S.C.J. 699 : (1959) 1 M.L.J. (Crl) 474 : A.I.R. 1959 S.C. 375.
2. (1953) S.C.J. 456 : (1953) 2 M.L.J. 113 : (1953) S.C.R. 730.
3. (1954) S.C.J. 461 : (1954) 1 M.L.J. 702 : (1954) S.C.R. 1150.
4. (1960) S.C.J. 726: (1960) 2 M.L.J. (S.C.) 39 : (1960) 2 An. W.R. (S.C.) 39 : (1960) M.L.J. (Crl.) 466 : A.I.R. 1960 S.C. 756.
5. (1954) S.C.J. 428 : (1954) 1 M.L.J. 680: (1954) S.C.R. 1077.

the constitutional right guaranteed by Article 20 (2) against double jeopardy can be successfully invoked only where the prior proceedings on which reliance is placed must be of a criminal nature instituted or continued before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. It would be noticed that the character of the said proceedings as well as the character of the forum before which the proceedings are initiated or conducted are treated as decisive in the matter. Similarly, for invoking the constitutional right against testimonial compulsion guaranteed under Article 20 (3) it must appear that a formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in prosecution. Here again the nature of the accusation and its probable sequel or consequence are regarded as important.

Thus we go back to the question which we have already posed: was the appellant accused of any offence at the time when the impugned notices were served on him? In answering this question in the light of the tests to which we have just referred it will be necessary to determine the scope and nature of the enquiry which the inspector undertakes under section 240; for, unless it is shown that an accusation of a crime can be made in such an enquiry, the appellant's plea under Article 20 (3) cannot succeed. Section 240 shows that the enquiry which the inspector undertakes is in substance an enquiry into the affairs of the company concerned. Certain documents are required to be furnished by a company to the Registrar under the provisions of the new Act. If, on examining the said documents, the Registrar thinks it necessary to call for information or explanation he is empowered to take the necessary action under section 234 (1). Similarly, under section 234 (7) if it is represented to the Registrar on materials placed before him by any contributory or creditor or any other person interested that the business of the company is carried on in the manner specified in the said sub-section the Registrar proceeds to make the enquiry. Thus the scope of the enquiry contemplated by section 234 is clear; wherever the Registrar has reason to believe that the affairs of the company are not properly carried on he is empowered to make an enquiry into the said affairs. Similarly under section 235 inspectors are appointed to investigate the affairs of any company and report thereon. The investigation carried on by the inspector is no more than the work of a fact-finding commission. It is true that as a result of the investigation made by the inspectors it may be discovered that the affairs of the company disclose not only irregularities and malpractices but also commission of offences, and in such a case the report would specify the relevant particulars prescribed by the circular in that behalf. If, after receiving the report, the Central Government is satisfied that any person is guilty of an offence for which he is criminally liable, it may, after taking legal advice, institute criminal proceedings against the offending person under section 242 (1); but the fact that a prosecution may ultimately be launched against the alleged offender will not retrospectively change the complexion or character of the proceedings held by the inspector when he makes the investigation. Have irregularities been committed in managing the affairs of the company; if yes, what is the nature of the irregularities? Do they amount to the commission of an offence punishable under the criminal law? If they do who is liable for the said offence? These and such other questions fall within the purview of the inspector's investigation. The scheme of the relevant sections is that the investigation begins broadly with a view to examine the management of the affairs of the company to find out whether any irregularities have been committed or not. In such a case there is no accusation, either formal or otherwise, against any specified individual; there

may be a general allegation that the affairs are irregularly, improperly or illegaly managed; but who would be responsible for the affairs which are reported to be irregularly managed is a matter which would be determined at the end of the enquiry. At the commencement of the enquiry and indeed throughout its proceedings there is no accused person, no accuser and no accusation against anyone that he has committed an offence. In our opinion a general enquiry and investigation into the affairs of the company thus contemplated cannot be regarded as an investigation which starts with an accusation contemplated in Article 20 (3) of the Constitution. In this connection it is neecessary to remember that the relevant sections of the Act appear in Part VI which generally deals with management and administration of the companies.

It is well-known that the provisions of the Act are modelled on the corresponding provisions of the English Companies Act. It would, therefore, be useful to refer to the observations made by the House of Lords in describing the character of the enquiry held under the corresponding provisions of the English Act in the case of *Hearts of Oak Assurance Co.* v. *Attorney-General*.[1] In that case Lord Thankerton said:

> "it appears to me to be clear that the object of the examination is merely to recover information as to the company's affairs and that it is in no sense a judicial proceeding for the purpose of trial of an offence; it is enough to point out that there are no parties before the inspector, that he alone conducts the enquiry, and that the power to examine on oath is confined to the officers, members, agents and servants of the company".

We ought, however, to add that the last observation is no longer true about the inspector's powers under section 240 of the new Act. In the same case Lord Macmillan observed that:

> "the object of the enquiry manifestly is that the Commissioner may either by himself directly or through the medium of a delegate obtain the information necessary to enable him to decide what action, if any, he should take. The cardinal words of the section are those which empower the Commissioner or his inspector to examine into and report on the affairs of the society".

Thus it is clear that the examination of, or investigation into, the affairs of the company cannot be regarded as a proceeding started against any individual after framing an accusation against him. Besides it is quite likely that in some cases investigation may disclose that there are no irregularities, or if there are they do not amount to the commission of any offence; in such cases there would obviously be no occasion for the Central Government to institute criminal proceedings under section 242 (1). Therefore, in our opinion, the High Court was right in holding that when the inspector issued the impugned notices against the appellant he cannot be said to have been accused of any offence; and so the first essential condition for the application of Article 20 (3) is absent. We ought to add that in the present case the same conclusion would follow even if the clause "accused of any offence" is interpreted more liberally than was done in the case of *M. P. Sharma and others*,[2] because even if the expression "accused of any offence" is interpreted in a very broad and liberal way it is clear that at the relevant stage the appellant has not been, and in law cannot be, accused of any offence. Thus the tests about the character of the proceedings and the forum where the proceedings are initiated or intended to be taken are also not satisfied; but, as we have already indicated such a broad and liberal interpretation of the relevant expression does not appear to be consistent with the tenor and effect of the previous decisions of this Court.

It is true that in his report the Registrar has made certain allegations on which Mr. Sastri has relied. He contends that the statements in the report

1. L.R. 1932 A.C. 392.
2. (1954) S.C.J. 428: (1954) 1 M.L.J. 680: (1954) S.C.R. 1077.

do amount to allegations of commission of offences by the appellant. What the Registrar has stated in his report in this particular case cannot be relevant or material in deciding the vires of the impugned section. The vires of the section can be determined only by examining the relevant scheme of the Act, and we have already seen that such an examination does not assist the appellant's contention that Article 20 (3) is contravened. Besides, what the Registrar has stated in his report can hardly amount to an accusation against the appellant; it is a report submitted by him to the Central Government, and it is only intended to enable the Central Government to decide whether it should appoint an inspector. It is not as if the investigation before the inspector begins on the basis that the Registrar is the complainant who has made an accusation against the appellant, or that the function of the investigation is to find out whether the said accusation is proved or not. As we have already seen an enquiry under section 240 may require a large number of persons to give evidence or produce documents but it cannot be said that any accusation is made against any of the said persons. In fact three persons have been served with similar notices in the present enquiry which shows that the inspector desires to obtain relevant evidence from them as from the appellant. How can it be said that an accusation has been made against the said three persons, and that incidentally helps to bring out the real character and scope of the enquiry. Therefore we do not think that the statements made in the Registrar's report on which Mr. Sastri relies can really assist us in deciding the question of the vires of section 240. It is also significant that the appellant has not challenged the validity of the impugned notices on any ground relatable to or based on, said report. The challenge is founded on the broad and general ground that section 240 offends against Article 20 (3).

We may incidentally add that it was in support of his argument based on the Registrar's report that Mr. Sastri sought to rely on the decision of the Calcutta High Court in *Collector of Customs and others* v. *Calcutta Motor Cycle Co. and others.*[1] In that case certain notices had been issued under section 171-A of the Sea Customs Act to certain persons to appear before the Customs officials and to produce certain documents. The High Court took the view that

> "it appeared from the accusations made in the search-warrants at the instance of the Customs Authorities and those made in one of the notices by the Customs Authorities themselves, that the accusations of criminal offences could not be excluded";

and so it was held that the requirements of Article 20 (3) were satisfied and the protection under the said Article was available to the persons concerned. In our opinion this decision does not assist the appellant. It proceeded on the finding that accusations of criminal offences could be held in substance to have been made against the persons concerned, and it dealt with the other points of law on that assumption. That being so, we think it unnecessary to discuss or consider the said decision. Our conclusion, therefore, is that section 240 does not offend against Article 20 (3) of the Constitution.

That still leaves the challenge to the vires of the said section under Article 14 of the Constitution, though we ought to add that Mr. Sastri did not seriously press his case under Article 14, and we think rightly. The argument under Article 14 proceeds on familiar lines. It is urged that the ordinary protection afforded to witnesses under section 132 of the Indian Evidence Act as well as the protection afforded to accused persons under section 161 (1) and (2) of the Criminal Procedure Code, have been denied to the appellant in the investigation which respondent 1 is carrying on in regard to the affairs of his company, and that violates equality before the law. The scope and effect of

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1 A.I.R. 1958 Cal. 682.

Article 14 have been considered by this Court frequently. It has been repeatedly held that what Article 14 prohibits is class legislation; it does not, however, forbid reasonable classification for the purpose of legislation. If the classification on which legislation is based is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and if the differentia has a rational relation to the object sought to be achieved, then the classification does not offend Article 14 (Vide: *Shri Ram Krishna Dalmia* v. *Justice Tendolkar.*[1]) Now in the light of this test how can it be said that the classification made by sections 239 and 240 offends Article 14 of the Constitution? A company is a creature of the statute. There can be no doubt that one of the objects of the Companies Act is to throw open to all citizens the privilege of carrying on business with limited liability. Inevitably the business of the company has to be carried on through human agency, and that sometimes gives rise to irregularities and malpractices in the management of the affairs of the company. If persons in charge of the management of companies abuse their position and make personal profit at the cost of the creditors, contributories and others interested in the company, that raises a problem which is very much different from the problem of ordinary misappropriation or breach of trust. The interest of the company is the interest of several persons who constitute the company, and thus persons in management of the affairs of such companies can be classed by themselves as distinct from other individual citizens. A citizen can and may protect his own interest, but where the financial interest of a large number of citizens is left in charge of persons who manage the affairs of the companies it would be legitimate to treat such companies and their managers as a class by themselves and to provide for necessary safeguards and checks against a possible abuse of power vesting in the managers. If the relevant provisions of the Act dealing with enquiries and investigations of the affairs of the companies are considered from this point of view there would be no difficulty in holding that Article 14 is not violated either by section 239 or section 240 of the new Act.

The result is the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT:—B. P. SINHA, *Chief Justice*, S. J. IMAM, A. K. SARKAR, K. N. WANCHOO AND J. C. SHAH, JJ.

Directors of Rationing and Distribution .. *Appellant**

v.

The Corporation of Calcutta .. *Respondent.*

(1) Attorney-General for India,
(2) The State of Punjab,
(3) The State of Uttar Pradesh,
(4) The State of Madras,
(5) The State of Bombay (now Maharashtra) and
(6) The State of Andhra Pradesh .. *Interveners.*

Calcutta Municipal Act (III of 1923), section 386 (1) (a) (corresponding to section 437 of the West Bengal Act (XXXIII of 1951)—Director of Rationing and Distribution using premises for storing rice without licence—Immunity of Government from liability—'Prerogative of perfection' that the King can do no wrong—Applicability of the maxim.

Maxims—King can do no wrong—Applicability to Government.

The immunity of Government from the operation of certain statutes, and particularly statutes creating offences, is based upon the fundamental concept that the Government or

1. (1959) S.C.J. 147 : (1959) 1 M.L.J. (S.C.) 67 : (1959) 1 An.W.R. (S.C.) 67: A.I.R. 1958 S.C. 538.

*Criminal Appeal No. 158 of 1956. 16th August, 1960.

its officers cannot be a party to committing a crime—analogous to the 'prerogative of perfection', that the King can do no wrong. Whatever may have been the historical reason of the rule, it has been adopted in our country on grounds of public policy as a rule of interpretation of statutes. Article 372 of the Constitution of India (1950) has specifically provided that all laws in force immediately prior to the commencement of the Constitution shall continue in force until altered or repealed or amended. "Laws in force" would include the Common Law of England which was adopted as the law of this country before the advent of the Constitution. Hence the rule of interpretation of the statutes based on the English law of Crown prerogatives that the State is not bound by a statute, unless it is so provided in express terms or by necessary implication, is still good law. The department of the Government (in the instant case) the Director of Rationing and Distribution was discharging the elementary duty of a Sovereign to ensure proper and equitable distribution of available food-stuffs and therefore it is immune from liability for storing rice without licence as required by Calcutta Municipal Act (III of 1923), section 386 (1) (*a*).

Per *Wanchoo, J.*—When the King as the embodiment of all power—executive, legislative and judicial—has disappeared and in our republican Constitution, sovereign power has been distributed among various organs created thereby, there is neither justification nor necessity for continuing the rule of construction based on the Royal prerogative. The State (in the instant case) is being prosecuted rendering it liable to fine. In effect, therefore if the State as such is to be prosecuted under a penal statute imposing fine the result is that the Court will sentence the State to fine which will go to the State itself. Therefore, where the penalty is fine and the fine goes to the State, it must be held that by necessary implication the law does not intend the State to be prosecuted for such an offence.

Appeal by Special Leave from the Judgment and Order dated the 9th February, 1955, of the Calcutta High Court in Criminal Revision No. 282 of 1954, arising out of the Judgment and Order dated the 15th December, 1953, of the Second Municipal Magistrate, Calcutta, in Case No. 2629-C of 1952.

S. M. Bose, Advocate-General for the State of West Bengal, *A. C. Mitra* and *B. Sen,* Senior Advocates, (*P. K. Bose* and *D. Gupta,* Advocates, with them), for Appellant.

N. C. Chatterjee, Senior Advocate, (*Sunil K. Basu* and *Sukumar Ghose,* Advocates, with him), for Respondent.

M. C. Setalvad, Attorney-General for India, (*R. Ganapathy Iyer, R. H. Dhebar* and *T. M. Sen,* Advocates with him), for Intervener No. 1.

S. M. Sikri, Advocate-General for the State of Punjab, (*D. Gupta,* Advocate, with him), for Intervener No. 2.

G. C. Mathur and *C. P.* Lal, (Advocates. with him), for Intervener No. 3.

V. K. Tiruvenkatachari, Advocate-General for the State of Madras, (*T. M. Sen,* Advocate, with him), for Intervener No. 4.

H. M. Seervai, Advocate-General for the State of Maharashtra, (*R. H. Dhebar,* Advocate, with him), for Intervener No. 5.

T. M. Sen, Advocate, for Intervener No. 6.

The Court delivered the following Judgment :

Sinha, C.J. (*On behalf of Imam, J., Shah, J. and himself*).—This appeal by Special Leave is directed against the Judgment and Order of the High Court at Calcutta dated February 9, 1955, whereby that Court, in its revisional jurisdiction, set aside an order of acquittal dated December 15, 1953, passed by the Municipal Magistrate, Calcutta, in respect of the prosecution launched by the Corporation of Calcutta, respondent in this Court, against the appellant.

The relevant facts are these. On July 1, 1952, the Corporation of Calcutta made an application for summons under section 488 of Bengal Act III of 1923, which was substituted by West Bengal Act XXXIII of 1951, against "the Director of Rationing and Distribution representing the Food Department of the Government of West Bengal". The offence complained of was

"for using or permitting to be used premises No. 259, Chitpur Road, Upper, for the purpose of storing rice, etc., under the provisions of the Bengal Rationing Order, 1943,

without a licence under section 386 for the year, 1951-52, corresponding section 437 of the Calcutta Municipal Act, 1951".

Section 386 (1) (a) of the Calcutta Municipal Act is in these terms:

> "No person shall use or permit to be used any premises for any of the following purposes without or otherwise than in conformity with the terms of a licence granted by the Corporation in this behalf, namely, any of the purposes specified in Schedule XIX."

Item 8 of the said Schedule is

> "storing, packing, pressing, cleansing, preparing or manufacturing, by any process whatever, any of the following articles"

and the articles mentioned include rice, flour, etc.

The facts alleged by the prosecution were not denied on behalf of the Department, which was in the position of the accused, but it was contended by way of a preliminary objection that the prosecution was not maintainable in law. After hearing arguments for the parties the learned trial Magistrate passed an order acquitting the accused relying upon a decision of the Calcutta High Court in the case of *The Corporation of Calcutta* v. *Sub-Postmaster, Dharamtala Post Office*,[1] holding that the provisions of section 386 of the Act, neither in terms nor by necessary implication, bound the Government. The respondent moved the Calcutta High Court in its revisional jurisdiction in Criminal Revision No. 282 of 1954, which was heard by a Division Bench consisting of J. P. Mitter and S. N. Guha Ray, JJ. Guha Ray, J., who delivered the judgment of the Court, Mitter, J. concurring, held that the previous decision of the same High Court in *The Corporation of Calcutta* v. *Sub-Postmaster, Dharamtala Post Office*[1] was clearly distinguishable. The distinction pointed out was that the previous decision of the Court had relied upon the decision of the Judicial Committee of the Privy Council in *Province of Bombay* v. *Municipal Corporation of the City of Bombay and another*,[2] in a case arising before the coming into force of the Constitution. As the present case arose after the advent of the Constitution, the High Court did not feel bound by the aforesaid decision of the Privy Council and therefore examined the legal position afresh. On such an examination, the High Court came to the conclusion that the Indian Legislature in enacting laws acted on the assumption that the Government would be bound unless excluded either expressly or by necessary implication oftener than on the assumption that it would not be bound, unless the Legislature so provided expressly or by necessary implication. The High Court took the view that the decision of the Division Bench of the Madras High Court in *Bell* v. *The Municipal Commissioner for the City of Madras*[3] was more in consonance with the law in India than the opposite view expressed in the Privy Council judgment aforesaid. They definitely decided that the law of India, even before the coming into effect of the Constitution, and even at the time of the passing of the Government of India Act, 1935, was that the Government was bound by a Statute unless it was exempted either expressly or by necessary implication. In that view of the matter, the High Court further observed that the question whether the decision aforesaid of the Privy Council was still good law under Article 372 of the Constitution did not arise and that, if it did, it was inclined to the view that the law declared by the Privy Council was not continued by any provision of law. In effect, the High Court took the view that the State was bound by the Statute unless it was excluded from its operation either expressly or by necessary implication. In that view of the matter, it held that section 386 of the Act bound the appellant, set aside the order of acquittal and sent the case back to the learned Magistrate for disposal according to law. The appellant made an

1. 54 C.W.N. 429.
2. L.R. 73 I.A. 271: (1946) F.L.J. 118: (1947) 1 M.L.J. 45 (P.C.).
3. I.L.R. 25 Mad. 457: 12 M.L.J. 208.

application for Special Leave to appeal from the aforesaid judgment and order of the High Court, and obtained Special Leave in September 1955. It is thus clear that this case has remained pending in this Court for about five years. If this Court agreed with the view expressed by the High Court, the case would have to be tried on merits and the trial would begin more than eight years after the institution of the petition of complaint, but, as will presently appear, this prosecution was misconceived and therefore, in effect, no one has been the worse for the long pendency of the prosecution, which now must come to an end.

The short question for determination in this appeal is whether any offence had been committed by the appellant, as alleged against him. If he was bound by the provisions of the Act to take out a licence on payment of the necessary fees, he must be held to have contravened the provisions of that Statute. It has been contended by the learned Advocate-General of Bengal, representing the appellant, that the decision of the Privy Council[1] referred to above is still good law and that the contrary decision of the Division Bench of the Madras High Court[2] did not take the correct view of the legal position. The argument further is that the Privy Council decision was certainly binding on the Courts in India at the time it was rendered. That was the law of the land as declared by the highest judicial authority. Has that judicial determination been altered by the Constitution? It has been argued that the law in India, even after the coming into effect of the Constitution, continues to be the same as the law in England in respect of the prerogative of the Crown. The Act in question does not make any express provision binding the Government and there was nothing in the Act to show to the contrary by necessary implication. The Act could operate with reasonable efficacy without being held to be binding on the Government. It was further pointed out that the High Court had failed to take into consideration the fact that the High Court itself had construed the Calutta Municipal Act of 1923, which was replaced by the present Act of 1951, on the basis of the Privy Council decision not to have bound the Government. The Act of 1951 did not make any provision expressly abrogating that view. Hence, it is argued the High Court should have felt bound by the previous decision of that very Court given on the basis of the Privy Council decision; and had erred in taking the opposite view. The argument further was that the State is not a person within the meaning of the penal section with reference to which the prosecution had been launched. The common law could not have been overridden impliedly by a course of legislation. The common law applies to India even after the Constitution, not because there is the King or the Queen, but because it is the law in force. In other words, what was the prerogative of the Sovereign has now become the law of the land in respect of the sovereignty of the State. Thus the law of England, which in its source was the prerogative of the Crown, was the common law of the land and was adopted by the Constitution by Article 372, subject to the reservations contained therein. The Attorney-General for India as also the Advocates–General of Madras and Bombay supported the contention raised on behalf of the appellant.

Mr. N. C. Chatterjee, who appeared on behalf of the respondent, contended that the State is a legal person as recognised in Article 300 of the Constitution and was, therefore, capable of rights and obligations; that unless there is an express exclusion of the State by the Legislature, the Act would apply to all, including the State. He further contended that under the Constitution there is no King and, therefore, there cannot be any question of prerogative. Any exemption from the operation of the Statute must be found in express immunity under the law and cannot be implied. He went to the length of con-

tending that a State's prerogative is inconsistent with the whole Constitution. Whatever may have been the legal position before the coming into effect of the Constitution, it has not countenanced the continuance of any such prerogative as is contended for on behalf of the appellant. Another line taken by Mr. Chatterjee is that when the State embarks upon a business, it does so not in its sovereign capacity, but as a legal person, subject to the same rights and liabilities as any other person. In effect, therefore, he contended that the State is a person within the meaning of section 386 of the Act; that the doctrine of immunity of States from the operation of its laws cannot be invoked after the advent of the Constitution, and, alternatively, that, even if the immunity is available to the State as a sovereign power, it is not available to the State when it embarked upon a commercial undertaking and that, in any case, the State was bound by the law by applying the rule of necessary implication from the provisions of the Act.

In this case it is manifest that it is the Government of West Bengal which is sought to be prosecuted through one of its officers. The prosecution is not against a named person, but against the Director of a named Department of the Government. The person who was the Director of the Department at the relevant date, that is to say, in the year 1951-52, may not be the same person who answered that description on the date the prosecution was launched. In essence, therefore, it is the Government of West Bengal which has to answer the charge levelled by the respondent, the Corporation of Calcutta. Whether a prosecution against such an indeterminate person would or would not lie is a matter which has not been raised and, therefore, need not be discussed. The question most canvassed before us is whether the penal section invoked in this case applies to Government. It has been contended, and in our opinion rightly, that the provisions of the penal section neither by express terms nor by necessary implication are meant to be applied to Government. The decision of the Judicial Committee of the Privy Council,[1] if it is good law even now, completely covers this case, but the decision of the High Court, now under examination, has taken the view that the earlier decision of the Division Bench of the Madras High Court[2] has laid down the correct law, and not the Privy Council decision. We have, therefore, to decide which of the two decisions has taken the correct view of the legal position as it obtained on the day the prosecution was launched.

It is well established that the common law of England is that the King's prerogative is illustrated by the rule that the Sovereign is not necessarily bound by a statutory law which binds the subject. This is further enforced by the rule that the King is not bound by a statute unless he is expressly named or unless he is bound by necessary implication or unless the Statute, being for the public good, it would be absurd to exclude the King from it. Blackstone Commentaries, Vol. I, pp. 261, 262) accurately summed up the legal position as follows:—

"The king is not bound by any act of Parliament, unless he be named therein by special and particular words. The most general words that can be devised........affect not him in the least, if they may tend to restrain or diminish any of his rights or interests. For it would be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed without its own express consent by constructions and implications of the subject. Yet, when an act of Parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the king as upon the subject; and, likewise, the king may take the benefit of any particular act, though he be not specially named." (Quoted at page 355 of Holdsworth, A History of English Law, Vol. X.)

1. L.R. 73 I.A. 271: (1946) F.L.J. 118: (1947) 1 M.L.J. 45 (P.C.).
2. I.L.R. 25 Mad. 745: 12 M.L.J. 208.

The King's prerogative is thus created and limited by common law and the Sovereign can claim no prerogative, except such as the law allows. (*See* Halsbury's Laws of England, Vol. VII, 3rd Edn., para. 464 at p. 221).

The prerogative of the Crown in respect of property is thus stated in the same volume of Halsbury's Laws of England, paragraph 980 at p. 465:—

> "The Crown not being bound by any statute whereby any prerogative right, title, or interest belonging to it may be divested or abridged, unless expressly named or bound by clear implication, property owned, and occupied by the Crown is exempt from taxation unless rendered liable either by express words or necessary implication. Moreover, an express exemption of particular classes of Crown property in a statute is not in itself sufficient to raise the implication that such property only is exempt, and that other property not falling within the exception is bound, such clauses being inserted merely *ex majore cautela.*"

That was the law applicable to India also, as authoritatively laid down by the Privy Council in the case referred to above. That decision was rightly followed by the Calcutta High Court as stated above. That would be the legal position until the advent of the Constitution.

The question naturally arises: whether the Constitution has made any change in that position? There are no words in the Constitution which can be cited in support of the proposition that the position has changed after the republican form of Government has been adumbrated by our Constitution. It was argued on behalf of the respondent that the existence of such a prerogative is negatived by the very form of our new set up, that is to say, it was contended that the republican form of Government is wholly inconsistent with the existence of such a prerogative. In our opinion, there is no warrant for such a contention. The immunity of Government from the operation of certain statutes, and particularly statutes creating offences, is based upon the fundamental concept that the Government or its officers cannot be a party to committing a crime—analogous to the 'prerogative of perfection' that the King can do no wrong. Whatever may have been the historical reason of the rule, it has been adopted in our country on grounds of public policy as a rule of interpretation of statutes. That this rule is not peculiar or confined to a monarchical form of Government is illustrated by the decision of the Supreme Court of U.S.A. in the case of *United States of America* v. *United Mine Workers of America*,[1] where it is laid down that restrictions on the issue of injunctions in labour disputes contained in certain statutes do not apply to the United States Government as an employer or to relations between the Government and its employees and that statutes in general terms imposing certain restrictions or divesting certain privileges will not be applied to the Sovereign without express words to that effect. Similarly, in the case of *United States of America* v. *Reginald P. Wittek*,[2] the question arose whether the District of Columbia Emergency Rent Act applied to government-owned defence housing or to government-owned low-rent housing in the District, and it was ruled by the Supreme Court, reversing the decision of the Municipal Court of Appeals, that the statute in question did not apply to the United States Government which was not a "land-lord" within the meaning of the Act. The decision was based on the rule that a general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect. Another illustration of the rule is to be found in the case of *Jess Larson* v. *Domestic and Foreign Commerce Corporation.*[3] In that case a suit by a citizen, in effect, against the Government (War Assets Administration) for an injunction was dismissed by the District Court on the ground that the Court did not have jurisdiction, because the suit was one

1. 91 L.E. 884.
2. 93 L.E. 1406.
3. 93 L.E. 1628.

against the United States. The Supreme Court, by majority, held that the suit as against the United States must fail on the ground that according to the laws of the country the Sovereign enjoyed an immunity which was not enjoyed by the citizens. The case of *Roberts* v. *Ahern*[1] is another illustration of the same rule. It was held by the High Court of Australia in that case that the Executive Government of the Commonwealth or of a State is not bound by a statute unless the intention that it shall be so bound is apparent.

On the other hand, Article 372 of the Constitution has specifically provided subject to the other provisions of the Constitution all the laws in force in this country immediately before the commencement of the Constitution shall continue in force until altered or repealed or amended by a competent Legislature or by other competent authority. The expression "law in force" has been used in a very comprehensive sense as would appear from the provisions of sub-clauses (*a*) and (*b*) of clause (3) of Article 13 of the Constitution. If we compare the provisions of Article 366 (10) which defines "existing law" which has reference to law made by a legislative agency in contradistinction to "laws in force" which includes not only statutory law, but also custom or usage having the force of law, it must be interpreted as including the common law of England which was adopted as the law of this country before the Constitution came into force. It is thus clear that far from the Constitution making any change in the legal position, it has clearly indicated that the laws in force continue to have validity, even in the new set up, except in so far as they come in conflict with the express provisions of the Constitution. No such provision has been brought to our notice. That being so, we are definitely of the opinion that the rule of interpretation of statutes that the State is not bound by a statute, unless it is so provided in express terms or by necessary implications, is still good law.

But Mr. Chatterjee further contended, alternatively, that even if it were held that the Government as a sovereign power may have the benefit of the immunity claimed, it is not entitled to that immunity when it embarks upon a business and, in that capacity, becomes subject to the penal provisions of the statute equally with other citizens. This question was not raised below and has not been gone into by the High Court, nor is it clear on the record, as it stands, that the Food Department of the Government of West Bengal, which undertook rationing and distribution of food on a rational basis had embarked upon any trade or business. In the absence of any indication to the contrary, apparently this Department of the Government was discharging the elementary duty of a sovereign to ensure proper and equitable distribution of available food-stuffs with a view to maintaining peace and good Government. Therefore, the alternative argument suggested by Mr. Chatterjee has no foundation in fact.

It only remains to consider the other alternative argument that even if the State has not been bound by the penal section in the statute in question in express terms, it must be deemed to be bound by it by necessary implication. But no specific provisions of the statute in question have been brought to our notice which could lend any support to this alternative argument. It has not been shown to us that if the section which was sought to be applied against the Government were held not expressly to apply to Government, the law will lose any of its efficacy, or that its working will be hampered in any way. It must, therefore, be held that there is no substance in this contention either.

The appeal is accordingly allowed, the judgment under appeal set aside and the acquittal of the appellant confirmed.

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1. 1 C.L.R. 406.

Sarkar, J.—The appellant is an officer of the Government of West Bengal. He was prosecuted before a Municipal Magistrate of Calcutta for storing rice in certain premises without obtaining a licence for that purpose from the respondent, the Corporation of Calcutta, as required by section 386 of the Calcutta Municipal Act, 1923. That was an Act passed by the legislature of the former Province of Bengal and may for the present purpose, be taken to have been passed by the legislature of the State of West Bengal. In storing the rice the appellant had acted in his official capacity and for carrying out the West Bengal Government's rationing scheme.

The Magistrate acquitted the appellant holding that the Act did not bind the Government as it was neither expressly nor by necessary implication made bound, and so, the appellant who had been prosecuted as representing the Government would not be liable for non-compliance with its provisions. On revision the High Court at Calcutta held that the English rule that a statue did not bind the Crown unless expressly or by necessary implication made bound, did not apply to Indian statutes and so the Government would be liable for breach of the provisions of the Calcutta Municipal Act. In this view of the matter, the High Court set aside the order of acquittal and sent the case back to the Magistrate for disposal on the merits. This appeal has been taken from the order of the High Court with Special Leave granted by this Court.

The main question is whether the English rule that "The Crown is not bound by the provisions of any statute unless it is directly or by necessary implication referred to" applies to India. It is said that the rule is based on the English law of Crown prerogatives and has no application to India since the promulgation of our Constitution as we have now a republican form of government where no question of royal prerogatives can arise. It is pointed out that the prosecution was in this case started since the Constitution came into force and whatever may have been the position earlier, the Government can no longer take shelter under the English rule.

I think the rule applies to India even after the Constitution. It seems to me that the rule as applied in modern times, is really a rule of construction of statutes and is not dependent on royal prerogatives. This is the view that appears to have been taken in all recent authorities, to some of which I wish now to refer.

In Craies on Statutes (5th ed.) it is stated at p. 392 that "The rule is analogous, if not equivalent, to the rule already stated that the common law is not presumed to be altered by statute". The rule, therefore, is based on the presumed intention of the legislature and is, hence, a rule of construction of statutes. Then I find it stated in *Attorney-General* v. *Donaldson*[1] that

> "It is a well established rule, generally speaking, in the construction of Acts of Parliament, that the King is not included unless there are words to that effect; for it is inferred *prima facie* that the law made by the Crown with the assent of the Lords and Commons, is made for subjects and not for the Crown."

Again in *Coomber* v. *Justices of Berks*[2] it was said in reference to this rule,

> "In *Rex* v. *Cook*,[3] the general principle as to the construction of statutes imposing charges as containing an exemption of the Crown was laid down."

In the Australian case of *Roberts* v. *Ahern*,[4] it was said,

> "This rule has commonly been based on the Royal prerogative. Perhaps, however, having regard to modern developments of constitutional law, a more satisfactory basis is to be found in the words of Alderson, B."

1. (1842) 10 M. & W. 117, 123.
2. (1883) L.R. 9 A.C. 61, 65.
3. 3 T.R. 519.
4. (1904) 1 C.L.R. 406, 417.

The words referred to are what I have already set out from *Attorney-General* v. *Donaldson*.[1]

In America too this rule has been applied as a rule of construction though there is no King there but the government is of the republican form. So in *United States* v. *United Mine Workers of America*[2] it was observed,

"There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect. It has been stated, in cases in which there were extraneous and affirmative rasons for blieving that the sovereign should also be deemed subject to a restrictive statute, that this rule was a rule of construction only."

Again in reference to the same rule it was said in *United States* v. *The State of California*,[3]

"The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt."

In our country also in *Bell* v. *The Municipal Commissioners for the City of Madras*,[4] a case on which much reliance has been placed by the respondent, it was said after referring to various English cases dealing with the rule,

"This emphatic statement of the rule being founded upon general principles of construction is undoubtedly applicable as much to Indian enactments as to Colonial or Imperial Statutes".

It was also said at the same page,

"The rule of construction above adverted to cannot itself be regarded as a prerogative of the Crown".

Then I find that in England the rule protects from the operation of a statute not only what may strictly be called Crown prerogatives, or whatever is nowadays left of them, but all the Crown's rights, title and interest: *see* Halsbury's Laws of England (3rd ed.) Vol. VII, p. 465. In volume XXXI of the Second edition of the same treatise it is stated with reference to the rule that,

"The Crown for this purpose means not only the King personally, but also the officers of State and servants of the Crown when acting within the scope of their authority on behalf of the Crown in the discharge of executive duties".

In *Mersey Docks* v. *Cameron*,[5] Lord Cranworth after referring to the various instances where the rule had been applied to exempt buildings occupied for purposes of the government from rates and other impositions, said,

"These decisions, however, have all gone on the ground more or less sound, that these might all be treated as buildings occupied by the servants of the Crown, and for the Crown, extending the shield of the Crown to what might more fitly be described as the public government of the country."

Again in *Coomber* v. *Justice of Berks*[6] Lord Blackburn after referring to certain observations of Lord Westbury in the *Mersey Docks case*[5] said,

"He there says that the public purposes to make an exemption 'must be such as are required and created by the government of the country, and are, therefore, to be deemed part of the use and service of the Crown;' and in *Greig* v. *University of Edinburgh* he more clearly shows what was his view by using this language, 'property occupied by the servants of the Crown, and (according to the theory of the Constitution) property occupied for the purposes of the administration of the government of the country, became exempt from liability to the poor-rate'."

In this case it was held that lands with buildings constructed thereon and used by county justices, and for police purposes were not liable to Income-tax. In *Cooper* v. *Hawkins*[7] it was held that an engine-driver employed by the Crown who drove a steam-locomotive on Crown service at a speed exceeding the limit specified by regulations made under

1. (1842) 10 M. &. W. 117, 123.
2. 91 L.Ed. 884, 902.
3. 80 L.Ed. 567, 574.
4. (1902) 12 M.L.J. 208 : I.L.R. 25 Mad. 457 (485).
5. 11 H.L.C. 443, 508.
6. (1884) L.R. 9 A.C. 61, 68.
7. L.R. (1904) 2 K.B. 164.

a statute, was not liable as in the absence of express words, the statute did not bind the Crown. Lastly, I refer to *Roberts* v. *Ahern*[1] where a person acting under the orders of the Government of the Commonwealth of Australia had been prosecuted for having carted away nightsoil from a Post Office without a licence from, and without having given any security to, the local authority as was required by an enactment of the State of Victoria. It was held that he was liable to prosecution because, "The modern sense of the rule, at any rate, is that the Executive Government of the State is not bound by Statutes unless that intention is apparent:" p. 418. It was also said that "The doctrine is well-settled in this sense in the United States of America:" (p. 418). It is unnecessary to multiply instances where acts of the executive government have received the protection of the rule.

All this would seem to put it beyond doubt, that whatever its origin, the rule has long been regarded only as a rule of construction. It has been widely used to exempt executive governments from the operation of statutes quite apart from protecting prerogative rights of the British Crown strictly so called. It has been held reasonable to presume that the legislature intended that executive governments are not to be bound by statutes unless made bound expressly or by necessary implication. It would be equally reasonable to do so in our country even under the present set up for the presumption has all along been raised in the past and especially as the applicability of the rule can no longer be made to depend on the prevailing form of government. In countries with a republican form of government, the Sovereign would be the State, and its acts, which can only be the acts of its executive limb, would be, under the rule exempt from the operation of its statutes. Whether the royal prerogative as understood in England, exists in the present day India is not a question that can arise in applying what is a pure rule of construction of statutes.

Further it is quite clear that the rule has been applied by Courts in India in the construction of Indian statutes all along at any rate up to the promulgation of our Constitution, except in the solitary instance of *Bell's case*[2] earlier referred to. It would therefore be right to hold that the legislatures in our country have proceeded on the basis that the rule would govern the enactments passed by them. That being so and remembering that the rule is one of construction, there would be no reason to deny its application to Indian statutes after the Constitution. The new republican form of government adopted by us would not warrant a departure from the long established rule of construction.

It was then said that the course of legislation in India would indicate that it was not intended even before the Constitution that the rule would apply to Indian statutes. This contention was based on *Bell's case*[2]. That case seems to me to have prooceeded on a basis not very sound. On an examination of certain Indian statutes it was said,

> "It is noteworthy that as a general rule government is specially excluded whenever the Legislature considered that certain provisions of an enactment should not bind the Government."

From this the conclusion was drawn that

> "According to the uniform course of Indian legislation, statutes imposing duties or taxes bind Government as much as its subjects, unless the very nature of the duty or tax is such as to be inapplicable to the Government."

It seems to me that this decision overlooks the uniform course of decisions of Indian Courts applying the rule in the construction of Indian statutes. The legislature must be deemed to have known of these decisions

1. (1904) 1 C.L.R. 406, 417, 418.
2. I.L.R. 25 Mad. 457 (48: 12 M.L.. 208.

and if they wanted to depart from their effect they would have passed a statute bringing about the desired result. No such statute was ever passed. It is well-known that in these circumstances the legislatures must be taken to have proceeded on the basis that the decisions were correct and the rule was to be applied to the statutes passed by them. That being so, an examination of the course of Indian legislation would be irrelevant. The cases where the Government was expressly excluded must be taken to be instances of exemptions *ex majori cautela*: *Hornsey Urban Council* v. *Hennel*.[1] Furthermore, it seems to me that a comparison of the number of statutes where the Government has been specially excluded from their operation with the number where the statutes are silent on the subject, is, at best, a very unsafe guide for deciding whether the rule should be applied to Indian enactments. I therefore dissent from the view expressed in *Bell's case*[2] that the rule does not apply in India.

Now it seems to me that in storing the rice in the present case, the Government of West Bengal was performing one of its governmental functions. It was storing rice for purposes of rationing, that is, making foodstuff available to citizens in the time of scarcity. That such activity is a part of the Government's duty is unquestionable. The act for which the appellant was convicted was, therefore, an act of the West Bengal Government done in discharge of its ordinary duties as the Government and the rule would prevent the Act from applying to make the Government liable for a breach of it.

Then it is said that the Act binds the Government by necessary implication. In support of this argument we were referred to certain provisions of the Act which expressly exempted the Government from their operation. I am unable to agree that this raises the necessary implication. It has been said in Halsbury's Laws of England (2nd ed.), Vol. XXXI, at p. 523 that

> "A general prerogative of the Crown is not deemed to have been abandoned by implication by reason of the specific exemption in a statute of any class of the servants of the Crown from acting in compliance with the prerogative, nor by reason of the fact that the Crown has foregone or curtailed its rights in some other direction in another part of the statute";

See also *Hornsey Urban Council case*[1] earlier referred to. These observations would show the unsoundness of the contention raised by the respondent.

Lastly, it is said that the purpose of the Act was to prevent adulteration of food stuffs and this object would be wholly defeated unless the Government was bound by it. It is not in dispute that if this were so, that might be a ground for holding that the Act bound the Government. On this aspect of the case reference may be made to *Province of Bombay* v. *Municipal Corporation of Bombay*.[3] I am however unable to hold that the purposes of the Act would be wholly or at all defeated if the Government were not bound by it. It seems to me that section 386 of the Act, the breach of which is complained in this case, is concerned with the use of premises and not with the prevention of adulteration of foodstuffs as was contended for the respondent. The provisions with regard to adulteration of foodstuffs are contained in a different part of the statute. There is nothing to show that the purpose of the Act would wholly be defeated if some premises were used contrary to the terms of the Act.

I would for these reasons hold that the Act did not bind the Government and the prosecution of the appellant for an act done in the discharge of his duties as an officer of the Government cannot be maintained. This appeal should therefore be allowed and the order of the High Court set aside and that of the Magistrate restored.

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1. (1902) 2 K.B. 73.
2. I.L.R. 25 Mad. 457 (485): 12 M.L.J. 208.
3. (1947) 1 M.L.J. 45 : L.R. 73 I.A. 271 : (1946) F.L.J. 118.

Wanchoo, J.—I have had the advantage of reading the judgments prepared by my Lord the Chief Justice and my brother Sarkar, J., I agree with their conclusion but my reasons are different. I therefore proceed to state my reasons for coming to the same conclusion.

The facts have already been stated in the judgment of my Lord the Chief Justice and I will not therefore repeat them. Suffice it to say that the Corporation of Calcutta initiated this prosecution, in substance, of the State of West Bengal through its Director of Rationing and Distribution under section 488 of the Calcutta Municipal Act, No. III of 1923, (now equivalent to section 537 of the Calcutta Municipal Act, No. XXXIII of 1951), for using or permitting to be used certain premises for the purpose of storing rice, etc., under the provisions of the Bengal Rationing Order, 1943, without a licence under section 386 of Act III of 1923, (now equivalent to section 437 of Act XXXIII of 1951). The State did not deny the facts; but it was contended on its behalf that the prosecution was not maintainable in law. The Magistrate held that the provisions of section 386 of the 1923 Act did not apply to the State either expressly or by necessary implication and therefore passed an order of acquittal. The Corporation took the matter in revision to the High Court, which distinguished an earlier decision of the High Court relied upon by the Magistrate and held that after India became a democratic republic from January 26, 1950, the High Court was not bound by the decision of the Privy Council in a similar matter reported in *Province of Bombay* v. *Municipal Corporation of the City of Bombay and another*[1] and that the rule of construction based on the royal prerogative that the Crown was not bound by a statute unless it was expressly named therein or at any rate could be held to be bound by necessary implication, did not apply in India after January 26, 1950, and that the true rule of construction on which the Indian legislatures acted was that the State would be bound unless excluded either expressly or by necessary implication. The High Court therefore held that section 488 of the Act of 1923 read with section 386 bound the State and set aside the order of acquittal and sent the case back to the Magistrate for disposal according to law.

The most important question thus is, whether the rule of construction derived from the royal prerogative in England can still be said to apply in India after January 26, 1950. If this rule of construction based on the royal prerogative does not apply, it would necessarily follow that the ordinary rule of construction, namely, that the State would also be bound by the law like anybody else unless it is expressly excluded or excluded by necessary implication, would apply. Now the rule of construction based on the royal prerogative is a survival from the mediaeval theory of divine right of Kings and the conception that the sovereign was absolutely perfect, with the result that the common law of England evolved the maxim that "the King can do no wrong". In course of time however the royal prerogative in England was held to have been created and limited by the common law and the sovereign could claim no prerogatives, except such as the law allowed nor such as were contrary to Magna Carta or any other statute or to the liberties of the subject. The Court also had jurisdiction to inquire into the existence or extent of any alleged prerogative. If any prerogative was disputed, they had to decide the question whether or not it existed in the same way as they decided any other question of law. If a prerogative was clearly established, they could take the same judicial notice of it as they took of any other rule of law: (*See* Halsbury's Laws of England, 3rd Edition, Vol. 7, p. 221, para. 464).

1. (1947) 1 M.L.J. 45: L.R. 73 I.A. 271: (1946) F.L.J. 118.

The question of Royal prerogative was also considered in *Attorney-General* v. *De Keyser's Royal Hotel Limited.*[1] It was held therein that even where there was prerogative it could be curtailed by a statute, if the statute dealt with something which before it could be affected by the prerogative, inasmuch as the Crown was a party to every Act of Parliament. Thus in modern times, the royal prerogative is the residue of discretionary or arbitrary authority which at any time is legally left in the hands of the Crown and is recognised under the common law of England. Two things are clear from this modern conception of royal prerogative, namely, (1) that there must be a Crown or King to whom the royal prerogative attaches, and (2) that the prerogative must be part of the common law of England. Both these conditions existed when the Privy Council decision in *Province of Bombay* v. *Municipal Corporation of the City of Bombay and another*[2] was given in October 1946; the King was still there and the Privy Council held that the English common law rule of construction applied to Indian legislation as much as to English statutes. I may mention however that in England also the rule has come in for criticism by writers of books on law. Glanville L. Williams in his treatise on "Crown Proceedings" says at p. 53:

> "The rule originated in the Middle Ages, when it perhaps had some justification. Its survival, however, is due to little but the *vis inertiae.*"

Again at p. 54 the author says:

> "With the great extension in the activities of the State and the number of servants employed by it, and with the modern idea, expressed in the Crown Proceedings Act" (compare in this connection Art. 300 of our Constitution), "that the State should be accountable in wide measure to the law, the presumption should be that a statute binds the Crown rather than it does not."

After January 26, 1950, when our country became a democratic republic and the King ceased to exist, it is rather otiose to talk of the Royal prerogative. It is also well to remember that the English common law as such never applied to India, except in the territories covered by the original side of the three Chartered High Courts, namely, Calcutta, Bombay and Madras, (see *Kshirodebihari Datta* v. *Manbobinda Panra*[3]) though sometimes rules of English common law were applied by Indian Courts on grounds of justice, equity and good conscience. It seems to me therefore that to apply to Indian statutes a construction based on the Royal prerogative as known to the common law of England now when there is no Crown in this country and when the common law of England was generally not even applicable, (except in a very small part), would be doing violence to the ordinary principle of construction of statutes, namely, that only those are not bound by a statute who are either expressly exempted or must be held to be exempt by necessary implication.

In our country the Rule of Law prevails and our Constitution has guaranteed it by the provisions contained in Part III thereof as well as by other provisions in other Parts: (see *Virendra Singh and others* v. *The State of Uttar Pradesh.*[4]) It is to my mind inherent in the conception of the Rule of Law that the State, no less than its citizens and others, is bound by the laws of the land. When the King as the embodiment of all power—executive, legislative and judicial—has disappeared and in our republican Constitution, sovereign power has been distributed among various organs created thereby, it seems to me that there is neither justification nor necessity for continuing the rule of construction based on the Royal prerogative. It is said that though the King has gone, sovereignty still exists and therefore what was the prerogative of the King has

1. (1920) A.C. 508.
2. L.R. 73 I.A. 271 : (1946) F.L.J. 118 : (1947) 1 M.L.J. 45.
3. (1934) I.L.R. 61 Cal. 841 at 857.
4. (1955) 1 S.C.R. 415 : (1954) S.C.J. 705 : (1954) 2 M.L.J. 369.

become the prerogative of the sovereign. There is to my mind a misconception here. It is true that sovereignty must exist under our Constitution; but there is no sovereign as such now. In England, however, the King is synonymous with the sovereign and so arose the royal prerogative. But in our country it would be impossible now to point to one person or institution and to say that he or it is the sovereign under the Constitution. A further question may arise, if one is in search of a sovereign now, whether the State Government with which one is concerned here is sovereign in the same sense as the English King (though it may have plenary powers under the limits set under our Constitution). This to my mind is another reason why there being no King or sovereign as such now in our counry, the rule of construction based on the Royal prerogative can no longer be invoked.

Reliance was placed in this connection on certain cases from Australia and Canada and aslo from the United States of America. So far as Australia and Canada are concerned, the cases are not of much help for the Crown exists there still. Besides in Canada and in most of the provinces of Canada and in New Zealand, provisions have been specifically introduced in the Interpretation Acts laying down that no provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby: (*See* Street on "Governmental Liability" at p. 152).

In the United States also, it is doubtful if the Royal prerogative as such is relied on as the basis of certain principles which are in force there. In *United States of America* v. *United Mine Workers of America, etc.*,[1] the Supreme Court did say that there was an old and well-known rule that statutes which in general terms divested pre-existing rights and privileges would not be applied to the sovereign without express words to that effect. But there was no discussion of the royal prerogative as such in the judgment and the rule was called a well established rule of construction only. Besides the Court went on to consider the words of the statutes under consideration and held that on a proper construction of them the United States was not bound.

In *United States of America* v. *Reginald P. Wittek*,[2] the Supreme Court did say that a general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect; but this decision was based mainly on the terms of the State statute there under consideration and the surrounding circumstances and legislative history of the statute concerned. Another case in the same volume is *Jess Larson* v. *Domestic and Foreign Commerce Corporation*[3] where a suit was brought against an officer of the United States and it was held that it was in substance a suit against the sovereign Government over which the Court in the absence of consent had no jurisdiction. There is no discussion in this case of the Royal prerogative having continued in the United States and the decision seems to have turned on some law of that country which provides that a suit against the Government could not be tried in a Court in the absence of consent. As against these decisions I may refer to *H. Snowden Marshall* v. *People of the State of New York*[4] to show that royal prerogative as such is losing ground in the United States, if nothing more. When dealing with the priority of a State over the unsecured

1. 91 L. Ed. 884.
2. 93 L. Ed. 1406.
3. 93 L. Ed. 1628.
4. 65 L. Ed. 315 at 317.

creditors in payment of debts out of the assets of the debtor, the Supreme Court held that whether the priority was a prerogative right or merely a right of administration was a matter of local law and the decision of the highest Court of the State as to the existence of the right and its incidents would be accepted by the Federal Supreme Court as conclusive. Again in *Guaranty Trust Company of New York* v. *United States of America*[1] the Supreme Court held that the immunity of the sovereign from the operation of statutes of limitation, although originally a matter of royal prerogative, was now based upon the public policy of protecting the citizens of the State from the loss of their public rights and revenues through the negligence of the officers of the State, showing that some of those immunities which in England were claimed as royal prerogatives, though preserved in the United States, were so preserved for other reasons. Besides it must not be forgotten that though the Crown no longer remained in the United States after the attainment of independence the American colonies out of which the United States arose were colonised by English settlers who carried the common law of England with them to America with the result the first Constitution of some of the States (like New York) after independence provided that the common law of England which together with the statutes constituted the law of the colony before independence should be and continue to be the law of the State subject to such alterations as its legislature might thereafter make: (see *H. Snowden Marshall* v. *York*[2]). That may account for the United States recognising some of those prerogative rights which were in force in England, though even so, the basis for such recognition is now more the law or public policy than any royal prerogative as such. The position in our country was somewhat different. We had the King but the common law of England did not, as already indicated, apply as a rule in this country. Now that the King has also gone, there seems to be no reason for continuing the royal prerogatives after January 26, 1950.

Further, it appears to me that the royal prerogative where it deals with substantive rights of the Crown as against its subjects, as, for example, the priority of Crown debts over debts of the same nature owing to the subject, stands on a different footing from the royal prerogative put forward in the present case, which is really no more than a rule of construction of statutes passed by Parliament. Where, for example, a royal prerogative dealing with a substantive right has been accepted by the Courts in India as applicable here also, it becomes a law in force which will continue in force under Article 372 (1) of the Constitution. But where the Royal prerogative is merely a rule of construction of statutes based on the existence of the Crown in England and for historical reasons, I fail to see why in a democratic republic, the Courts should not follow the ordinary principle of construction that no one is exempt from the operation of a statute unless the statute expressly grants the exemption or the exemption arises by necessary implication. On the whole therefore I am of opinion that the proper rule of construction which should now be applied, at any rate after January 26, 1950, is that the State in India whether in the Centre or in the States is bound by the law unless there is an express exemption in favour of the State or an exemption can be inferred by necessary implication. The view taken by the Calcutta High Court in this connection should be accepted and the view expressed by the Privy Council in *Province of Bombay* v. *Municipal Corporation of the City of Bombay*[3] should no longer be accepted as the rule for construction of statutes passed by Indian legislatures.

1. 82 L. Ed. 1224.
2. 65 L.Ed. 315 at 317.
3. L.R. 73 I.A. 271 : (1946) F.L.J. 118 : (1947) 1 M.L.J. 45 (P.C.).

Let me then come to the question whether on the view I have taken of the rule of construction, the prosecution in this case can be allowed to continue. There is nothing in the Act of 1923 or in the Act of 1951 exempting the State specifically from these provisions of the Calcutta Municipal Act. In this case the State is being prosecuted under section 488 (or section 537 now) and that section provides for fine for breach of section 386 (or section 437 now). The provision is a penal provision and immediately a question arises whether the State as such, apart from its individual officers as natural persons, is liable to prosecution under the criminal law or has to be exempted from the operation of the provisions of criminal statutes by necessary implication. A criminal proceeding generally ends with punishment which may be imprisonment or fine or both. Now it does not require any elaborate reason to realise that the State as such cannot be sentenced to imprisonment because there is no way of keeping it in prison; therefore, by necessary implication, the State is exempt from all penal statutes and provisions providing for sentences of imprisonment or death. Then come those penal provisions which impose fines like the present case and the question is whether in such a case also the State must be deemed by necessary implication to be exempt from the penal provision. Generally speaking fines when inflicted by Courts are realised by the State and go to the coffers of the State. In effect, therefore if the State as such is to be prosecuted under a penal statute imposing fine the result is that the Court will sentence the State to fine which will go to the State itself. It is obvious that if such is the result of a prosecution, namely that the accused gets the fine, the intention could never be that such a prosecution should be launched. Therefore where the penalty is fine and the fine goes to the State, it must be held that by necessary implication the law does not intend the State to be prosecuted for such an offence. In the present case I find that under section 81 of the Act of 1923 (or the corresponding section 115 of the Act of 1951) the fines imposed by the Magistrate will not go to the Corporation but in the usual way to the State. Under the circumstances whatever other methods may be possible for enforcing the provisions of section 386 (or section 437 now) against the State it cannot be intended to be enforced by prosecution resulting in fine which would go to the State itself. In these circumstances it must be held that by necessary implication the State is exempt from the penal provisions contained in section 488 (now section 537). I would therefore allow the appeal, set aside the judgment of the High Court and restore the order of acquittal by the Magistrate.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—B. P. SINHA, *Chief Justice,* S. J. IMAM, A. K. SARKAR, K. SUBBA RAO, AND J. C. SHAH, JJ.

A. St. Arunachalam Pillai .. *Appellant**

v.

Messrs. Southern Roadways, Ltd. and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), sections 64-A, 44-A, 48, 48-A and 133-A (3)—Regional Transport Officer rejecting an application for variation of route—Government of Madras setting aside that order and granting the variation of the route—Validity of—Whether the delegation to the Regional Transport Officer of the power to vary the conditions of a permit is valid under section 44-A of the Act.

By *Majority.*—The Madras Financial Code, Volume II, Appendix I and the Half-yearly List of Gazetted Officers in the Transport Department show that Regional Transport Officers are subordinate to the Transport Commissioner.

Section 44-A of the Motor Vehicles Act authorized the State Government, notwithstanding anything contained in the Act, to authorize any officer subordinate to the Transport Commissioner to exercise and discharge in lieu of any other authority such powers and functions as may be exercised by that authority. This section did not depend upon any rules to be framed under section 133-A (3) specifying as to who is subordinate to which authority.

Since however no rules have been framed under section 133-A (3) so far as section 44-A is concerned, any officer who is subordinate to the Transport Commissioner in any way must include the Regional Transport Officers.

Hence the Regional Transport Officer had jurisdiction to vary the conditions of a permit and consequently the Government had the power under section 64-A of the Act to do what the Regional Transport Officer could have done, but had refused to do.

Per *Subba Rao, J.* (*dissenting*).—No rule has been framed under section 133-A (3) of the Act making the Regional Transport Authority subordinate to the State Transport Commissioner. If the State Government could act administratively in regard to matters covered by section 133-A (3) of the Act why should the said sub-section be made at all? The only reasonable construction of section 133-A of the Act is that the State can create subordination of one officer to another by way of statutory rules only and not otherwise, Hence in the absence of any rules framed under section 133-A (3) of the Act, the Regional Transport Officer is not subordinate to the State Transport Commissioner within the meaning of section 44-A of the Act.

Appeal from the Judgment and Order, dated the 17th July, 1957, of the Madras High Court in Writ Appeal No. 110 of 1956,[1] arising out of the Judgment and Order, dated the 3rd September, 1956, of the said High Court in Writ Petition No. 2 of 1956.

M. C. Setalvad, Attorney-General for India, *S. N. Andley, J. B. Dadachanji, Rameshwar Nath* and *P. L. Vohra,* Advocates of *Messrs. Rajinder Narain & Co.,* with him), for Appellant.

R. Ganapathy Iyer and *N. R. Govindachari,* Advocates and *G. Gopalakrishnan,* Advocate of *Messrs Gagrat & Co.,* for Respondent No. 1.

The Court delivered the following Judgments—

Imam, J. (on behalf of the Majority).—This appeal is on a certificate granted by the Madras High Court as in its opinion it involved a substantial question of law to the effect "whether the delegation to the Regional Transport Officer of the power to vary the conditions of a permit is valid". The appellant is the proprietor of Sri Vinayagar Transports, Woriyur, Tiruchirapalli. He held a permit to ply his

*Civil Appeal No. 262 of 1958. 29th April, 1960.

1. (1958) 1 M.L.J. 1: 1958 M.L.J. (Cr.) 22.

bus on the route Tiruchirapalli-Mainguard Gate to Tiruchirapalli Railway Station *via* Palakarai and Round Tana. He applied on July 19, 1954, to the Regional Transport Officer, Tiruchirapalli, for variation of the route so as to ply his bus between Mainguard Gate and Golden Rock *via* Palakarai, Round Tana, Tiruchirapalli Railway Station and retrace again to Round Tana and thence to Golden Rock. The Regional Transport Officer notified this application for variation and called for objections. The appellant's application and the objections thereon were heard on July 15, 1955, but the Regional Transport Officer rejected the application. The appellant filed a revision petition before the Government of Madras under section 64-A of the Motor Vehicles Act, hereinafter called the Act, section 64-A having been introduced into that Act by the Legislature of the State of Madras. The Madras Government after having heard objections to the revision petition, by its order, dated December 28, 1955, set aside the order of the Regional Transport Officer and directed the grant of the variation in the permit of the appellant as prayed for by him. Against the order of the Madras Government the respondent, the Southern Roadways (Private) Ltd., hereinafter called the respondent, filed a petition under Article 226 of the Constitution in the Madras High Court on January 2, 1956, for the issue of a writ of *certiorari* to quash the order of the Government of Madras.

When the petition came up for hearing before Rajagopalan, J., the respondent raised a plea which was not taken in the petition under Article 226 of the Constitution to the effect that the Regional Transport Officer had no jurisdiction to grant the variation asked for by the appellant and the Government had likewise no jurisdiction to grant, in revision, what the Regional Transport Officer himself could not have granted. This plea was made on account of a Division Bench decision of the Madras High Court in Writ Appeal No. 107 of 1955, arrived at since the filing of the petition, wherein it was held that the Regional Transport Officer had no jurisdiction to deal with an application for variation of the conditions of a permit. Rajagopalan, J., following the decision in Writ Appeal No. 107 of 1955 held that the Regional Transport Officer had no jurisdiction to deal with the appellant's application for variation and that it followed that the Government of Madras had equally no jurisdiction to grant the variation on a revision petition filed against the order of the Regional Transport Officer. The learned Judge accordingly set aside the order of the Government of Madras, dated December 28, 1955, without going into the other contentions raised by the respondent in its petition under Article 226. The appellant appealed against the decision of Rajagopalan, J. Although in the appeal the correctness of the decision in Writ Appeal No. 107 of 1955 was questioned it was not pressed because of the decision of the Full Bench of the Madras High Court in Writ Appeals Nos. 56 and 57 of 1956 decided on April 12, 1957. The argument in the present case therefore proceeded on the footing that the Regional Transport Officer, Tiruchirapalli, had no jurisdiction to deal with the appellant's application for variation.

In the High Court on behalf of the appellant it was urged that the respondents had submitted to the jurisdiction of the Regional Transport Officer and therefore could not at a later stage obtain the discretionary writ of *certiorari* on the ground that there was lack of jurisdiction. It was next contended that even if the Regional Transport Officer had no jurisdiction to deal with the appellant's application for variation the order of the Government of Madras which was sought to be quashed could not be said to be one passed without jurisdiction or excess of jurisdiction because the Government had undoubtedly power to pass the order in question under section 64-A of the Act. Both these

contentions were rejected and the decision of Rajagopalan, J., was affirmed. The High Court, however, granted a certificate that the case was a fit one for appeal to this Court.

The principal question for consideration in this appeal is whether the Regional Transport Officer had the power to vary the conditions of a permit to ply a stage carriage. In order to decide that question some sections of the Act, as amended by the Legislature of the State of Madras, require consideration, particularly the provisions of section 44-A. But before we proceed to do that the other two questions which were decided against the appellant by the High Court may first be considered.

In our opinion, although the respondent had submitted to the jurisdiction of the Regional Transport Officer and had not in his petition under Article 226 in the High Court taken the objection that that officer had no jurisdiction to vary the conditions of a permit, the High Court acted rightly in allowing the respondent to urge that the Regional Transport Officer had no jurisdiction to vary the conditions of a permit. It was not until the decision of the High Court in Writ Appeal No. 107 of 1955 that it became the considered view of that Court that the Regional Transport Officer had no jurisdiction to make any such variation. When the law was so declared by the High Court it could not reasonably be said that the High Court erred in allowing the respondent to take this point although in its petition under Article 226 the point had not been taken. This was obviously because the decision of the High Court in Writ Appeal No. 107 of 1955 had not been given at the time of the filing of the petition. Since the question went to the root of the matter and it involved the question whether the Regional Transport Officer had jurisdiction to vary the conditions of a permit the High Court, faced with a Division Bench decision of its own on the matter, could not very well refuse permission to the respondent to rely on that decision in support of its petition questioning the validity of the order of the Government of Madras made under section 64-A of the Act.

It had been strongly urged in this Court on behalf of the appellant that on a proper construction of section 64-A of the Act there was ample power in the Government of Madras to make an order directing the variation sought in the conditions of the permit of the appellant, even though the Regional Transport Officer had no jurisdiction to do so. Section 64-A empowered the Government of Madras to pass such orders as it thought fit with respect to any order passed or proceedings taken under Chapter IV of the Act by any authority or officer subordinate to it for the purpose of satisfying itself of the legality, regularity or propriety of the order or proceeding when it had called for the records of the case. In our opinion, section 64-A is a power vested in the State Government by way of revision of orders passed under Chapter IV of the Act by any authority or officer subordinate to it. This is not a power which the State Government could exercise by way of original jurisdiction which was vested elsewhere. In our opinion, although the words "may pass such order in reference thereto as it thinks fit" are wide in expression, they do not mean that the State Government could pass an order in exercise of revisional jurisdiction which the authority whose order the Government was revising had no jurisdiction to pass. The State Government could undoubtedly set aside an order of an authority or officer subordinate to it who had no jurisdiction to pass the order in question under Chapter IV but it could not substitute for that order its own order directing the variation in the conditions of the permit of the appellant. It is significant that section 43 which deals with the power of the State Government to control Road Transport does not mention that such a

Government has the power to vary the conditions of a permit, although the various powers conferred by that section are fully specified, including the power to vary the notification issued under the section. If the Act had intended to give the powwer to the State Government to vary the conditions of a stage carriage permit granted to a particular person, it would have specified such a power in this section. The authority which is empowered to vary the conditions of a permit is stated in section 48-A which certainly is not the State Government. Under the Act, therefore, no such authority was vested in the State Government and the words in section 64-A "as it thinks fit" must mean within the ambit of the provisions of the Act.

Coming now to the question whether the Regional Transport Officer had the power to vary the conditions of the permit of the appellant it would be necessary to construe section 44-A of the Act. Before we proceed to do so, reference to certain sections of the Act and the Rules framed thereunder would be necessary as well as certain relevant facts. Section 42 prohibits the owner of a transport vehicle to use or permit its use, save in accordance with the conditions of a permit granted or counter-signed by a Regional or Provincial Transport Authority. Reference to section 43 has already been made which deals with the power of the State Government to control road transport. Section 43-A empowers the State Government to issue such orders and directions of a general character as it may consider necessary in respect of any matter relating to road tansport to the State Transport Authority or Regional Transport Authority and such Authority shall give effect to all such orders and directions. Section 44 empowers the State Government by notification in the Official Gazette to constitute a State Transport Authority and Regional Transport Authorities, the former to exercise and discharge the functions specified in sub-section (3) and the latter to exercise such powers as may be specificd in the notification in respect of each Regional Transport Authority. Section 44-A which is incorporated by the Madras Amending Act reads:

"The State Government may appoint a State Transport Commissioner and notwithstanding anything contained in this Act, may, by notification in the *Fort St. George Gazette*, authorize such Commissioner or any officer subordinate to him, to exercise and discharge in lieu of any other authority prescribed by or under this Act such powers and functions as may be specified in the notification."

Section 45 deals with applications for a permit and directs that they shall be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle. Section 46 states the matters which shall be stated in the application for a permit. Section 47 provides the procedure to be observed by a Regional Transport Authority in considering applications for stage carriage permits. Section 48 empowers a Regional Transport Authority to restrict the number of stage carriages for which permits may be granted in the region or in any specified area or on any specified route within the region and to impose conditions on such permits. One of these conditions is contained in clause (d) (*ii-a*) which is to the effect that stage carriage or stage carriages shall be used only on specified routes or in a specified area. Section 48-A provides for the alteration of the conditions attached to a permit and reads:

"Any conditions attached to a stage carriage permit in pursuance of clause (d) of section 48 may at any time be *varied*, cancelled or added to by the State Transport Authority, provided that this power shall not be exercised to the prejudice of the holder of the permit without giving not less than three months' notice to him."

Section 133-A (1) authorises the State Government, for the purpose of carrying into effect the provisions of the Act to establish a Motor Vehicles

Department and to appoint as officers thereof such persons as it thinks fit. Sub-section (3) authorises the State Government to make rules to regulate the discharge by officers of the Motor Vehicles Department of their functions and in particular and without prejudice to the generality of the foregoing power to prescribe the uniform to be worn by them, *the authorities to which they shall be subordinate,* the duties to be performed by them, the powers (including the powers exercisable by police officers under the Act) to be exercised by them and the conditions governing the exercise of such powers. No rules, in fact, had been framed.

It will be seen from what has been stated that it is the State Transport Authority and no other which is authorised under section 48-A to vary the conditions of a permit of a stage carriage. Section 44-A, however, authorises the State Government to appoint a State Transport Commissioner. It further provides that notwithstanding anything contained in the Act the State Government may by notification authorize the State Transport Commissioner *or any officer subordinate to him* to exercise and discharge *in lieu of any other authority* prescribed by or under the Act such powers and functions as may be specified in the notification. By this section, although under section 48-A it is the State Transport Authority which can vary the conditions of a stage carriage permit, the State Government could, notwithstanding the provisions of that section, authorise the State Transport Commissioner to exercise such powers in lieu of the State Transport Authority. It could also confer such power on an officer subordinate to the State Transport Commissioner. The vital question for determination is, how are the words "any officer subordinate to him" to be construed. In construing these words the provisions of section 133-A will have to be kept in mind as it was contended on behalf of the respondent that these sections should be read together. It was urged on behalf of the respondent that under section 133-A (3) as to who was subordinate to whom in the Motor Vehicles Department had to be prescribed by rules. As no rules had been framed it could not be said that the Regional Transport Officer was subordinate to the State Transport Commissioner.

The Full Bench of the Madras High Court in the case of *T. Krishnaswamy Mudaliar and another* v. *P. S. Palani Pillai and another*[1] had occasion to consider whether a Regional Transport Officer was subordinate to the State Transport Commissioner for the purposes of the Act. Three views were pressed before it. The first view, which was favoured by a Division Bench of that Court, was to the effect that the word 'subordinate' in section 44-A meant "administrative subordination." The second view was pressed by the Advocate-General of Madras who had urged that the word 'subordinate' in the section meant "functional subordination" and the third view was pressed by Mr. Nambiar to the effect that the word 'subordinate' meant "statutory subordination". It was the third view which was accepted by the Full Bench and the High Court expressed its opinion in the following words:—

"Of the three views placed before us we are inclined to prefer the third. It appears to us to be the most rational and the most free from objections. It is in accord with all well established rules of interpretation of Statutes. It does not require as the theory of 'functional subordination' seems to require, the introduction of new words into the section. It has the merit of being more flexible of powers not merely at the State level but at the regional level also. It ensures that there will be no transfer or delegation of powers except to officers whose subordination has been determined by rules properly framed under the Act. It also ought to avoid the anomaly that has now occurred of a person in the position of a Secretary of a body being empowered to vary the condition of a permit granted by that body. We therefore adopt this view."

1. (1957) 2 M.L.J. 243: (1957) M.L.J. (Cr.) 411: I.L.R. (1957) Mad. 957: A.I.R. 1957 Mad. 599 (F.B.).

The High. Court in rejecting the view submitted by the Advocate-General observed that there were no qualifying words whatever to the word 'subordinate' in section 44-A.

The Full Bench decision of the Andhra Pradesh High Court in the case of *B. Veeraswamy and others* v. *State of Andhra Pradesh*,[1] did not agree with the Full Bench decision of the Madras High Court. The Andhra Pradesh High Court was of the opinion that the Regional Transport Officer was an officer subordinate to the Transport Commissioner within the meaning of section 44-A of the Act. It laid emphasis on the word "any" and observed that that word excluded limitation or qualification and connoted wide generality. It comprehended not only the officer whose subordination was statutorily determined, but all eligible subordinate officers and therefore the Regional Transport Officer came within the ambit of the expression "any officer subordinate" used in section 44-A. Having examined the reasons given in the decisions of the Full Bench of the Madras High Court and the Full Bench of the Andhra Pradesh High Court we are generally in agreement with the view taken by the Andhra Pradesh High Court for the reasons which we now proceed to state.

We have not on the record any material to show when the Madras Government appointed a State Transport Commissioner nor have we any notification in the *Fort St. George Gazette* as to what powers he or an officer subordinate to him was authorized to exercise and discharge in lieu of any other authority prescribed by or under the Act. The Madras Road Traffic Code of 1940 shows that on May 21, 1947, the Governor of Madras constituted a Provincial Transport Authority for the Province (now the State) of Madras, a Regional Transport Authority for the district and city of Madras and a Regional Transport Authority for each of the other districts in the Province (now the State) of Madras. This Code also contains the Madras Motor Vehicles Rules, 1940, hereinafter called the Rules. The Rules came into force on April 1, 1940. Under Rule 3 (*c*) "Central Road Traffic Board" or "Central Board" means the Provincial Transport Authority constituted for the State of Madras under sub-section (1) of section 44 of the Act. This definition obviously must have been inserted in the Rules after the constitution of the Provincial Transport Authority in the year 1947. This definition was again altered on December 20, 1955 and for the words "Central Road Traffic Board" or "Central Board" the words "State Transport Authority" was substituted. On the same date a further definition was added to the Rules by the insertion of clause (*m*) in Rule 3 which was to the effect that "Transport Department" means the Motor Vehicles Department set up under section 133-A of the Act. The Government of Madras issued a notification No. G. O. Ms. 527 on February 14, 1953, wherein it was stated that prior to the decision of the Madras High Court in Writ Petition No. 806 of 1951 the Regional Transport Authorities were varying whenever necessary all the conditions of the permits, but according to the decision of the High Court in that petition the Regional Transport Authorities could not vary the existing conditions of a stage carriage permit imposed under section 48 (*d*) of the Act and that it was only the State Transport Authority which could do so under section 48-A of the Act. The decision of the High Court resulted in great administrative inconvenience as all applications for variation of conditions of permit would have now to be made to the State Transport Authority which involved delay and inconvenience to operators. It further stated that the Government of India had under consideration a proposal to amend section 48 of the Act so as to empower the Regional Transport Authorities to vary all conditions of permits, but some time would be taken to carry out the necessary legislation.

1. (1959) 1 Andh.W.R. 308: A.I.R. 1959 Andh. Pra. 413 (F.B.).

Pending the legislation the Government of Madras had decided to empower Regional Transport Officers, as a temporary measure, to vary conditions of permits now dealt with by the State Transport Authority. The notification further went on to say that in exercise of the powers conferred by section 44-A of the Act the Governor of Madras authorized the Regional Transport Officers and the Secretary, Road Traffic Board, Madras, to exercise the powers and discharge the functions of the State Transport Authority under sections 48-A, 51-A and 56-A of the Act. On October 20, 1955, the Government of Madras issued a further notification reorganizing the Motor Transport Department with reference to the Motor Vehicles (Madras Amendment) Act, 1954 (XXXIX of 1954). According to this notification a Member of the Board of Revenue should be appointed as Transport Commissioner under section 44-A of the Act and the present post of Transport Commissioner should be abolished; that an officer of the Transport Department should be appointed as State Transport Authority who will also be the Assistant Transport Commissioner; that the post of Secretary, Central Road Traffic Board, should be redesignated as Secretary, State Transport Authority; that Collectors of districts in the mofussil and the Commissioner of Police in the City of Madras should be appointed as Regional Transport Authorities under section 44 of the Act: that the Regional Transport Officers in the mofussil and the Deputy Commissioner of Police (Traffic and Licensing), in the Madras City should be the Secretaries to the Regional Transport Authorities, and that an officer of the grade of a District Judge should be appellate authority prescribed under section 64 (1) of the Act, as amended, to deal with appeals against the orders of the Regional Transport Authorities and be designated as the State Transport Appellate Tribunal. Under clause (2) of the notification the Member of the Board of Revenue to be appointed as Transport Commissioner would be the Head of the Transport Department and would have general responsibility for administration of the Act. He would be empowered by the Government under section 44-A to exercise the powers now exercised by the State Transport Authority under sub-sections (3) (*a*) and (*c*) and (4) of section 44 of the Act. In the discharge of these functions the Transport Commissioner will have administrative control over the organisation at present working under the Transport Commissioner. Under clause (4) (*ii*) the powers under sections 48-A, 51-A and 56-A of the Act to alter the conditions of stage carriage permits, contract carriage permits and public carriers permits, exercised by the Regional Transport Officers, would thereafter be exercised by the Regional Transport Authorities. Under clause (5) (*i*) the Regional Transport Officer would be the Secretary to the Regional Transport Authority and in that capacity he would assist the Regional Transport Authority in the performance of the functions prescribed in clause (4). It is, however, to be remembered that when on July 19, 1954, the appellant applied to the Regional Transport Authority for the variation of the conditions of his permit, the notification No. G. O. Ms. 527, dated February 14, 1953, of the Government of Madras was in force by virtue of which Regional Transport Officers were authorised to discharge the functions of the State Transport Authority under sections 48-A, 51-A and 56-A of the Act.

In paragraph 6 of the statement of the case filed by the respondent it was stated that in the exercise of the powers conferred under section 44 (1) of the Act the Government of Madras constituted Provincial and Regional Transport Authorities. It also set up a Motor Transport Department with a Transport Commissioner as its head and officers in that Department, in the lower scale, were the Regional Transport Officers who functioned as the Secretaries of the respective Regional Transport Authorities called the Road Traffic Board. It was further stated in paragraph 7 that although a Regional Transport

Officer was a subordinate of the Transport Commissioner on the administrative side he could not be held to be a subordinate officer within the meaning of section 44-A. The State Government may establish a Motor Vehicles Department and appoint officers thereto under section 133-A, but mere appointment of officers in that Department could not invest them with statutory functions to be discharged under the Act and under the Rules. Section 133-A contemplates framing of rules to regulate the discharge by officers of the department of their functions, as also to state the authorities to whom such officers shall be subordinate and the duties to be performed by them. It was not suggested that any duties or powers of a statutory nature had been vested in the Transport Commissioner, nor was there any rule showing that the Regional Transport Officer is a subordinate of the Transport Commissioner for the purposes of the Rules. The statement of the case further stated that section 44-A required a functional subordination and not merely an administrative one.

The Madras Financial Code, Vol. II, Appendix I shows the list of Heads of Departments of the Government of Madras. The Transport Commissioner is shown as the Head of a Department. The Half-Yearly List of Gazetted Officers in the Transport Department corrected upto the 31st of July, 1955, shows that the Transport Commissioner is also the Chairman, Central Road Traffic Board, Madras, and subordinate to him are the Secretary, Central Road Traffic Board, Madras, Assistant Secretary, Road Traffic Board, Madras and Regional Transport Officers. There can be no question therefore that the Regional Transport Officers are officers subordinate to the Transport Commissioner. It is perhaps for this reason that the respondent admits that the Regional Transport Officers, administratively, are subordinate to the Transport Commissioner. Section 44-A speaks merely of an officer subordinate to the Transport Commissioner to whom by notification the Government of Madras may confer the authority in lieu of any other authority prescribed by or under the Act to discharge the powers and functions of that authority. It was, however, argued that until rules were framed under section 133-A specifying as to who is subordinate to which authority for the purposes of the Act and the statutory functions to be performed under the Act, administrative subordination is not what is contemplated under section 44-A. On the other hand, on behalf of the appellant it has been urged that effect must be given to the words of section 44-A which did not in the least indicate in what way the officer has to be subordinate to the Transport Commissioner. It was worthy of notice that section 44-A authorized the State Government, notwithstanding anything contained in the Act, to authorize any officer subordinate to the Transport Commissioner to exercise and discharge in lieu of any other authority such powers and functions as may be exercised by that authority. The section did not depend upon any rules to be framed under section 133-A. Furthermore, section 133-A was an enabling section by which a State Government could, if it so wished, for the purpose of carrying into effect the purposes of the Act establish a Motor Vehicles Department. Until such a Department was established the question of framing rules under the section did not arise.

There is no clear material on the record or in the Madras Road Traffic Code from which it can be ascertained precisely as to when the Madras Government established a Motor Vehicles Department. It is significant, however, by a notification, dated December 20, 1955, clause (m) was added to rule 3 of the Rules and this stated that "Transport Department" means the Motor Vehicles Department set up under section 133-A of the Act. Apparently, until this date Transport Department was something other than the Motor Vehicles Department set up under section 133-A of the Act. It is clear, therefore, that

on February 14, 1953, when the notification G. O. Ms. No. 527 was issued by the Government of Madras the Regional Transport Officers were officers subordinate to the Transport Commissioner. Even if at some time or the other a Motor Vehicles Department had been set up by the Government of Madras admittedly the Government of Madras had framed no rules under section 133-A (3). If rules had been framed under that section and they showed that the Regional Transport Officers were not subordinate to the Transport Commissioner then a question might well have arisen as to how the words "any Officer subordinate to him" should be construed owing to a conflict between the Regional Transport Officer being administratively subordinate to the Transport Commissioner and yet not subordinate to him by virtue of the rules framed under section 133-A. Since, however, no rules have been framed under this section, so far as section 44-A is concerned, any officer who is subordinate to the Transport Commissioner in any way must include the Regional Transport Officers in the Transport Department. The words of the section are wide enough for this interpretation and they are incapable of being given the restricted meaning suggested on behalf of the respondent. It was, however, suggested that anomalies may occur if section 44-A is construed so widely, because a Regional Transport Officer was a Secretary of a Regional Transport Authority and therefore subordinate to that authority and yet he could be empowered to vary the conditions of a permit which the State Transport Authority, to which the Regional Transport Authority is subordinate, may have declined to do. In the matter of interpretation such considerations cannot be of much assistance. If the words of section 44-A are wide enough to mean any officer subordinate to the Transport Commissioner they must be given effect to. In the matter of interpretation a Court could not, if the words were plain enough, proceed on the basis that possibly the Government of Madras may misuse its powers.

We accordingly hold that the Regional Transport Officer, Tiruchirapalli, had jurisdiction to vary the conditions of a permit by virtue of the power conferred on him by the notification No. G.O. Ms. 527 issued by the Government of Madras. Consequently, that Government had the power under section 64-A to do that which the Regional Transport Officer could have done but had refused to do.

In our opinion, the appeal must be allowed and the judgments of the single Judge and appellate Court of the High Court must be set aside and the case remanded to the High Court for the rehearing of the writ petition by the single Judge as several questions which were raised in that petition have not been decided by him. He had allowed the petition solely on the ground that the decision of the Government of Madras must be set aside as the Regional Transport Officer had no jurisdiction to vary the conditions of the permit and that being so the Government of Madras could not make such an order in the exercise of its revisional jurisdiction. The case will accordingly go back to the single Judge for decision on the other points raised in the writ petition filed by the respondent. The appellant is entitled to his costs of this appeal. The costs in the High Court will abide the result.

Subba Rao, J.—I have had the advantage of perusing the judgment of my learned brother, Imam, J., I regret my inability to agree with him in regard to the main question raised in the case, namely, whether the Regional Transport Officer is subordinate to the State Transport Commissioner within the meaning of section 44-A of the Motor Vehicles Act, 1939 (IV of 1939) (hereinafter referred to as the Act). The facts are fully stated by my learned brother and it is not necessary to restate them here.

Section 44-A was inserted in the Act by the Madras Act XX of 1948 and it reads:

"The State Government may appoint a State Transport Commissioner, and notwithstanding anything contained in this Act, may, by notification in the *Fort St. George Gazette*, authorise such Commissioner or any officer subordinate to him, to exercise and discharge in lieu of any other authority prescribed by or under this Act, such powers and functions as may be specified in the notification.

This section empowers the State Government to appoint only a State Transport Commissioner and does not confer any power on it to appoint any officer subordinate to him; that power must be found elsewhere in the Act or the rules made thereunder. This section also does not enable the State Government to confer any powers on or entrust any functions to, the said Commissioner other than those exercisable by any authority under the Act. On the interpretation of this provision there is a conflict of views between the Full Bench decision of the Madras High Court in *T. Krishnaswamy Mudaliar* v. *P. S. Palani Pillai*[1] and the Full Bench decision of the Andhra Pradesh High Court in *B. Veeraswamy* v. *State of Andhra Pradesh*.[2] In the former case, Balakrishna Ayyar, J., delivering the judgment of the Court, summarised his views thus at page 602:

"Of the three views placed before us we are inclined to prefer the third (statutory subordination). It appears to us to be the most rational and the most free from objections. It is in accord with all well established rules of interpretation of Statutes. It does not require as the theory of 'functional subordination' seems to require, the introduction of new words into the section. It has the merit of being more flexible and practical since it permits of the transfer or delegation of powers not merely at the state level but at the regional level also.

It ensures that there will be no transfer or delegation of powers except to officers whose subordination has been determined by rules properly framed under the Act. It also ought to avoid the anomaly that has now occurred of a person in the position of a secretary of a body being empowered to vary the condition of a permit granted by that body. We therefore adopt this view."

On the other hand, Satyanarayana Raju, J., speaking for the full bench of the Andhra Pradesh High Court, in the latter case summarises his views thus at page 416:

"The Regional Transport Officer is an individual who is invested with the authority and is required to perform the duties incidental to an office and is therefore an officer. In the performance of his various duties, he is subject to the direction and control of the Transport Commissioner. He is thus an officer subordinate to the Transport Commissioner."

The question is which of the two views is correct. It falls to be decided on the provisions of the Act and the rules framed thereunder. The Act was passed to consolidate and amend the law relating to motor vehicles. It deals with a variety of subjects relating to motor vehicles, such as licensing of drivers (Chapter II), registration of motor vehicles (Chapter III), control of transport vehicles (Chapter IV), construction, equipment and maintenance of motor vehicles (Chapter V), control of traffic (Chapter VI), motor vehicles temporarily leaving or visiting India (Chapter VII), insurance of motor vehicles against third party risks (Chapter VII), offences, penalties and procedures (Chapter IX), and miscellaneous (Chapter X). Each chapter, with the exception of Chapter X, provides for a particular aspect relating to motor vehicles and is, within its range, self-contained, and contains a separate provision conferring power on the Government to make rules for the purpose of carrying

1. (1957) 2 M.L.J. 243 : I.L.R. (1957) Mad. 957 : 1957 M.L.J. (Crl.) 411 : A.I.R. 1957 Mad. 599 (F.B.).

2. (1959) 1 An. W.R. 308 : A.I.R. 1959 A.P. 413 (F.B.).

into effect the provisions of that chapter. Section 133-A of the Chapter dealing with miscellaneous matters enables the Government, for the purpose of carrying into effect the provisions of the Act, to establish a Motor Vehicles Department, to appoint officers to the said department, to make rules, *inter alia*, to regulate their functions and duties and name the authorities to whom they shall be subordinate. In short, the Act is comprehensive and self-contained; the powers and *duties* of the various authorities and their relationship *inter se* are all laid down and regulated by the provisions of the Act and the rules made thereunder.

With this background let us look at the relevant provisions of Chapter IV of the Act and the rules made thereunder. Chapter IV deals with "Control of Transport Vehicles". Under section 42, no owner of a transport vehicle shall use or permit the use of the vehicle in any public place save in accordance with the conditions of a permit. Section 43 confers power on the State Government to control road transport. Section 43-A which was inserted in the Act by Act XX of 1948 enables the Government to issue administrative directions to Transport Authorities created under the Act. Section 44 empowers the State Government to constitute for the State a State Transport Authority and Regional Transport Authorities for different regions to exercise and discharge throughout their respective areas the powers and functions specified in the Act. Section 44-A, which was inserted by Madras Act XX of 1948, further empowers the State Government to appoint a State Transport Commissioner and by notification authorize him or any officer subordinate to him to exercise and discharge in lieu of any other authority prescribed by or under the Act such powers and functions as may be specified in the notification. The duties and functions of this Authority and its subordinate are confined only to notified statutory functions and duties imposed on other Authorities under this Act in whose place they are appointed. Sections 45 to 56 lay down the procedure to be followed by the Regional Transport Authority in issuing permits in respect of stage, contract, private and public carriages and also confer powers on the said Transport Authority to vary or cancel all or any of the conditions attached to such permits. Section 58 deals with the duration and renewal of permits and section 59 gives the statutory conditions attached to a permit. Section 60 enables the Transport Authority which granted a permit to cancel or to suspend it on any of the grounds mentioned therein. Section 64 confers a right of appeal on an aggrieved party to prefer an appeal against an order of the State or Regional Transport Authority within the prescribed time to the prescribed Authority in respect of matters mentioned therein. Section 64-A gives revisional jurisdiction to the State Government to call for the records of any order passed by any Authority or officer subordinate to it for the purpose of satisfying itself as to the legality, regularity or propriety of such order. Section 68 confers on the State Government power to make rules for the purpose of carrying into effect the provisions of this chapter and under sub-section (2) (*a*) thereof, the State Government is authorized to make rules in respect of the period of appointment and the terms of appointment of and the conduct of business by Regional and State Transport Authorities and the reports to be furnished by them.

This chapter, therefore, follows the same pattern adopted in the Act. It creates Authorities, defines their powers and duties and provides for the regulation of their relationship *inter se*.

In exercise of the powers conferred under section 44, the State Government constituted in the State a State Transport Authority and also Regional Transport Authorities and appointed members to the said bodies. The constitution of the said bodies was changed from time to time. At the crucial period, *i.e.*, on

July 19, 1954, the State Transport Authority [redacted] described as the Central Road Traffic Board (C.R.T.B.) and its Chair[redacted] was the State Transport Commissioner. So too, the State Government a[redacted] ited Regional Transport Authorities, described as Boards, and from time to time changed their composition. During the period in question the Regional Transport Authorities consisted of District Magistrate, District Superintendent of Police, the President, District Board, and one non-official person to be nominated by the Government.

It also appears from the judgment of Krishnaswamy Naidu, J., who referred the question to the Full Bench of the Madras High Court, that the State Government established a Motor Vehicles Department under section 133-A of the Act and appointed Regional Transport Officers. Their powers are regulated by the rules made under the Act. Under rule 124, the Regional Transport Officer is made the Secretary, and executive officer of the Board, *i.e.*, the Regional Transport Authority. Rules 131, 134, 134-B and 135 define the duties to be performed by the Secretary. Rule 134-A enables the Board, for the prompt and convenient discharge of business, to delegate to the Secretary functions described under that rule. Rule 134-A authorizes the Board to give general instructions as to the manner in which the Secretary shall exercise the powers delegated to him. Under rule 147, appeals lie to the Central Board against particular orders of the Secretary and the Board. These rules positively establish that the Regional Transport Officer is subordinate to the Board, *i.e.*, the Regional Transport Authority. He has statutory duties and functions, and in discharge of those duties he is under the control of the Board and in the matter of some quasi-judicial duties an appeal lies to the Central Road Traffic Board. It is, therefore, manifest that the Regional Transport Officer is appointed by the Government in exercise of its powers under section 133-A of the Act, that his duties are statutorily defined and that under the rules he is made subordinate to the Board, *i.e.*, the Regional Transport Authority.

Now coming to the State Transport Commissioner, the State Government is authorized to appoint him under section 44-A of the Act, which was inserted in the year 1948. He is also a statutory authority. Both the parties proceeded on the basis that the State Government established a Motor Vehicles Department and the Commissioner was one of its officers. The Division Bench of the Madras High Court which referred the question to the Full Bench also accepted the fact that the Madras Government created a Motor Vehicles Department under section 133-A of the Act and the Commissioner is an officer of that Department. The Full Bench of the Andhra Pradesh High Court also founded its conclusion on the fact that "the Transport Commissioner is constituted the head of the department of transport which is the Motor Vehicles Department". That apart, clause (*m*), which was inserted in rule 3 on December 20, 1955, clarifies the position by enacting that the Transport Department is the Motor Vehicles Department set up under section 133-A of the Act. It is, therefore, clear that the State has created a Motor Vehicles Department and appointed the Commissioner as an officer in that Department. Neither section 44 nor section 133-A makes any officer subordinate to the said Commissioner. Section 44 only enables the State Government to confer on him powers and duties and functions entrusted to any Authority under the Act. No notification issued by the Government authorizing the Commissioner to discharge any of the functions specified in the Act has been placed before us. No rule has been framed under sub-section (3) of section 133-A of the Act making the Regional Transport Authority subordinate to the State Transport Commissioner. The only material available to us is that the Commissioner was appointed by the State Government as Chairman of the Central Road Traffic Board. Under the

Act and the rules frame[illegible]eunder, there are certain statutory duties and functions allotted to the [illegible]l Road Traffic Board, but no separate powers are conferred on the Chair[illegible] the Board apart from his being a part of the Board. It is, therefore, [illegible] that under the Act and the rules framed thereunder the Regional Transport Officer is not made subordinate to the State Transport Commissioner.

But what is contended is that though between the Commissioner and the Regional Transport Officer, there is no statutory subordination, the latter was made by the Government administratively subordinate to the Commissioner. There is no order of the Government making the Regional Transport Officer a subordinate to the Commissioner placed before us. The only material is a notification issued by the Government, dated October 20, 1955, on which reliance is placed to indicate that the Regional Transport Officer is subordinate to the Commissioner. But obviously it has no relevance to the present enquiry, for the notification was issued on a date subsequent to the date of the impugned order. If there was an earlier notification, the State or the appellant would have produced it, but from its non-production it may be assumed that there was no such notification. If that is excluded, the only two remaining documents are, (*i*) The Madras Financial Code giving a list of the heads of departments of the Madras State, and (*ii*) the Half-Yearly list of Gazetted Officers in the Madras State Government. The former shows the Transport Commissioner as one of the heads of departments. It does not in itself show that the Regional Transport Officer is his subordinate. The mere mention of the Regional Transport Officers in the list of Gazetted Officers in the department is not decisive of the fact that they are subordinate to the Transport Commissioner. In this state of record, it is not possible to hold that even administratively the Regional Transport Officer is subordinate to the State Transport Commissioner.

I shall assume for the purpose of this case that the Regional Transport Officer is treated by the Government as a subordinate officer to the Commissioner. The question in this case is whether such administrative treatment in utter disregard of the statutory provisions can confer upon the Regional Transport Officer a right to function under section 44-A of the Act.

The foregoing provisions relevant to the present enquiry may be summarised thus: The Act is a self-contained one. Under specific provisions it empowers the Government to constitute a State Transport Authority, the Regional Transport Authorities and a State Transport Commissioner. Section 44-A does not authorize the Government to appoint subordinate officers to the Commissioner but only enables it to confer statutory powers on an officer subordinate to the Commissioner. In exercise of the powers conferred under section 133-A of the Act, the State Government created a Motor Vehicles Department and appointed in that Department a Commissioner, Regional Transport Officers and others. But the State Government has not made any rules making the Regional Transport Officer a subordinate to the Commissioner. Indeed, the rules made him the executive officer of the Regional Transport Board indicating thereby that he is a subordinate to the Board. It is, therefore, manifest that either under the statute or under the rules made thereunder the Regional Transport Officer is not subordinate to the Commissioner.

Learned Attorney-General contends that section 133-A of the Act only confers a discretionary power on the State Government to make rules indicating the authorities to which the officers appointed shall be subordinate and, therefore, it is not bound to do so. Assuming that the word "may" in the section confers a discretionary power on the State Government, is it permissible to

contend that the Government is entitled to do administratively what it is empowered to do by rules? If the Government decides not to exercise the powers conferred under sub-section (3) of section 133-A, it may withhold from doing so; but it cannot bring about the same result administratively, *i.e.*, by a process other than by way of rules. If the contention were accepted, it would be attributing to the Legislature an intention to make an unnecessary provision. If the State Government could act administrattively in regard to matters covered by sub-section (3), why should the said sub-section be made at all? Either by making rules or without making rules, the Government can achieve the same object. There is an understandable reason for the legislative preference to a statutory rule. Statutory rules are placed before Parliament for its approval, while administrative regulations are entirely in the discretion of the executive Government. Statutory authorities under the Act are empowered to exercise powers affecting valuable rights of citizens. The power to issue permits and modify the conditions thereof affects large interests and it may well be that the Legislature in insisting upon statutory rules seeks to exercise supervision to prevent abuse of powers. The only reasonable construction of section 133-A is that the State can create subordination of one officer to another by only statutory rules and not otherwise. I would, therefore, hold that if the Government seeks to make a particular officer of the Department subordinate to another, it can only do so by making a statutory rule under sub-section (3) of section 133-A of the Act.

The result is that negatively there is no statutory rule making the Regional Transport Officer subordinate to the State Transport Commissioner, and positively there is a rule making him subordinate to the Regional Transport Authority (R.T.A.). If that be so, I must hold that the Regional Transport Officer is not a subordinate to the State Transport Commissioner within the meaning of section 44-A of the Act.

In the result, the appeal fails and is dismissed with costs.

ORDER

In view of the majority judgment of the Court, the appeal is allowed with costs in this Court, and the case, remanded to the High Court for a re-hearing by a single Judge. Costs in the High Court will abide the result.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Seth Jamnadas Daga and others .. *Appellants**

v.

The Commissioner of Income-tax .. *Respondent.*

Income-tax Act (XI of 1922), sections 14, 16 and 24—Scope and effect—Share of income from unregistered firm—If can be set-off against share of loss from registered firms—Such losses—If can be carried forward in subsequent years.

Although the share of a partner in the profits of an unregistered firm is exempt from tax, it is included in his total income for the purpose of rate only. The profit from the unregistered firm could be set-off against the losses from the registered firms to find out the rate applicable to other income of the assessee. The assessee could carry forward loss from the registered firms in the subsequent year or years. It cannot be

*Civil Appeal No. 516 of 1959. 12th December, 1960.

said that the losses of the registered firm could not be carried forward because they had been absorbed by the profits of the unregistered firm.

Appeal from the Judgment and Order, dated the 3rd September, 1957, of the Bombay High Court in Income-tax Reference No. 49 of 1957.

J. M. Thakar, Advocate, and *S. N. Andley, J. B Dadachanji, Rameshwar Nath* and *P. L. Vohra*, Advocates of *Rajinder Narain & Co.*, for Appellants.

A. N. Kirpal and *D. Gupta*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—The three appellants appeal against the Judgment and Order of the High Court of Bombay answering, in the affirmative, following question:

"Whether the share income of the assessees from the unregistered firm (which is separately taxed), namely, Rs. 26,110, can be set-off against their share loss from registered firms, namely, Rs. 13,167?"

The facts are as follows: Two of the appellants are brothers, and the third appellant is the widow of a third brother, who died during the pendency of the appeal after certificate had been granted by the High Court. The three brothers were partners in two registered firms and one other firm, which was unregistered. The assessment years for the purposes of the appeal are 1948-49 and 1949-50. For the assessment year 1948-49, the income of the three brothers was the same, and it was as follows:

From registered firms		Rs. 11,902 loss
		Rs. 1,265 loss
	Total loss	Rs. 13,167
Income from the unregistered firm		Rs. 26,110 profit
Other income		Rs. 262

The income of the unregistered firm was taxed on the firm and not in the hands of the partners, as was possible under the provisions of clause (*b*) of sub-section (5) of section 23. In assessing the amount of Rs. 262, the Income-tax Officer first determined the total income of each of the appellants by setting off their share of the profits of the unregistered firm against their share of the loss of the registered firms. The appellants contended that, inasmuch as tax had already been assessed on the unregistered firm, this could not be done, and that as there was loss in the business of the registered firms, no tax was demandable on Rs. 262. They also contended that they were entitled to carry forward the loss amounting to Rs. 12,905 to the succeeding year, under section 24 (2) of the Income-tax Act. These contentions were not accepted by the Income-tax Officer, to whose order it is not necessary to refer in detail. The assessment for the assessment year 1949-50 was also done on similar lines.

The appeal to the Appellate Assistant Commissioner was unsuccessful, and six appeals were taken to the Tribunal by the three appellants three for each assessment year. These appeals were disposed of by a common order. The Tribunal held, relying upon the second proviso to section 24 (1), that just as loss in an unregistered firm could not be set off against profits from a registered firm under that proviso, the profits in an unregistered firm could not be set off against the loss from a registered firm. It relied upon a decision of the Madras High Court in *Commissioner of Income-tax* v. *Ratanshi Bhavanji*,[1] which it purported to follow in preference to a decision of the Punjab High Court in *Banka Mal Niranjandas* v. *Commissioner of Income-tax*.[2] The same

1. (1952) 2 M.L.J. 855: I.L.R. (1953) Mad. 257: (1952) 22 I.T.R. 82.

2. (1951) 20 I.T.R. 536.

reasoning was applied to the assessment year 1949-50, and in the result, all the six appeals were allowed.

The order of the Tribunal involved, in addition to the point set out above, certain other questions, which were asked by the assessees to be referred to the High Court for decision cnder section 66 (1). The Commissioner also asked for a reference in respect of the decision, substance whereof has been set out above. The Tribunal referred two questions at the instance of the assessees and one question, which we have already quoted, at the instance of the Commissioner. In the High Court, the assessees abandoned the two questions, and the High Court accordingly expressed its opinion in the judgment and order under appeal, on the remaining question. The High Court differed from the decision of the Tribunal, and held that the profit from the unregistered firm could be set off against the losses from the registered firms to find out the rate applicable to Rs. 262 which was other income of the assessees. The High Court also held that the assessees could not carry forward the loss of the registered firms to the following year, because such loss must be deemed to have been absorbed in the profits of the unregistered firm. It, however, certified the case as fit for appeal to this Court, and the present appeal has been filed.

In our opinion, the High Court correctly answered the question referred to it, but was in error in holding that the losses of the registered firms could not be carried forward, because they must be deemed to have been absorbed in the profits of the unregistered firm.

Inasmuch as we substantially agree with the High Court on the first part of the case, it is not necessary to examine closely or in detail the reasons on which the decision of the High Court proceeds. In our opinion, the matter is simple, and can be stated within a narrow compass. Under section 3 of the Income-tax Act, income-tax is chargeable for an assessment year at rate or rates prescribed by an annual Act in respect of the total income of the previous year Section 14 (2) (*a*), before its amendment in 1956, provided that the tax shall not be payable by an assessee, if a partner of an unregistered firm in respect of any portion of his share in the profits and gains of the firm computed in the manner laid down in clause (*b*) of scb-section (1) of section 16 on which the tax had already been paid by the firm. The section thus gave immunity from tax to the share of the assessee as a partner in an unregistered firm in respect of the share of profits received by him from the unregistered firm and on which the unregistered firm had already been taxed. Section 16 (1) (*a*), however, provided that in computing the total income of an assessee, any sum exempted under sub-section (2) of section 14 shall be included. The combined effect of those two sections was stated by the High Court to be,

> "that although the share of a partner in the profits of an unregistered firm is exempt from tax, it is included in his total income for the purpose of rate only."

We agree that this is a correct analysis. The Tribunal relied upon the second proviso to section 24 (1), which read as follows:

> "Provided further that where the assessee is an unregistered firm which has not been assessed under the provisions of clause (*b*) of sub-section (5) of section 23......any such loss shall be set-off only against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the said firm; and where the assessee is a registered firm, any loss which cannot be set-off against other income, profits and gains of the firm shall be apportioned between the partners of the firm and they alone shall be entitled to have the amount of the loss set-off under this section."

The Tribunal came to the conclusion that,

> "....just as a partner in an unregistered firm which has suffered loss will not be allowed to set-off his share loss in the usregistered firm against his income from any

other source, so it stands to reason that his loss from other sources cannot also be set-off against his share income from an unregistered firm."

The decision of the Tribunal was not based upon any specific provision of the Income-tax Act but upon a parity of reasoning by which a specific provision about loss was held to apply the other way round also. The High Court correctly pointed out that all that section 14, sub-section (2), did was to save the profits of an unregistered firm from liability to tax in the hands of the partners. It did not affect the computation of the total income to determine the rate applicable under section 3 in the light of section 16 (1) (*a*). Indeed, section 16 (1) (*a*) clearly provided that any sum exempt under section 14 (2) was to be included in computing the total income of an assessee, and in view of this specific provision, the converse of the second proviso to section 24 (1) which we have quoted above, hardly applied. To this extent, the order of the Tribunal was incorrect. The error was pointed out by the High Court, and the question thus raised was properly decided. We see no reason to differ from the High Court on this part of the case.

The question, however, arose before the High Court as to whether in view of this decision, the assessees could carry forward loss from the registered firms in the subsequent year or years. The High Court came to the conclusion that they could not carry forward the loss. Indeed, the Tribunal had earlier stated that if the profits from the unregistered firm were to be set off against the losses of the registered firms, such losses would not be carried forward to the following year, and that that would be contrary to section 24. The High Court rejected this ground in dealing with the question as to the rate applicable to the other income, and pointed out—and in our view, rightly, that under sections 14 (2) and 16 (1) (*a*) the profits and losses had to be set off against each other, to find out the total income. The High Court, however, held that once losses were set off against profits, they were to that extent absorbed, and that there was nothing to carry forward. In our opinion, this conclusion does not follow. Section 24 provides for a different situation altogether; it provides for the carrying forward of a loss in business to the subsequent year or years till the loss is absorbed in profits, or till it cannot be carried forward any further. That has little to do with the manner in which the total income of an assessee has to be determined for the purpose of finding out the rate applicable to his income, taxable in the year of assessment. In our opinion, to read the provisions of sections 14 (2) and 16 (1) (*a*) in this extended manner would be to nullify in certain cases section 24 altogether. Neither is such an intention expressed; nor can it be implied. In our opinion, though the decision of the High Court on the main issue and on one aspect of the question posed for its opinion was correct, it was in error in deciding that the losses of the registered firms could not be carried forward because they had been absorbed by the profits of the unregistered firm.

To this extent, the judgment and order of the High Court will stand modified. Subject to that modification, the appeal will be dismissed. In the circumstances of the case, there will be no order as to costs.

Order modified.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

The Income-tax Officer, Alwaye .. *Appellants**

v.

The Asok Textiles, Ltd., Alwaye .. *Respondent.*

Income-tax Act (XI of 1922), section 35—Applicability—Review—Scope.

According to section 35 of the Income-tax Act power is given to the various income-tax authorities within four years from the date of any assessment passed by them to rectify any mistake "apparent from the record". In the Civil Procedure Code the words are "an error apparent on the face of the record" and the two provisions do not mean the same thing.

The Income-tax Officer can under section 35 of the Income-tax Act, examine the record and if he discovers that he has made a mistake he can rectify the error and the error which can be corrected may be an error of fact or of law. The restrictive operation of the power of review under Order 47, rule 1, Civil Procedure Code, is not applicable in the case of section 35 of the Income-tax Act.

The Income-tax Officer had jurisdiction to levy penal interest under section 18-A (8) of the Income-tax Act for failure to make advance deposit under section 18-A (3).

Appeal from the Judgment and Order dated the 31st October, 1955, Travancore-Cochin High Court, Ernakulam, in Original Petition No. 75 of 1955.

A. N. Kripal and *D. Gupta,* Advocates, for Appellant.

Sardar Bahadur, Advocate for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal pursuant to a certificate of the High Court of Kerala against the judgment and order of that Court and the question for decision is the applicability of section 35 of the Indian Income-tax Act (hereinafter termed the 'Act').

The facts which have given rise to the appeal are these: The respondent is a limited company which owns a spinning mill at Alwaye. It commenced business in January, 1951, and its first accounting year ended on December 31, 1951, and the relevant assessment year is 1952-53. It filed its return showing an income of Rs. 3,21,284 without taking into account the amount allowable under section 15-C of the Act. On February 2, 1953, the net assessable income of the respondent was determined at Rs. 1,47,083 after deducting Rs. 1,79,081 under section 15-C. The respondent however declared a dividend of Rs. 4,72,415 which attracted the application of section 2 of the Finance Act, 1952, read with Part B, proviso (*ii*) of First Schedule and thus it became liable to the payment of additional income-tax and this fact was overlooked by the Income-tax Officer. After giving notice under section 35 of the Act, the Income-tax Officer by an order dated January 25, 1954, rectified this error and imposed an additional tax at the rate of one anna in the rupee. He later discovered that this was also erroneous and the rate should have been 5 annas in a rupee. By an order dated August 12, 1954, he rectified the error. Under section 18-A, advance income-tax had to be paid and the respondent company had deposited only Rs. 5,000 and therefore became liable to penal interest under section 18-A (8) of the Act. By the same order this omission to impose penal interest was corrected and this error was thus rectified.

Against this order the respondent company went in revision under section 33-A (2) to the Commissioner of Income-tax but the revision was dis-

*Civil Appeal No. 311 of 1959. 13th December, 1960.

missed. Thereupon the respondent company filed a petition in the High Court of Kerala under Article 226 of the Constitution on the ground that section 35 of the Act did not apply and that on the merits additional tax could not be imposed. The High Court by its judgment, dated October 31, 1955, held that the orders made were without jurisdiction and therefore granted a writ of *certiorari* quashing the orders and the Income-tax Officer has brought this appeal pursuant to a certificate of that High Court.

According to the High Court, section 35 of the Act was a provision for rectification of "mistakes apparent on the record" and in the opinion of the High Court it was a mistake analogous to Order 47, rule 1, of the Code of Civil Procedure for grant of review on the ground of mistake or error apparent on the face of the record and it construed it in the following words:—

"*i.e.*, an evident error which does not require any extraneous matter to show its incorrectness. The error may be one of fact but is not limited to matters of fact and include also errors of law. But the law must be definite and capable of ascertainment. An erroneous view of law on a debatable point or a wrong exposition of the law or a wrong application of the law or a failure to apply the appropriate law cannot be considered a mistake or error apparent on the face of the record. *See* Chitaley's Civil Procedure Code, Vol. III, pages 3549-50, 5th edition."

On the ground that the applicability of proviso (*ii*) of Part B of the First Schedule of the Finance Act was a complex question which could not be said to be "apparent on the face of the record", the High Court held that the necessary foundation for the exercise of the powers under section 35 had not been laid and therefore the Income-tax Officer had no jurisdiction to make the order that he did. The High Court also held that the levy of penal interest under section 18-A (8) of the Act for failure to make advance deposit under section 18-A (3) was also without jurisdiction.

The learned Judges of the High Court seem to have fallen into an error in equating the language and scope of section 35 of the Act with that of Order 47, rule 1, Civil Procedure Code. The language of the two is different because according to section 35 of the Act which provides for rectification of mistakes the power is given to the various income-tax authorities within four years from the date of any assessment passed by them to rectify any mistake "apparent from the record" and in the Civil Procedure Code the words are "an error apparent on the face of the record" and the two provisions do not mean the same thing. This court in *Maharana Mills (Private) Ltd.* v. *Income-tax Officer, Porbandar*[1] has laid down the scope of section 35 at page 358 in the following words:—

"The power under section 35 is no doubt limited to rectification of mistakes which are apparent from the record. A mistake contemplated by this section is not one which is to be discovered as a result of an argument but it is open to the Income-tax Officer to examine the record including the evidence and if he discovers any mistake he is entitled to rectify the error provided that if the result is enhancement of assessment or reducing the refund then notice has to be given to the assessee and he should be allowed a reasonable opportunity of being heard."

In that case the error arose because of an initial mistake in determining the written down value which was subsequently rectified. In an earlier case *M. K. Venkatachalam* v. *Bombay Dyeing & Manufacturing Co. Ltd.*[2] where as a consequence of a subsequent amendment of the law having retrospective effect, the Income-tax Officer reduced the amount of interest under section 18-A (5) of the Act and the assessee obtained from the High Court a writ of prohibition against the Income-tax Officer on the ground that the mistake contemplated

1. 36 I.T.R. 350 (358); (1959) S.C.J. 1125.
2. (1958) S.C.J. 1054: (1958) 2 M.L.J. (S.C.) 182: (1958) 2 An.W.R. (S.C.) 182: 34 I.T.R. 143.

had to be apparent on the face of the order and not a mistake resulting from an amendment of the law even though it was retrospetcive in its effect, it was held that it was a case of error apparent from the record. Gajendragadkar, J., in his judgment said:—

"At the time when the Income-tax Officer applied his mind to the question of rectifying the alleged mistake, there can be no doubt that he had to read the principal Act as containing the inserted proviso as from April 1, 1952."

Thus this Court has held that discovery of an error on the basis of assessment due to an initial mistake in determining the written down value is a mistake from the record and so is a misapplication of the law even though the law came into operation retrospectively. The Income-tax Officer, can, under section 35 of the Act, examine the record and if he discovers that he has made a mistake he can rectify the error and the error which can be corrected may be an error of fact or of law. The restrictive operation of the power of review under Order 47, rule 1, Civil Procedure Code, is not applicable in the case of section 35 of the Act and in our opinion it cannot be said that the order of the Income-tax Officer in regard to assessment in dispute was without jurisdiction.

In regard to section 18-A (8) also the learned Judges have misdirected themselves because that section is mandatory. It provides:—

Section 18-*A* (8) · "Where, on making the regular assessment, the Income-tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section, interest calculated in the manner laid down in sub-section (6) shall be added to the tax as determined on the basis of the regular assessment."

Therefore the Income-tax Officer was required to calculate the interest in the manner provided under the provisions of that sub-section and had to add it to the assessment.

Counsel for the respondent sought to raise the question as to the applicability of proviso (*ii*) of Part B of First Schedule of the Finance Act, 1952, and relied upon the judgments of this Court in *Commissioner of Income-tax* v. *Elphinstone Spinning & Weaving Mills Co., Ltd.*[1] and similar cases reported as *Commissioner of Income-tax, Bombay City* v. *Jalgaon Electric Supply Co., Ltd.*[2] and *Commissioner of Income-tax, Bombay City* v. *Khatau Makanji Spinning and Weaving Co., Ltd.*[3]; but the facts of those cases were different. In the first case there was no total income and the Finance Act was not applicable in that case. In the second there was no profit in any preceding year and therefore the fiction failed because it postulates that there should be undistributed profits of one or more years immediately preceding the previous year. In the third case also the Finance Act was inapplicable because the additional tax was not properly laid upon the total income and what was actually taxed was never a part of the total income of the previous year.

In our opinion the order of the High Court was erroneous. We therefore allow this appeal and set aside the judgment and order of the High Court with costs in this Court and in the High Court.

Appeal allowed.

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1. (1961) 1 S.C.J. 158: 40 I.T.R. 142.
2. (1961) 1 S.C.J. 80: 40 I.T.R. 184.
3. (1960) S.C.J. 1226: 40 I.T.R. 189.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH, AND J. C. SHAH, JJ.

All India Reporter, Ltd. .. *Appellant**

v.

Ramchandra D. Datar .. *Respondent.*

Income-tax Act (XI of 1922), section 18—Applicability—Decree for damages for wrongful termination of service by employer and arrears of salary—Tax payable as on salary if can be deducted at source by the employer—No assessment on employee decree-holder—Notice under section 46 (5) of the Income-tax Act—If can be issued on the decree-holder —Right to execute the decree in full—Income-tax Officer—If entitled to attach the decree debt by garnishee proceedings.

Where in a suit by an employee for arrears of salary, compensation for wrongful termination of employment and interest the Court passes a decree on that claim, it becomes a judgment-debt. It may have been open to the judgment-debtor employer in the suit to apply to the Court for making a provision in the decree for payment of income-tax due by the employee, but that was not done in the instant case: granting that compensation for wrongful termination of employment can be regarded as in the nature of salary, when the claim is merged in the decree of the Court, the claim assumes the character of a judgment-debt, and to judgment-debts, section 18 of the Income-tax Act has not been made applicable. The decree passed by the Civil Court must be executed subject to the deductions and adjustments permissible under the Code of Civil Procedure. The debtor is not entitled to deduct income-tax which may become due and payable by the judgment-creditor on the plea that the cause of action on which the decree was passed, was the contract of employment and a part of the claim represented amount due to the employee as salary or damages in lieu of salary.

Where there had been no assessment of the employee to tax the Income-tax Officer had no authority to issue a notice under section 46 (5) of the Income-tax Act. In such a case the Income-tax Officer could not claim to recover 'tax due' by a proceeding in the nature of a garnishee proceeding by applying to the civil Court to attach the judgment-debt payable by the employer. Any such application by the Income-tax Officer must be ignored.

Westminster Bank, Ltd. v. *Richee,* 18 T. C. 159 and *Manickam Chettiar* v. *Income-tax Officer, Madras,* (1938) 1 M.L.J. 14: 6 I.T.R. 180, distinguished.

Apeal from the Order, dated the 28th June, 1956, of the Bombay High Court at Nagpur in Miscellaneous First Appeal No. 15 of 1954.

A. V. Viswanatha Sastri, Senior Advocate, (*Shankar Anand* and *A. G. Ratnaparkhi,* Advocates, with him), for Appellant.

K. N. Rajagopal Sastri, Senior Advocate, (*Amicus curiae*), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—Ramachandra Dhondo Datar—hereinafter referred to as the respondent—was employed by the appellant company in its publications branch. By agreement dated March 23, 1943, the appellant company agreed to pay to the respondent as from April 1, 1943, remuneration per annum equal to 3½% of the gross sales or Rs. 12,000, whichever was greater. The agreement was to remain in operation for ten years from April 1, 1943, in the first instance and was renewable at the option of the respondent for such period as he desired. By notice dated April 19, 1948, served on the respondent on April 22, 1948, the appellant company terminated the employment of the respondent. The respondent then filed a civil suit in the Court of the Fifth Additional District Judge, Nagpur, for a decree for Rs. 1,30,000 being the amount of compensation for wrongful termination of employment, arrears of salary and interest. On July 17, 1953, the Court after

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*C.A. No. 327 of 1959. 29th November, 1960.

giving credit for the amount received by the respondent passed a decree for Rs. 42,359 (which was inclusive of Rs. 36,000 as compensation for termination of employment and Rs. 6,000 as salary in lieu of six months' notice and interest) and costs and interest on judgment. The respondent then applied for execution of the decree and claimed Rs. 54,893-12-0 less Rs. 18,501-10-0 decreed against him in a cross-suit filed by the appellant company. The Income-tax Officer, Nagpur, served a notice under section 46 of the Indian Income-tax Act upon the respondent and also gave intimation to the District Judge, Nagpur, that the appellant-company be permitted to deduct at source and to pay into the Government Treasury Rs. 15,956-13-0 as income-tax, surcharge and super-tax due on the sum of Rs. 50,972-2-0 awarded to the respondent. The appellant-company also applied that the executing Court do declare that the appellant-company was entitled and in law bound to deduct the tax due on the amount. The learned Judge directed the appellant-company to pay to the Income-tax Department Rs. 15,956-13-0 on account of income-tax and super-tax on the amount due to the respondent and directed it to pay the balance in Court after filing a receipt for payment of tax from the Income-tax Department. In appeal to the High Court of Judicature at Nagpur, the order passed by the District Judge was reversed and execution as claimed by the respondent was directed.

The appellant-company contends that under section 18 (2) of the Income-tax Act, it was bound to deduct the tax computed at the appropriate rate on the salary payable to the respondent as the amount due under the decree represented salary. Section 18, sub-section (2) of the Income-tax Act in so far as it is material provides that any person paying any amount chargeable under the head "salaries" shall at the time of payment deduct income-tax and super-tax at the rate representing the average of the rates applicable to the estimated total income of the assessee under the head "salary". Sub-section (7) declares that a person failing to deduct the taxes required by the section shall be deemed to be an assessee in default in respect of such tax. The Legislature has, it is manifest, imposed upon the employer the duty to deduct tax at the appropriate rate on salary payable to the employee and if he fails to do so, the tax not deducted may be recovered from him. But the liability to deduct arises in law, if the amount is due and payable as salary. In this case, there has been no assessment of tax due by the Income-tax officer on the amount payable to the respondent. Under section 46 (5), any person paing salary to an assessee may be required by the Income-tax Officer to deduct arrears of tax due from the latter and the employer is bound to comply with such a requisition and to pay the amount deducted to the credit of the Government. But this order can only be passed if income-tax has been assessed and has remained unpaid. It is undisputed that at the material time, no tax was assessed against the respondent; the Income-tax Officer had accordingly no authority to issue a notice under section 46 (5). Nor could the Income-tax Officer claim to recover tax due by a proceeding in the nature of a garnishee proceeding by applying to the civil Court to attach the judgment-debt payable by the company. The application submitted by the Income-tax Officer must therefore be ignored. Undoubtedly, the employer is by section 18 of the Act liable to deduct from the salary payable by him to his employee the amount of tax at the average rate applicable to the estimated total income; but can it be said that as between the appellant-company and the respondent the decretal amount represented salary? The respondent had filed a suit for a decree for arrears of salary, compensation for wrongful termination of employment and interest. The Court having passed a decree on that claim, it became a judgment-debt. It

may have been open to the appellant company in the suit to apply to the Court for making a provision in the decree for payment of income-tax due by the respondent, but no such provision was made.

We are not concerned to decide in this appeal whether in the hands of the respondent the amount due to him under the decree, when paid, will be liable to tax; that question does not fall to be determined in this appeal. The question to be determined is whether as between the appellant-company and the respondent the amount decreed is due as salary payment of which attracts the statutory liability imposed by section 18. The claim decreed by the civil Court was for compensation, for wrongful termination of employment, arrears of salary, salary due for the period of notice and interest and costs, less withdrawals on salary account. The amount for which execution was sought to be levied was the amount decreed against which was set off the claim under the cross-decree. A substantial part of the claim decreed represented compensation for wrongful termination of employment and it would be difficult to predicate of the claim sought to be enforced what part thereof if any represented salary due. Granting the compensation payable to an employee by an employer for wrongful termination of employment can be regarded as in the nature of salary, when the claim is merged in the decree of the Court, the claim assumes the character of a judgment-debt, and to judgment-debts section 18 has not been made applicable. The decree passed by the civil Court must be executed subject to the deductions and adjustments permissible under the Code of Civil Procedure. The judgment-debtor may, if he has a cross-decree for money, claim to set off the amount due thereunder. If there be any adjustment of the decree, the dcree may be executed for the amount due as a result of the adjustment. A third person who has obtained a decree against the judgment-creditor may apply for attachment of the decree and such decree may be executed subject to the claim of the third person: but the judgment-debtor cannot claim to satisfy, in the absence of a direction in the decree to that effect the claim of a third person against the judgment-creditor, and pay only the balance. The rule that the decree must be executed according to its tenor may be modified by a statutory provision. But there is nothing in the Income-tax Act which supports the plea that in respect of the amount payable under a judgment-debt of the nature sought to be enforced, the debtor is entitled to deduct income-tax which may become due and payable to the judgment-creditor on the plea that the cause of action on which the decree was passed was the contract of employment and a part of the claim decreed represented amount due to the employee as salary or damages in lieu of salary.

Counsel for the appellant-company strongly relied upon the decision of the House of Lords in *Westminster Bank, Ltd. v. Richee.*[1] That was a case in which in an action brought by one *R* against the Westminster Bank trustee of the estate of one *X*—*R* was awarded a decree for £36,255 principal and £10,028 as interest. The Bank thereafter brought an action for a declaration that it had satisfied the judgment in the action by *R* by paying him the amount due less £5,014, the latter sum representing income-tax on the interest awarded by the judgment. It was held by the House of Lords that £10,028 was "interest of money" within Schedule D and General Rule 21 of the Income-tax Act, 1918, and that income-tax was deductible therefrom. In that case, the only argument advanced on behalf of the Bank is set out in the speech of Viscount Simon, L.C., at page 187;

"The appellant contends that the additional sum of £ 10,028 though awarded under a power to add interest to the amount of the debt, and though called interest in the

1. 18 Tax Cases 159.

judgment, is not really interest such as attracts Income-tax, but is damages. The short answer to this is that there is no essential incompatibility between the two conceptions. The real question, for the purposes of deciding whether the Income-tax Acts apply, is whether the added sum is capital or income, not whether the sum is damages or interest."

The House of Lords in that case by a majority held that £10,028 awarded under the judgment represented not capital but interest and was liable to tax. In our view, this case has no application to the facts of the present case. In the case before us, there is a decree passed in favour of the respondent; under the scheme of the Civil Procedure Code, that decree has to be executed as it stands, subject to such deductions or adjustments as are permissible under the Code. There was no tax liability which the respondent was assessed to pay in respect of this amount till the date on which the appellant-company sought to satisfy the alleged tax liability of the respondent. As between the appellant company and the respondent, the amount did not represent salary; it represented a judgment-debt and for payment of income-tax thereon, no provision was made in the decree. The Civil Procedure Code bars an action of the nature which was filed in *Westminster Bank's case*[1]. The defence to the execution if any must be raised in the execution proceeding and not by a separate action. The amount payable by the appellant-company to the respondent was not salary but a judgment-debt and before paying that debt the appellant-company could not claim to deduct at source tax payable by the respondent. Nor could the appellant-company seek to justify its plea on the ground that the judgment-creditor was indebted to a third person.

The principle of the case in *Manickam Chettiar* v. *Income-tax Officer, Madura*,[2] on which reliance was also sought to be placed by the appellant company has no application to this case. In *Manickam Chettiar's case*[2] in execution of a money decree certain properties belonging to a judgment-debtor were attached and sold and the sale proceeds were received by the Court. The Income-tax Officer who had assessed the decree-holder to tax payable by him on his other income applied to the Court for an order directing payment to him out of the sale proceeds the amount of income-tax due by the decree-holder. It was held that the claim for income-tax was entitled to priority in payment and the Court had inherent power to make an order on the application for payment of money due as income-tax. Tax had admittedly been assessed, and proceedings substantially for recovery of the tax so assessed were adopted by the Income-tax Officer. It was held in the circumstances that the Court had jurisdiction to direct recovery of tax out of the amount standing to the credit of the decree-holder. The principle of that case can have no application to the facts of the present case.

The respondent had not appeared before us, but we have been assisted by Mr. Rajagopala Sastri and we are indebted to him for placing the evidence and the various aspects of the case on a true appreciation of which the question in issue fell to be determined.

The appeal fails and is dismissed. As there was no appearance for the respondent, there will be no order for costs.

Appeal dismissed.

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1. 18 Tax Cases 159.
2. (1938) 1 M.L.J. 14: 6 I.T.R. 180.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

The Commissioner of Income-tax, Bombay City II, Bombay .. *Appellant**

v.

Sitaldas Tirathdas, Bombay .. *Respondent.*

Income-tax Act (XI of 1922)—Amounts paid by assessee under a decree for maintenance of his wife and children—If entitled to be deducted from assessable income.

There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow.

Where the wife and children of the assessee continued to be members of his family and received monthly maintenance under a decree, from the assessee it must be held that they received a portion of the income of the assessee, after the assessee had received the income as his own. The case is one of application of a portion of the income to discharge an obligation and not a case in which by an overriding charge the assessee became only a collector of another's income. The matter in the present case would have been different, if such an overriding charge had existed either upon the property or upon its income, which is not the case. The case falls outside the rule in *Bejoy Singh Dudhuria's case*, (1933) 65 M.L.J. 285: L.R. 60 I.A. 196: 1 I.T.R. 135 (P.C.) and rather falls within the rule in *P. C. Mullick's case*, (1938) 1 M.L.J. 704: L.R. 65 I.A. 150: 6 I.T.R. 206 (P.C.).

Appeal from the Judgment and Order, dated the 20th Septmber, 1957, of the former Bombay High Court in I.T.R. No. 15 of 1957.

Hardayal Hardy and *D. Gupta,* Advocates, for Appellant.

R. J. Kolah, Advocate, and *S. N. Andley, J. B. Dadachanji, Rameshwar Nath* and *P. L. Vohra,* Advocates *of Rajinder Narain and Co.,* for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—The Commissioner of Income-tax, Bombay City II, has filed this appeal with a certificate under section 66-A (2) of the Income-tax Act, against the Judgment and Order of the High Court of Bombay, dated September 20, 1957, in Income-tax Reference No. 15 of 1957.

The question referred to the High Court for its opinion by the Income-tax Appellate Tribunal, Bombay, was:

"Whether the assessee is entitled to deduction of Rs. 1,350 and Rs. 18,000 from his total income of the previous year relevant to the assessment years, 1953-54, 1954-55?"

The assessee, Sitaldas Tirathdas of Bombay, has many sources of income, chief among them being property, stocks and shares, bank deposits and share in a firm known as Messrs. Sitaldas Tirathdas. He follows the financial year as his accounting year. For the assessment years 1953-544 and 1954-55, his total income was respectively computed at Rs. 50,375 and Rs. 55,160. This computation was not disputed by him, but he sought to deduct therefrom a sum of Rs. 1350 in the first assessment year and a sum of Rs. 18,000 in the second assessment year on the ground that under a decree he was required to pay these sums as maintenance to his wife, Bai Deviben and his children. The suit was filed in the Bombay High Court (Suit No. 102 of 1951) for main-

*Civil Appeal No. 528 of 1959. 24th November, 1960.

tenance allowance, separate residence and marriage expenses for the daughters and for arrears of maintenance, etc. A decree by consent was passed on March 11, 1953, and maintenance allowance of Rs. 1,500 per month was decreed against him. For the account year ending March 31, 1953, only one payment was made, and deducting the Rs. 150 per month as the rent for the flat occupied by his wife and children, the amount paid as maintenance under the decree came to Rs. 1,350. For the second year, the maintenance at Rs. 1,500 per month came to Rs. 18,000 which was claimed as a deduction. No charge on the property was created, and the matter does not fall to be considered under section 9 (1) (*iv*) of the Income-tax Act. The assessee, however, claimed this deduction on the strength of a ruling of the Privy Council in *Bejoy Singh Dudhuria* v. *Commissioner of Income-tax.*[1] This contention of the assessee was disallowed by the Income-tax Officer, whose decision was affirmed on appeal by the Appellate Assistant Commissioner. On further appeal, the Tribunal observed:

> "This is a case, pure and simple, where an assessee is compelled to apply a portion of his income for the maintenance of persons whom he is under a personal and legal obligation to maintain. The Income-tax Act does not permit of any deduction from the total income in such circumstances."

The Tribunal mentioned in the statement of the case that counsel for the assessee put his contention in the following words:

> "I claim a deduction of this amount from my total income because my real total income is whatever that is computed, which I do not dispute, less the maintenance amount paid under the decree."

The assessee appears to have relied also upon a decision of the Lahore High Court in *Diwan Kishen Kishore* v. *Commissioner of Income-tax.*[2] The Tribunal, however, referred the above question for the opinion of the High Court.

The High Court followed two earlier decisions of the same Court reported in *Seth Motilal Manekchand* v. *Commissioner of Income-tax*[3] and *Prince Khanderao Gaekwar* v. *Commissioner of Income-tax,*[4] and held that, as observed in those two cases, the test was the same, even though there was no specific charge upon property so long as there was an obligation upon the assessee to pay, which could be enforced in a Court of law. In *Bejoy Singh Dudhuria's case,*[1] there was a charge for maintenance created against the assessee, and the Privy Council had observed that the income must be deemed to have never reached that assessee, having been diverted to the maintenance-holders. In the judgment under appeal, it was held that the income to the extent of the decree must be taken to have been diverted to the wife and children, and never became income in the hands of the assessee.

The Commissioner of Income-tax questions the correctness of the decision and also of the two earlier decisions of the Bombay High Court. We are of opinion that the contention raised by the Department is correct.

Before we state the principle on which this and similar cases are to be decided, we may refer to certain rulings, which illustrate the aspects the problem takes. The leading case on the subject is the decision of the Judicial Committee in *Bejoy Singh Dudhuria's case.*[1] There, the step-mother of the Raja had brought a suit for maintenance and a compromise decree was passed under which the step-mother was to be paid Rs. 1,100 per month, which amount was declared a charge upon the properties in the hands of the Raja, by the Court. The Raja sought to deduct this amount from his assessable income,

1. (1933) 65 M.L.J. 285 : L.R. 60 I. A. 196: 1 I.T.R. 135 (P.C.).
2. (1933) 1 I.T.R. 143.
3. (1957) 31 I.T.R. 735.
4. (1948) 16 I.T.R. 294.

which was disallowed by the High Court at Calcutta. On appeal to the Privy Council, Lord Macmillan observed as follows:

"But their Lordships do not agree with the learned Chief Justice in his rejection of the view that the sums paid by the appellant to his step-mother were not 'income' of the appellant at all. This in their Lordships' opinion is the true view of the matter.

Where the Act by section 3 subjects to charge 'all income' of an individual, it is what reaches the individual as income which it is intended to charge. In the present case the decree of the Court by charging the appellant's whole resources with a specific payment to his step-mother has to that extent diverted his income from him and has directed it to his step-mother; to that extent what he receives for her is not his income. It is not a case of the application by the appellant of part of his income in a particular way, it is rather the allocation of a sum out of his revenue before it becomes income in his hands."

Another case of the Privy Council may well be seen in this connection. That case is reported in *P. C. Mullick* v. *Commissioner of Income-tax, Bengal.*[1] There, a testator appointed the appellants as executors and directed them to pay Rs. 10,000 out of the income on the occasion of his *addya sradh*. The executors paid Rs. 5,537 for such expenses, and sought to deduct the amount from the assesable income. The Judicial Committee confirmed the decision of the Calcutta High Court disallowing the deduction, and observed that the payments were made out of the income of the estate coming to the hands of the executors and in pursuance of an obligation imposed upon them by the testator. It observed that it was not a case in which a portion of the income had been diverted by an overriding title from the person who would have received it otherwise, and distinguished the case in *Bejoy Singh Dudhuria's case.*[2]

These cases have been diversely applied in India, but the facts of some of the cases bring out the distinction clearly. In *Diwan Kishen Kishore* v. *Commissioner of Income-tax*[3] there was an impartible estate governed by the law of primogeniture, and under the custom applicable to the family, an allowance was payable to the junior member. Under an award given by the Deputy Commissioner acting as arbitrator and according to the will of the father of the holder of the estate and the junior member, a sum of Rs. 7,200 per year was payable to the junior member. This amount was sought to be deducted on the ground that it was a necessary and obligatory payment, and that the assessable income must, therefore, be taken to be *pro tanto* diminished, It was held that the income never became a part of the income of the family or of the eldest member but was a kind of a charge on the estate. The allowance given to the junior member, it was held, in the case of an impartible estate was the separate property of the younger member upon which he could be assessed and the rule that an allowance given by the head of a Hindu coparcenery to its members by way of maintenance was liable to be assessed as the income of the family, had no application. It was also observed that if the estate had been partible and partition could have taken place, the payment to the junior member out of the coparcenary funds would have stood on a different footing. In that case, the payment to the junior member was a kind of a charge which diverted a portion of the income from the assessee to the junior member in such a way that it could not be said that it became the income of the assessee.

In *Commissioner of Income-tax, Bombay* v. *Makanji Lalji*[4] it was stated that in computing the income of a Hindu undivided family monies paid to the widow of a deceased coparcener of the family as maintenance could not be deducted, even though the amount of maintenance had been decreed by the Court and had been made a charge on the properties belonging to the family. This case is open to serious doubt, because it falls within the rule stated in

1. (1938) 1 M.L.J. 704: L.R. 65 I.A. 150: 1 I.T.R. 135 (P.C.).
6 I.T.R 206 (P.C.).
2. (1933) 65 M.L.J. 285: L.R. 60 I.A. 196:
3. (1933) 1 I.T.R. 143.
4. (1937) 5 I.T.R. 539.

Bejoy Singh Dudhuria's case;[1] and though the High Court distinguished the case of the Judicial Committee, it appears that it was distinguished on a ground not truly relevant, namely, that in *Bejoy Singh Dudhuria's case*[1] the Advocate-General had abandoned the plea that the step-mother was still a member of the undivided Hindu family. It was also pointed out that this was a case of assessment as an individual and not an assessment of a Hindu undivided family.

In *Commissioner of Income-tax, Bombay* v. *D. R. Naik*,[2] the assessee was the sole surviving member of a Hindu undivided family. There was a decree of Court by which the assessee was entitled to receive properties as a residuary legatee, subject, however, to certain payments of maintenance to widows. The widows continued to be members of the family. It was held that though section 9 of the Income-tax Act did not apply, the assessee's assessable income was only the balance left after payment of the maintenance charges. It appears from the facts of the case, however, that there was a charge for the maintenance upon the properties of the assessee. This case also brings out correctly the principles laid down by the Judicial Committee that if there be an overriding obligation which creates a charge and diverts the income to some one else, a deduction can be made of the amounts so paid.

The last case may be contrasted with the case reported in *P. C. Mallick and D. C. Aich*, In re.[3] There, under a will certain payments had to be made to the beneficiaries. These payments were to be made gradually together with certain other annuities. It was held that the payments could only be made out of the income received by the executors and trustees from the property, and the sum was assessable to income-tax in the hands of the executors. It was pointed out that under the will it was stated that the amounts were to be paid "out of the income of my property". and thus, what had been charged was the income of the assessees, the executors. The case is in line with the decision of the Privy Council in *P. C. Mullick* v. *Commissioner of Income-tax, Bengal*.[4]

In *Hira Lal*, In re,[5] there was a joint Hindu family, and under two awards made by arbitrators which were made into a rule of the Court, certain maintenance allowances were payable to the widows. These payments were also made a charge upon the property. It was held that inasmuch as the payments were obligatory and subject to an overriding charge they must be excluded. Here too, the amount payable to the widows was diverted from the family to them by an overriding obligation in the nature of a charge, and the income could not be said to accrue to the joint Hindu family at all.

In *Price Khanderao Gaekwar* v. *Commissioner of Income-tax*,[6] there was a family trust out of which two grandsons of the settlor had to be paid a portion of the income. It was provided that if their mother lived separately, then the trustees were to pay her Rs. 18,000 per year. The mother lived separately, and two deeds were executed by which the two grandsons agreed to pay Rs. 15,000 per year to the mother, and created a charge on the property. The sons having paid Rs. 6,000 in excess of their obligations, sought to deduct the amount from their assessable income, and it was allowed by the Bombay High Court, observing that though the payment was a voluntary payment, it was subject to a valid and legal charge which could be enforced in a Court of law and the amount was thus deductible under section 9 (1) (*iv*). There is no distinction between a charge created by a decree of Court and one created by agreement of parties,

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1. (1933) 65 M.L.J. 285: L.R. 60 I.A. 196: 1 I.T.R. 135 (P.C.).
2. (1939) 7 I.T.R. 362.
3. (1940) 8 I.T.R. 236.
4. (1938) 1 M.L.J. 704: L.R. 65 I.A. 150: 6 I.T.R. 206 (P.C.).
5. (1945) 13 I.T.R. 512.
6. (1948) 16 I.T.R. 294.

provided that by that charge the income from property can be said to be diverted so as to bring the matter within section 9 (1) (*iv*) of the Act. The case was one of application of the particular section of the Act and not one of an obligation created by a money decree, whether income accrued or not. The case is, therefore, distinguishable from the present, and we need not consider whether in the special circumstancs of that case it was correctly decided.

In *V. M. Raghavalue Naidu & Sons* v. *Commissioner of Income-tax*[1] the assessees were the executors and trustees of a will, who were required to pay maintenance allowances to the mother and widow of the testator. The amount of these allowances was sought to be deducted, but the claim was disallowed. Satyanarayana Rao and Viswanatha Sastri, JJ., distinguished the case from that of the Privy Council in *Bejoy Singh Dudhuria's case*[2] Viswanatha Sastri, J., observed that the testator was under a personal obligation under the Hindu Law to maintain his wife and mother, and if he had spent a portion of his income on such maintenance, he could not have deducted the amount from his assessable income and that the position of the executor was not better. Satyanarayana Rao, J., added that the amount was not an allowance which was charged upon the estate by a decree of Court or otherwise and which the testator himself had no right or title to receive. The income which was received by the executors included the amount paid as maintenace, and a portion of it was thus applied in discharging the obligation.

The last cited case is again of the Bombay High Court, which seems to have influenced the decision in the instait case. That is reported in *Seth Motilal Manekchand* v. *Commissioner of Income-tax*.[3] In that case, there was a managing agency, which belonged to a Hindu joint family consisting of A, his son B and A's wife A partition took place, and it was agreed that the managing agency should be divided, A and B taking a moiety each of the managing agency remuneration but each of them paying A's wife 2 annas 8 pies out of their respective 8 annas share in the managing agency remuneration. Chagla, C. J. and Tendolkar, J., held that under the deed of partition A and B had really intended that they were to receive only a portion of the managing agency commission and that the amount paid to A's wife was diverted before it became the income of A and B and could be deducted. The learned Judge observed at page 741 as follows:

"We are inclined to accept the submission of Mr. Kolah that it does constitute a charge,, but in our opinion, it is unnecessary to decide this question because this question can only have relevance and significance if we were considering a claim made for deduction under section 9 (1) (*iv*) of the Income-tax Act where a claim is made in respect of immovable property where the immovable property is charged or mortgaged to pay a certain amount. It is sufficient for the purpose of this reference if we come to the conclusion that Bhagirathibai had a legal enforceable right against the partner in respect of her 2 annas and 8 pies share and that the partner was under a legal obligation to pay that amount."

These are the cases which have considered the problem from various angles. Some of them appear to have applied the principle correctly and some, not. But we do not propose to examine the correctness of the decisions in the light of the facts in them. In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by

1. (1950) 2 M.L.J. 300: 18 I.T.R. 787.
2. (1933) 65 M.L.J. 285: L.R. 60 I.A. 196: 1 I.T.R. 135 (P.C.).
3. (1957) 31 I.T.R. 735.

the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable. In our opinion, the present case is one in which the wife and children of the assessee who continued to be members of the family received a portion of the income of the assessee, after the assessee had received the income as his own. The case is one of application of a portion of the income to discharge an obligation and not a case in which by an overriding charge the assesee became only a collector of another's income. The matter in the present case would have been different, if such an overriding charge had existed either upon the property or upon its income, which is not the case. In our opinion, the case falls outside the rule in *Bejoy Singh Dudhuria's case*[1] and rather falls withthe rule stated by the Judicial Committee in *P. C. Mullick's case.*[2]

For these reasons, we hold that the question referred to the High Court ought to have been answered in the negative. We, accordingly, discharge the answer give by the High Court, and the question will be answered in the negative. The appeal is thus allowed with costs here and in the High Court.

Appeal allowed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Sarjoo Prasad .. *Appellant**

v.

The State of Uttar Pradesh .. *Respondents.*

*Prevention of Food Adulteration Act (XXXVII of 1954), sections 7 and 16—Scope—Servant in shop, selling adulterated foodstuff—Offence—*Mens rea *not essential for liability.*

The Legislature has, in the interest of public health, enacted the Prevention of Food Adulteration Act and has provided that all persons are prohibited from selling adulterated food. In the absence of any provision, express or necessarily implied from the context, the Courts will not be justified in holding that the prohibition was only to apply to the owner of the shop and not to the agent or servant of the owner who sells adulterated food. If the owner of a shop in which adulterated food is sold is without proof of *mens rea* liable to be punished for sale of adulterated food, there is no reason why an agent or servant of the owner is not liable to be punished for contravention of the same provision unless he is shown to have guilty knowledge.

Re. *S. Moses and another*, I.L.R. (1959) Mad. 418: (1959) 2 M.L.J. 49: (1959) M.L.J. (Cr.) 491, overruled.

Appeal by Special Leave from the Judgment and Order dated the 21st July, 1959, of the Allahabad High Court in Criminal Revision No. 503 of 1958 arising out of the Judgment and Order dated the 27th March, 1958, of the Sessions Judge, Allahabad, in Criminal Appeal No. 745 of 1957.

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1. (1933) 1 I.T.R. 135: L.R. 60 I.A. 196: 65 M.L.J. 285 (P.C.).

2. (1938) 6 I.T.R. 206 : L.R. 65 I.A. 150 : (1938) 1 M.L.J. 704 (P.C.).

*Criminal Appeal No. 147 of 1959. 16th December, 1960.

C. B. Agarwala, Senior Advocate (*K. P. Gupta,* Advocate, with him), for Appellant.

G. C. Mathur and *C. P. Lal,* Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—The appellant, Sarjoo Prasad was convicted by P. M. Aga, Magistrate First Class, Allahabad, of an offence under section 7 read with section 16 of the Prevention of Food Adulteration Act XXXVII of 1954—hereinafter referred to as the Act—and in view of a previous conviction for a similar offence was sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs. 2,000. The conviction and sentence were confirmed in appeal by the Court of Session at Allahabad and by the High Court of Judicature at Allahabad in revision. The appellant has appealed to this Court with Special Leave under Article 136 of the Constitution.

The appellant was an employee of one Thakur Din who carries on business at 92-C, Mirganj, Allahabad, as a vendor of edible oils and provisions. On September 22, 1956, a Food Inspector of the Allahabad Municipality purchased from the appellant a sample of mustard oil exposed for sale in the shop which on analysis was found to be adulterated with linseed oil. Thakur Din and the appellant were prosecuted in the Court of the First Class Magistrate, Allahabad, for selling adulterated food. The Magistrate convicted Thakur Din and the appellant and sentenced Thakur Din to pay a fine of Rs. 200 and the appellant to suffer rigorous imprisonment for one year and to pay a fine of Rs. 2,000.

The expression "sale" is defined by section 2 (*xiii*) in the Act as meaning sale of any article of food, whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption or use, or for analysis, and includes an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article, and includes also an attempt to sell any such article. The definition includes not only actual sale but agreement for sale, offer for sale, exposure for sale and even possession of articles for sale and attempt to sell. The appellant was in charge of the shop at the time when mustard oil was sold to the Food Inspector. Mustard oil was exposed for sale and it was in the possession of the appellant and he actually sold it. But counsel for the appellant contends that by section 7 of the Act, the owner of a shop alone is prohibited from selling adulterated food, and a servant employed in the shop who sells food on behalf of the employer is not a "person" against whom the prohibition operates. Counsel says that an employee in a shop who with knowledge that an article of food is adulterated, sells it is guilty of aiding and abetting his employer, but without such knowledge he is not liable to be punished for contravening the provisions of the Act.

Section 7 of the Act in so far as it is material provides:

"No person shall himself or by any person on his behalf............sell................

(*i*) any adulterated food;

.........................".

The material part of section 16 (1) provides:

"If any person,

(*a*) whether by himself or by any person on his behalf............................ sells......................any article of food in contravention of the provisions of this Act............or

....he shall,........, be punishable........".

That the mustard oil sold by the appellant was adulterated has not been challenged in this appeal. The appellant's plea that the mustard oil delivered to the Food Inspector was not meant for sale was disbelieved by the Trial Magistrate and that view has been confirmed by the Court of Session and the High Court. The expression "person" has not been defined in the Act and in the context in which that expression occurs, it *prima facie* includes every one who sells adulterated food. By the collocation of the expression, "no person shall himself or by any person on his behalf", the employer alone is not prohibited. The intention of the Legislature is plain. Every person, be he an employer or an agent is prohibited from selling adulterated food and infringement of the prohibition is by section 16 penalised. By section 19 in a prosecution for an offence pertaining to the sale of any adulterated article of food, it is no defence merely to allege that the vendor was ignorant of the nature of the substance or quality of the food sold by him. Such a defence can only succeed if the person charged with selling adulterated food proves that the article of food was purchased as of the same in nature, substance and quality as that demanded by the purchaser with a written warranty in the prescribed form, that he had no reasons to believe at the time when he sold it that the food was not of such nature, substance, and quality and that he sold it in the same state as he purchased it, and he submits to the food inspector or the local authority a copy of the warranty with a written notice that he intends to rely upon it and specifies the name and address of the person from whom he received it. Prohibition of sale of adulterated food is evidently imposed in the larger interest of maintenance of public health. The prohibition applies to all persons who sell adulterated food, and for contravention of the prohibition all such persons are penalised. Because the Legislature has sought to penalise a person who sells adulterated food by his agent, it cannot be assumed that it was intended to penalise only those who may act through their agents. If the owner of a shop in which adulterated food is sold is without proof of *mens rea* liable to be punished for sale of adulterated food, we fail to appreciate why an agent or a servant of the owner is not liable to be punished for contravention of the same provision unless he is shown to have guilty knowledge.

The argument that the Legislature could not have intended having regard to the fact that a large majority of servants in shops which deal in food are illiterate to penalise servants who are not aware of the true nature of the article sold has in our judgment no force. The intention of the Legislature must be gathered from the words used in the statute and not on any assumptions about the capacity of the offenders to appreciate the gravity of the acts done by them. There is also no warrant for the assumption that the servants employed in shops dealing in food stuff are generally illiterate.

The Legislature has, in the interest of public health, enacted the Act and has provided that all persons are prohibited from selling adulterated food. In the absence of any provision, express or necessarily implied from the context, the Courts will not be justified in holding that the prohibition was only to apply to the owner of the shop and not to the agent of the owner, who sells adulterated food. The view taken to the contrary by the Madras High Court in Re *S. Moses and another*[1] is, in our judgment, erroneous.

There is no substance in the contention that the conviction of the appellant was not for a second offence committed by him under the Prevention of Food Adulteration Act. The prosecutor produced before the Court an extract

1. I.L.R. (1959) Mad. 418: (1959) 2 M.L.J. 49: 1959 M.L.J. (Cr.) 491.

dated April 7, 1956, of a judgment in Criminal Case No. 208 of 1956 which showed that one "Sarjoo Prasad" had been convicted by P. N. Jauhari, Magistrate F-Class, Allahabad, of the offence of adulteration of mustard oil and sentenced to pay a fine of Rs. 80. In the view of the Magistrate, the extract related to the appellant. The name of the person convicted and his father's name and residence were identical with the name of the appellant, his father's name and his residence. All the details given in the extract tallied with the description of the appellant. In the memorandum of appeal filed to the Court of Session challenging the conviction recorded by the Magistrate First Class, it was not contended that the person convicted in the earlier case was some person other than the appellant.

But the appellant was merely an employee of Thakur Din. It is not shown that he made himself any profit out of the transaction. Thakur Din has been sentenced to pay a fine of Rs. 200 only. The offence committed by the appellant is a repetition of a similar offence committed by him a few months earlier, but we think that having regard to all the circumstances, this is a case in which there are special and adequate reasons which would justify imposition of a penalty less than the minimum prescribed by section 16 (*ii*) of the Act. We reduce the sentence to imprisonment to three months and we remit the fine. Subject to this modification, the appeal is dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Setabganj Sugar Mills, Ltd. (In both the Appeals) .. *Appellants**

v.

The Commissioner of Income-tax, Central, Calcutta (In both the Appeals) .. *Respondent.*

Income-tax Act (XI of 1922), section 66 (2)—Question whether different ventures carried on by an individual or company form same business is a mixed question of law and fact on which High Court should ask for statement of case.

The question whether, on the application of the settled tests, different ventures carried on by an individual or a company form the same business is a mixed question of law and fact. Certain principles are applied to determine whether on the facts found a legal inference can be drawn that the different ventures constitute separate businesses or, viewed together, can be said to constitute the same business. No doubt, findings of fact are involved because a variety of matters bearing on the unity of the business have to be investigated such as unity of control and management, conduct of the business through the same agency, the inter-relation of the business, the employment of same capital, the maintenance of common books of account, employment of same staff to run the business, the nature of the different transactions, the possibility of one being closed without affecting the texture of the other and so forth. When, however, the true facts have been determined, the ultimate conclusion is a legal inference from proved facts, and it is one of mixed law and fact, on which depends the application of section 24 (2) of the Income-tax Act. A question of law did arise in the case on which the High Court should have asked for a statement of the case.

Appeal by Special Leave from the Judgment and Order, dated the 15th March 1955, of the Income-tax Appellate Tribunal of India, Calcutta, in I.T.A. No. 4309 of 1954-55 and Appeal by Special Leave from the Judgment and Order, dated the 27th April, 1956, of the Calcutta High Court in Income-tax Matter No. 9 of 1956.

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*Civil Appeal Nos. 143 and 144 of 1958. 17th November, 1960.

N. A. Palkhivala, Senior Advocate, *B. P. Maheshwari*, Advocate, with him) In both the Appeals for Appellants.

K. N. Rajagopal Sastri, Senior Advocate, (*D. Gupta*, Advocate, with him), (In both the Appeals), for Respondent.

Th Judgment of the Court was delivered by

Hidayatullah, J.—These are two consolidated appeals by Special Leave. The first is directed against an order of the Income-tax Appellate Tribunal, Calcutta Bench, dated March 15, 1955, and the other, against an order of the Calcutta High Court, dated April 27, 1956, declining to ask for a statement of the case under section 66 (2) of the Indian Income-tax Act.

The facts are as follows: Setabgunj Sugar Mills, Ltd., is the appellant. This Company was incorporated in 1934, and was established to take over some sugar mills run by a firm. Included in the objects for which the Company was established was the business of buyers, sellers and dealers in jute, gunnies, oil seeds, etc. For the first few years, the Company carried on the business of manufacture and sale of sugar only. In the accounting year ending August 31, 1945, the Company had some transactions in gunnies and made a profit. In the next accounting year ending August 31, 1946, the Company made also a profit in transactions in gunnies and jute. In the accounting year ending August 31, 1947, (corresponding assessment year being 1948-49), the Company did business in mustard seeds, gunnies and hessian and made profit. After this assessment year, the Company ceased to have any business other than the manufacture and sale of sugar.

We are concerned with the assesment year 1948-49, corresponding to the accounting year ending August 31, 1947. In that year, the profits from the sale of gunnies, mustard and jute amounted to Rs. 6,14,018. Some of the business was done by purchases or sales in the territory now in Pakistan. During the same accounting year, the sugar business resulted in a loss of Rs. 2,09,306. The loss in sugar business was set off against the profits of the other businesses, and the Income-tax Officer by his order assessed the Company on an income of Rs. 4,04,712. The Company claimed to set off against this profit, business losses of back years in its business in sugar amounting to Rs. 13,43,069, which had been brought forward from the previous year. The contention of the Company was that these losses were of the same business, and that section 24 (2) of the Indian Income-tax Act applied. This contention was not accepted. On appeal to the Appellate Assistant Commissioner, the contention of the Company was accepted. The Commissioner of Income-tax then preferred an appeal before the Income-tax Appellate Tribunal (Calcutta Bench), which was allowed. The Tribunal gave reasons why the various activities of the Company could not be construed as the same business for the application of section 24 (2).

The Company then asked the Tribunal to make a reference to the High Court on four questions of law which, it stated, arose out of the Tribunal's order. The Tribunal declined to make a reference. The Company next moved the High Court under section 66 (2) of the Act for calling upon the Tribunal to state a case on the four questions, but its application was summarily dismissed. The Company has now, with Special Leave, appealed against the order of the Tribunal reversing the decision of the Appellate Assistant Commissioner and also against the order of the High Court declining to call for a statement of the case.

The question whether, on the application of the settled tests, different ventures carried on by an individual or a company form the same business is a mixed question of law and fact. Certain principles are applied to deter-

mine whether on the facts found a legal inference can be drawn that the different ventures constitute separate businesses or viewed together, can be said to constitute the same business. These principles were stated by Rowlatt, J. in *Scales* v. *Thompson & Co. Ltd.*[1] The learned Judge observed:

"...........the real question is, was there any inter-connection, any interlacing, any inter-dependence, any unity at all embracing those two businesses."

The learned Judge also observed that what one had to see was whether the different ventures were so interlaced and so dovetailed into each other as to make them into the same business. These principles have to be applied to the facts, before a legal inference can be drawn that a particular business is composed of separate businesses, and is not the same one. No doubt, findings of fact are involved, because a variety of matters bearing on the unity of the business have to be investigated, such as unity of control and management, conduct of the business through the same agency, the inter-relation of the businesses, the employment of same capital, the maintenance of common books of account, employment of same staff to run the business, the nature of the different transactions, the possibility of one being closed without affecting the texture of the other and so forth. When, however, the true facts have been determined, the ultimate conclusion is a legal inference from proved facts, and it is one of mixed law and fact, on which depends the application of section 24 (2) of the Act. In our opinion, a question of law did arise in the case, on which the High Court should have asked for a statement of the case. That question of law is:

"Whether on the facts and circumstances of the case, the business activities of the Company to wit, manufacture and sale of sugar and sale and purchase of gunnies, jute, mustard seeds constituted the same business within the meaning of section 24 (2) of the Indian Income-tax Act, 1922."

We accordingly allow Civil Appeal No. 144 of 1958, with costs, and direct the High Court to call for a statement of the case from the Tribunal on this question, and dispose of it, according to law.

As regards Civil Appeal No. 143 of 1958, which questions the order of the Tribunal, we express no opinion, though we may state that the learned counsel for the Department attempted to show that the order of the Tribunal in the circumstances of the case was correct, and that no other decision but the one given by the Tribunal was possible. In view of the fact that the Appellate Assistant Commissioner had drawn an inference contrary to that of the Tribunal, it cannot be said that the legal inference was one and one alone. We, however, express no opinion either way, because we are satisfied that a question of law did arise in the case, and have, therefore, allowed the other appeal, so that the matter may be examined by the High Court in the first instance, on a statement of the case by the Tribunal.

Civil Appeal No. 143 of 1958, will, therefore, be dismissed, but without any order as to costs.

C.A. No. 144 *of* 1958 *allowed and*
C.A.No. 143 *of* 1958 *dismissed.*

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1. (1927) 13 Tax Cases 83, 89.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Kantilal Manilal and others .. *Appellants**

v.

The Commissioner of Income-tax, Bombay North, Kutch and Saurashtra, Ahmedabad .. *Respondent.*

Income-tax Act (XI of 1922), section 2 (6-A)—Public Limited Company holding 5,000 shares in Bank of India—Bank offering new shares to existing shareholders in proportion of one new share for every three shares—Distribution of right to such new shares by the limited company to its shareholders in the proportion of two shares for each share held by each shareholder—If distribution of 'dividend'.

Dividend need not be distributed in money; it may be distributed by delivery of property or right having monetary value.

Where a Bank offered new shares to its existing shareholders in proportion of one new share for every three shares and a limited company which held shares in the Bank distributed the right to receive the new shares issued by the Bank to its own shareholders in the proportion of two shares for each share held by a shareholder, the distribution of the right to apply for and obtain two shares of the Bank for each share held by the shareholders of the company amounted to distribution of dividend.

Appeal from the Judgment and Order, dated the 22nd February, 1956, of the former Bombay High Court in I. T. R. No. 31 of 1955.

N. A. Palkhivala, Senior Advocate, (*I. N. Shroff,* Advocate, with him), for Appellants.

A. N. Kripal and *D. Gupta,* Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—This is an appeal by seven appellants with leave granted by the High Court of Judicature at Bombay certifying that it involves a question of importance.

The appellants held 570 out of a total issue of 800 shares of the Navjivan Mills Ltd., Kalol, a public limited company—hereinafter referred to as the Mills. Between the years 1943-47, the Mills purchased 5,000 shares of the Bank of India, Ltd. At an extraordinary general meeting of the shareholders of the Bank of India held on May 6, 1948, a resolution was passed increasing the share capital of the Bank and for that purpose offering new shares to the existing shareholders in the proportion of one new share for every three shares held by the sharholders. The face value of the new shares was to be Rs. 50, but the shares were issued at a premium of Rs. 50. The shareholders had to pay Rs. 100 for each new share. The Mills as the holder of 5,000 shares became entitled to receive 1,666 2|3 shares of the Bank of India at the rate of Rs. 100 per share. The Bank of India communicated its resolution by letter, dated May 25, 1948 and enclosed therewith three forms. Form A for acceptance, Form B for renunciation and Form C which may compendiously be called a form for allotment to nominees. On receiving the circular letter, the Directors of the Mills passed the following resolution:

"Resolved that the company having a holding of 5,000 ordinary shares in the capital of the Bank of India, Ltd. having now received an intimation from the said Bank that this company is entitled to get 1,666 2/3 more ordinary shares on payment of Rs. 50 as capital and Rs. 50 as premium per each share and it is considered proper to invest in the said issue of the said Bank the funds of this company to the extent of 66 shares only and to distribute the right of this company to the remaining 1,600 shares of the said issue amongst the shareholders of this company in the proportion of the shares held by them in

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*C.A. No. 364 of 1957. 22nd November, 1960.

this company. IT IS HEREBY RESOLVED that the funds of this company may be invested in the 66 shares out of 1,666 shares offered by the Bank of India, Ltd., and the right to the remaining 1,600 shares is hereby distributed among 800 shares of this company in the proportion of right to two shares of the Bank per one ordinary share held in this company.

The Managing Agents may take steps to intimate the shareholders to exercise the right if they like to do so."

Accordingly, the Mills exercised the right to take over only 66 shares out of the shares offered and resolved that the right to the remaining 1,600 shares be distributed amongst its 800 shareholders. The seven appellants as holders of 570 shares of the Mills became entitled to 1,140 shares of the Bank of India. The appellants agreed to the allotment of these shares and ultimately transferred them to a private company—Jesinghbai Investment Co., Ltd.

The assessment of the seven appellants and of other shareholders of the Mills was reopened under section 34 (1) (*a*) of the Indian Income-tax Act by the Income-tax Officer on the footing that the release by the Mills of the shares of the Bank of India amounted to a distribution of "dividend" and the value of the right released in favour of the shareholders though taxable under section 12 of the Act, had escaped tax. The order of the Income-tax Officer reassessing the income of the seven appellants was confirmed in appeal by the Appellate Assistant Commissioner and by the Appellate Tribunal. At the instance of the appellants, the following question was submitted by the Tribunal to the High Court at Bombay under section 66 (1) of the Income-tax Act:

"Whether on the facts and circumstances of the case the distribution of the right to apply for the shares of the Bank of India by Navjivan Mills, Ltd. in favour of the assessees amounted to a distribution of 'dividend' within the meaning of section 2 (6-A) of the Indian Income-tax Act."

The High Court re-framed the question as follows:

"Whether on the facts and circumstances of the case, the distribution of the right to apply for the shares of the Bank of India by Navjivan Mills, Ltd., in favour of the assessees amounted to a distribution of 'dividend'?",

and answered it in the affirmative.

The High Court observed that the definition of "dividend" in section 2 (6-A) was an inclusive and not an exhaustive definition, and even if the distribution of the right to the shares of the Bank of India could not be regarded as dividend within the extended meaning of that expression in section 2 (6-A), it was still dividend within the ordinary meaning of that expression and was taxable as income in the hands of the appellants.

Counsel for the appellants contended that the High Court was not justified, having regard to the form of the question which expressly related to the distribution of the right to the Bank of India shares being dividend within the meaning of the definition in section 2 (6-A) of the Income-tax Act, in enlarging the scope of the question and in answering it in the light of its ordinary meaning. There is no substance in this contention. "Dividend" is defined in section 2 (6-A) as inclusive of various items and exclusive of certain others which it is not necessary to set out for the purpose of this appeal. "Dividend" in its ordinary meaning is a distributive share of the profits or income of a company given to its shareholders. When the Legislature by section 2 (6-A) sought to define the expression "dividend" it added to the normal meaning of the expression several other categories of receipts which may not otherwise be included therein. By the definition in section 2 (6-A), "dividend" means dividend as normally understood and includes in its connotation several other receipts set out in the definition. The

Tribunal had referred the question whether the distribution of the right to apply for the Bank of India shares amounted to distribution of dividend within the meaning of section 2 (6-A) and in answering that question, the High Court had to take into account both the normal and the extended meaning of that expression. In the question framed by the Tribunal, there is nothing to indicate that the High Court was called upon to advise on the question whether the receipts by the appellants amounted to dividend only within the extended definition of that expression in section 2 (6-A).

It was also urged that in nominating its shareholders to exercise the option to purchase the new issue of the Bank of India, the Mills did not distribute any dividend. The Mills were, it is true, not obliged to accept the offer made by the Bank of India; however advantageous it might have been to the Mills to accept the offer: it was open to the Mills to renounce the offer. The Mills had three options, (1) to accept the shares, (2) to decline to accept the shares, or (3) to surrender them in favour of its nominee. It is undisputed that when the shares were offered by the Bank of India to its shareholders, the right to apply for the shares had a market value of Rs. 100 per share. The face value of the new share was Rs. 50 but the shareholders had to pay a premium of Rs. 50, thus making a total payment of Rs. 100 for acquiring the new share. The new shares were quoted in the market at more than Rs. 200: and the difference between the amount payable for acquiring the shares under the right offered by the Bank of India and the market quotation of the share was indisputably the value of the right. The Mills could not be compelled to obtain this benefit if it did not desire to do so: it could accept the shares or decline to accept those shares or exercise the option of surrendering them in favour of its nominees. This last option could be exercised by nominating the persons who were to take over the shares and that is what the Mills did. The Mills requested the Bank of India to allot the shares to its nominees, and the request for allotment to its nominees amounted to transfer of the right. By its resolution, the Mills in truth transferred a right of the value of Rs. 200 for each share held by its shareholders. This was manifestly not distribution of the capital of the Mills. It was open to the Mills to sell the right to the shares of the Bank of India in the market, and to distribute the proceeds among the shareholders. Such a distribution would undoubtedly have been distribution of dividend. If instead of selling the right in the market and then distributing the proceeds, the Mills directly transferred the right, the benefit in the hands of the shareholders was still dividend.

Dividend need not be distributed in money; it may be distributed by delivery of property or right having monetary value. The resolution, it is true, did not purport to distribute the right amongst the shareholders as dividend. It did not also take the form of a resolution for distribution of dividend; it took the form of distribution of a right which had a monetary value. But by the form of the resolution sanctioning the distribution, the true character of the resolution could not be altered. We are therefore of the view that the High Court was right in holding that the distribution of the right to apply for and obtain two shares of the Bank of India (at half their market value) for each share held by the shareholders of the Mills amounted to distribution of dividend.

The appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Mahabir Prasad Rungta (In both the Appeals) .. *Appellant**

v.

Durga Datta (In both the Appeals) .. *Respondent.*

Contract Act (IX of 1872), section 55—Right to rescind on breach of covenant for payment of bills within 10th of the following month—Time how far of essence of the contract—Interest on arrears of bills—Right to.

In commercial transactions time is ordinarily of the essence of the contract and where in an agreement for transport of coal for a period the payment of bills of every month by a particular day is mentioned but such bills were not paid in time or even within a reasonable time after presentation of the bills there is a breach of the covenant as to payment which entitles the other party to rescind the contract. The case is covered by section 55 of the Contract Act.

Where there is no agreement about interest nor implied and the notice did not specify the sum demanded, interest up to date of suit was not claimable. Interest as damages cannot be awarded. *Pendente lite* interest is within discretion of Court. (4 per cent. per annum till realisation was awarded).

Appeals from the Judgment and Decree, dated the 11th March, 1953, of the Judicial Commissioner's Court, Rewa, in First Appeals Nos. 104 and 116 of 1952.

B. C. Misra, Advocate, for Appellant, (In both the Appeals).

Tarachand Brijmohan Lal, Advocate, for Respondent, (In both Appeals).

The Judgment of the Court was delivered by

Hidayatullah, J.—Mahabir Prasad Rungta, appellant in these two appeals, was plaintiff in his own suit and defendant in a counter suit fied by Durga Datt, the respondent. The two appeals have been filed on certificates granted by the Judicial Commissioner, Vindhya Pradesh, against a common judgment and decree of the Judicial Commissioner's Court in four appeals filed by the rival parties, two in each civil suit. Certificate was also granted to the respondent; but he did not take steps in that behalf, and we are, therefore, concerned only with the appeals of Mahabir Prashad Rungta.

The two suits were filed in the following circumstances: Rungta owns a colliery at Budhar in Madhya Pradesh. On October 30, 1950, an agreement was executed between Rungta and the respondent, Durga Datt. Durga Datt agreed to transport coal from the colliery to the railway station at the rate of Rs. 2-8-0 per ton for a period of two years commencing from November 11, 1950 to November 10, 1952. That agreement is Exhibit P-1. The case of Rungta was that Durga Datt broke the contract from July 29, 1951, by stopping the work of transport. Durga Datt in his suit, on the other hand, averred that Rungta had broken the agreement and work of carriage as a result was stopped from July 30, 1951. The difference of a day between them is of no consequence. Rungta's case was that as a result of the breach of the contract on the part of Durga Datt, he was required to employ other carriers and to pay them at Rs. 3 per ton, and he incurred demurrage and damages to his constituents for delay in supplies. He, therefore, claimed a sum of Rs. 60,000 as damages, including Rs. 20,000 as general damages for loss of business, credit and reputation. He admitted that a sum of Rs. 15,087-5-0 was owed by him to Durga Datt on account of coal carried by

*Civil Appeals Nos. 54 and 55 of 1957. 31st January, 1961.

the latter, and he thus claimed Rs. 44,912-11-0, after allowing credit for that sum.

Durga Datt, in his suit, asked for a decree for Rs. 49,544-12-0. This included Rs. 26,139-11-0 on account of arrears of bills and Rs. 905-1-0 as interest on the amount. The balance (Rs. 22,500) was claimed as damages for loss of business and profits of the unexpired period of the contract at Rs. 1,500 per month. In giving the particulars for Rs. 26,139-11-0, Durga Datt stated that he had transported 15,844 tons 2 Cwts. of coal to the end of July, 1951, which were loaded in the wagons and despatched. He also claimed Rs. 7,500 in respect of 3000 tons of coal which he had transported to the railway yard, but which had not been loaded in the wagons. After adjusting sundry amounts and allowing credit for Rs. 21,861-7-6, he cliamed Rs. 26,139-11-0, as stated above. Durga Datt alleged that Rungta was guilty of breach of the contract, particularly of clauses (4), (5) and (8) thereof, which compelled him to recind the contract. These clauses may be quoted here:

"(4) Petrol:—It will be arranged by party No. 1 himself but party No. 2 will help in time of need to get the petrol; the expenses incurred by party No. 2 for securing such petrol will be borne by party No. 1. If party No. 2 in spite of his best efforts cannot arrange for petrol then in such case party No. 1 will not be responsible for any loss in regard to transportation of coal.

(5) Payment of Bills: Party No. 2 will make payment of Bills of party No. 1 for actual despatch of coal on the 10th of the following months;

(8) The road will be kept in repair by party No. 2".

The two suits were consolidated by the trial Judge, and evidence was partly recorded separately and partly for the two suits together. The trial Judge held that the breach of the contract proceeded from Durga Datt, and the suit of Rungta was decreed in the sum of Rs. 12,900 as damages due to him. In the other suit, the trial Judge held that Durga Datt was entitled to a payment of Rs. 26,695-6-6 and a decree for Rs. 13,795-6-6 was passed in his favour after setting off the two amounts against each other. The rest of the claims in the two suits were dismissed.

The parties were dissatisfied with the decrees, and four appeals were filed. The learned Judicial Commissioner reversed the decision of the trial Judge. He held that Rungta was guilty of the breach of the contract, because he had not made payments to Durga Datt as laid down by clause (5) of the agreement and had not kept the road in repair. He ordered the dismissal of Rungta's suit in its entirety, and reducing the amount decreed in Durga Datt's favour by Rs. 918-6-0 for which there was a double charge, he passed a decree for Rs. 25,113-4-0 awarding interest at 6 per cent. per annum on the amount from August 1, 1951, till date of realisation.

In these two appeals, Rungta challenges (*a*) the dismissal of his suit for damages based on the finding that the breach proceeded from him; (*b*) the inclusion of Rs. 7,500 in respect of 3000 tons of coal said to have been transported to the railway yard but not loaded in the wagons; and (*c*) the award of, and in the alternative, the rate of, interest.

The main question in these appeals is, who was responsible for the breach of the contract? The admitted position is that work stopped about the end of July, 1951. Previous to the closure of work, each party had written letters of protest to the other, Rungta complaining that Durga Datt had slowed his work and he was suffering loss, and Durga Datt complaining that lack of arrangements for petrol, failure to repair the road and the with-

holding of the money due to him were making it impossible for him to fulfil the contract. The trial Judge did not accept the case set up by Durga Datt, and held that he had wilfully stopped work. The learned Judicial Commissioner, on the other hand, held that Rungta had unreasonably and in breach of the agreement, withheld large payments and had left the road in a poor state of repair and thus caused the breach of the contract. He did not attach much importance to the controversy over the supply of petrol which controversy was not mooted before us again.

Of the two reasons on which Rungta was held responsible for the breach of the contract, the important one was the withholding of payment. Learned counsel for Rungta contended that time was not of the essence of the contract, and that, in any case, the payment of bills to Durga Datt depended upon the presentation of the bills in time. From the evidence, it appears that when the trucks were loaded, coal was not weighed. It was weighed at the bridge where the wagons were loaded, details of which were either with the railway company, or with the representative of Rungta at the station. Durga Datt was required to obtain the information from one source or the other before he could make his bills. How much coal was transported by Durga Datt was a fact also within the knowledge of Rungta, and the clause quoted above merely provided for payment of the bills by the 10th of the following month, without stating expressly that the presentation of bill was a condition precedent to the payment. The learned Judicial Commissioner held, on both the points, against Rungta, and in our opinion, rightly. Even if the presentation of the bills be regarded as a condition precedent to payment, it is clear enough that Rungta paid not the whole of the amounts due under the bills but only small sums from time to time. Learned counsel for Rungta contended that Durga Datt, by receiving such payments and by not insisting on his rights, must be deemed to have waived payment in a lump sum under clause (5). But no case of waiver was pleaded by him, and the evidence, if any, cannot be looked into. In any event, an examination of the accounts between the parties discloses that payments were, in fact, withheld. Under the agreement, 10 per cent. of the bills was to be withheld to build up a security deposit of Rs. 2,000, and an amount in excess of this was withheld by the end of May. No doubt, the bills were not presented by Durga Datt at the end of each month; bills for April and May were submitted on 16th July, 1951, and bills for June and July, on August 6 and 13 respectively. Even so, the indebtedness of Rungta to Durga Datt stood as follows:

16th July, 1951	about	Rs.	7,835
27th July, 1951	"	Rs.	6,790
6th August, 1951.	"	Rs.	11,170
12th August, 1951	"	Rs.	15,590

These sums were in addition to a security deposit of Rs. 2,038. Whatever might be the intent and purpose of the clause in question, it is clear enough that Rungta was withholding substantial amounts over a very long period without any reasonable cause. To Durga Datt, the receipt of money in time was a vital consideration if he was to fulfil his contract at all. It was not to be expected that he would go on carrying thousands of tons of coal from the colliery without receiving payments. In our opinion, these facts speak for themselves, and amply support the finding of the learned Judicial Commissioner that Rungta was really responsible for hamstringing the work of Durga Datt. Why Rungta

did so is not very clear from the record of the case, though an attempt was made to show that the quantity of coal transported from month to month was falling. An abstract of the quantities transported does not support this allegation. This abstract is of the quantity loaded in wagons. The figures are almost constant, except in one month (April). There were, of course, variations in the quantity of coal loaded in the wagons from month to month; but the evidence shows that some coal remained at the siding in heaps and was not loaded immediately. The variation in the quantity also might have been due as much to Durga Datt as to the colliery and its output. In our judgment, no inference can be drawn from the abstract, showing the quantities of coal loaded into the wagons, that Durga Datt had slackened work after May. Learned counsel for Rungta cited some cases in which time was not considered as of the essence of the contract. Most of these cases deal with immovable property, where a different rule applies. In commercial transactions, time is ordinarily of the essence, and in the agreement, with which we are concerned, the payment of bills by a particular date was expressly mentioned. The intention, obviously, was that Durga Datt would receive payments for work executed as soon as the amounts became due. Rungta did not pay these amounts, which were also within his own knowledge either by the 10th of the following month or even within a reasonable time after the presentation of the bills. In these circumstances, we are of opinion that clause (5) was breached by Rungta.

In addition to this, there were difficulties of the road being in a bad state during the rainy season. The evidence shows that the wheels of the trucks used to sink in the mud frequently and the trucks had to be dragged out. For this state of affairs, Rungta was mainly responsible under clause (8). The inclusion of the clause in the agreement itself shows that the parties realised that there might be hindrance to the trucks, if the road was not repaired. The finding of the Judicial Commissioner on this part of the case is, therefore, sound, though that reason by itself might not have been sufficient for stopping the work altogether and rescinding the contract.

The case is thus covered by section 55 of the Indian Contract Act, and Durga Datt was entitled to rescind the contract, when the very important condition of the agreement was broken by Rungta. We confirm the finding of the Judicial Commissioner on this part of the case.

This brings us to the inclusion of Rs. 7,500 on account of 3,000 tons of coal alleged to have been transported. The evidence on this part of the case is somewhat unsatisfactory. Fortunately for Durga Datt, some of the witnesses of Rungta admitted that besides coal which was loaded in the wagons, there were three large heaps of coal lying in the yard and that this coal was transported by Durga Datt. The estimate of Durga Datt was 3,000 tons. That is no more than a mere guess. A railway official was examined in the case, and he stated that loose coal was sufficient to fill "100 or 50 wagons". From the schedule filed, it appears that a wagon carries on an average 20 tons. Taking the number of wagons as 75, the quantity could not exceed 1,500 tons. A sum of Rs. 3,750 as payment for 1,500 tons at Rs. 2-8-0 per ton ought to have been included, instead of Rs. 7,500. To that extent, the decree in favour of Durga Datt would be modified.

There remains the question of interest. Interest for a period prior to the commencement of suit is claimable either under an agreement, or usage of trade or under a statutory provision or under the Interest Act, for a sum certain where notice is given. Interest is also awarded in some cases by Courts of

equity. (*Bengal Nagpur Railway Co, Ltd.* v. *Ruttanji Ramji and others*).[1] In the present case no agreement about interest was made, nor was it implied. The notice which was given did not specify the sum which was demanded, and, therefore, the Interest Act does not apply. The present case also does not fall within those cases in which Courts of equity grant interest. Learned counsel for Durga Datt claimed interest as damages; but it is well-settled that interest as damages cannot be awarded. Interest up to date of suit, therefore, was not claimable, and a deduction shall be made of such interest from the amount decreed. As regards interest *pendente lite* until the date of realisation, such interest was within the discretion of the Court. The rate fixed is 6 per cent. which, in the circumstances and according to the practice of Courts, appears high. Interest shall be calculated at 4 per cent per annum instead of at 6 per cent, and the decree shall be modified accordingly.

Except for reduction in the amount decreed by Rs. 3,750 and of interest up to the date of the filing of the suit which has been disallowed and of the rate of interest *pendente lite* until realisation, the appeals shall stand dismissed. In view of the substantial failure of the appeals, the appellant shall pay the costs in this Court. One hearing fee.

Appeals dismissed in the main.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—B. P. SINHA, *Chief Justice*, S. K. DAS, A. K. SARKAR, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

The State of Andhra .. *Appellant**

v.

Gaddam Venkatappayya .. *Respondent.*

Madras Police Subordinate Service—Rules relating to—Rules 3, 4 and 5—Scope.

The words 'upto, not more than' in rule 3 of the Rules relating to the Madras Police Subordinate Service framed under section 243 of the Government of India Act, 1935, merely fixes the maximum percentage of rank-promotees (promotion from Head-Constables to Sub-Inspectors posts) in the category, leaving it to the appointing authorities to adopt any percentage below this figure. There is no violation of rule 4 as to seniority, in the appointment of direct recruits to substantive posts before the absorption of rank-promotees. As direct recruits and rank-promotees belonged to distinct classes the juniority for revision had to be determined separately for each class and not on the basis of the two classes forming part of a unified force before confirmation. Rule 5 (*b*) makes specific provision for an order of discharge laid down in clause (*a*) being departed from in cases where such order would entail "exceptional administrative inconvenience".

Appeal from the Judgment and Order dated the 21st July, 1955 of the High Court of Andhra, Guntur, in Writ Appeal No. 122 of 1954.

K. N. Rajagopal Sastri, Senior Advocate; *D. Gupta*, Advocate, with him, for Appellant.

T. V. R. Tatachari, Advocate, for Respondent.

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*C. A. No. 506 of 1957. 8th December, 1960.

1. L.R. 65 I.A. 66: (1938) 1 M.L.J. 640: I.L.R. (1938) 2 Cal. 72.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This appeal by the State of Andhra is from the Judgment of the High Court Andhra, dated July 21, 1955, on a certificate under Article 133 (1) (*c*) of the Constitution.

The respondent joined the Madras Police Force as a Constable on September 1, 1939. He became a permanent Head Constable in 1946 and was promoted to officiate as a Sub-Inspector on October 1, 1947, when his probation commenced. By order dated September 24, 1950, he was declared to have satisfactorily completed his period of probation and was brought to the "A" list with effect from September 10, 1950. He was still merely officiating as a Sub-Inspector, the effect of his being placed in List "A" being that he came into the category of an "approved probationer", *i.e.*, fit for being confirmed as Sub-Inspector when substantive vacancies arose. On August 3, 1952, the District Superintendent of Police, Krishna, issued an order reverting the respondent to the rank of Head Constable with effect from August 14, 1952, *i.e.*, to the post which he substantively held, for the reason that there was not a sufficient number of vacancies in the post of Sub-Inspectors for being filled by him. It may be mentioned that such reversion was not confined to the respondent alone but extended to a very large number of officiating Sub-Inspectors who are similarly promotees from the rank of Head Constables. The reverted officers petitioned to the Inspector-General of Police and in reply thereto and in further explanation and clarification of the reasons for the reversions the Inspector-General of Police, Madras, issued a memorandum on January 15, 1953, in the following terms:

"MEMORANDUM.

Sub: Officiating Sub-Inspector—Reverting as Head Constables—Seniority over direct recruits—Petitions.

As direct recruits are recruited against vacancies specially reserved for them and cannot be reverted for want of vacancies, seniority between directly recruited Sub-Inspectors and promoted Sub-Inspectors should be determined separately. Their contention that they should not have been reverted in preference to direct recruits is not, therefore, correct. Their reversion as Head Constables is in order."

The respondent thereafter submitted a memorial to Government in which the principal challenge was to the view of the Government that the directly recruited Sub-Inspectors formed a category distinct from the promotee-Sub-Inspectors as not being countenanced by the relevant rules relating to the constitution of the Police Establishment. Not having obtained any redress by reason of his memorial, the respondent filed before the High Court of Madras a petition under Article 226 of the Constitution (Writ Petition No. 524 of 1953) and prayed therein that the State of Madras may be directed by the issue of a writ of *mandamus* to refrain from enforcing the order reverting him as Head Constable but to consider his claim to be confirmed as Sub-Inspector on the basis of his seniority in the list of approved probationers. Balakrishna Iyer, J., who heard the petition allowed it and issued a direction to the State

"to forbear from giving effect to the order of reversion if the petitioner by virtue of his seniority among promotees can be included in the 30 per cent. already referred to."

We shall be dealing in detail with the nature and scope of the rule as to the 30 per cent. referred to here, which formed the basis of the learned Judge's order in its proper place and will not interrupt the narration of the events which have led to the appeal now before us. The State preferred an appeal from this judgment which was transferred to the High Court of Andhra after that Court was formed. The learned Judges who heard the appeal differed from the

learned Single Judge in his view as to the scope of the rule as to 30 per cent. but dismissed the appeal holding that the Government in directing the reversion of the promotee-probationers had not observed strictly the relevant rule as to juniority prescribed in rule 5 of the Service Rules, to which rule we shall refer in due course. The State of Andhra thereafter moved the High Court for the grant of a certificate and having obtained it, has filed this appeal.

Though in his petition under Article 226 filed before the High Court of Madras, the petitioner had alleged that his reversion from the officiating post of Sub-Inspector to his substantive post as Head Constable was a reduction in rank within the meaning of Article 311 (2) of the Constitution, *i.e.*, a reduction by way of punishment effected without giving him an opportunity to show cause therefor, this contention was abandoned early in the proceedings before the Court and the case has proceeded throughout on both sides on the footing that the reversion was effected solely for administrative reasons and not for any misconduct by way of punishment. Indeed, it may be mentioned that when the respondent was normally due for promotion to the substantive post of Sub-Inspector—without reference to the Judgment of the High Court—he was duly promoted to that post and he now occupies the post of a Sub-Inspector drawing the increments and salary fixed therefor.

Article 311 (2) being out of the way, the questions that arise fall under two heads: (1) Was there a violation of the Service Rules when the respondent was reverted as Head Constable? (2) If there was such a violation, do breaches of Service Rules by themselves constitute an infringement of the legal rights of officers to whom they apply, entitling them to seek remedies therefor before Courts.

The rules on the construction of which the answer to the first point depends are those framed, *inter alia,* under section 243 of the Government of India Act, 1935, entitled "Rules relating to the Madras Police Subordinate Service". Rule 3 which relates to recruitment and which was held to be violated, by the learned Single Judge ran in these terms:

"*Rule 3. Method of appointment and promotions*:—

(a) Appointment to the several classes and categories shall be made as indicated in Annexure I.

ANNEXURE I

Category 2	Method of appointment	Limitation	Appointing authority
(1)	(2)	(3)	(4)
Sub-Inspectors	Promation from Head Constables	Up to not more than 30% of the cadre	In the mofussil the D. I. G. Police concerned
	Direct recruitment	Nil	do

This is followed by rules 4 & 5 which read:

"*Rule 4. Right of probationers and approved probationers to appointment to vacancies*:—A vacancy in any class or category shall not be filled by the appointment of a person who has not yet commenced his probation in such class or category when an approved probationer, or a probationer therein is available for such appointment."

"*Rule 5. Order of discharge of probationers and approved probationers*:—

(a) The order in which probationers and approved probationers shall be discharged for want of vacancies shall be—

first, the probationers in order of juniority; and second, the approved probationers in order of juniority.

(*b*) The order of discharge laid down in sub-rule (a) may be departed from in cases where such order would involve excessive expenditure on travelling allowance or exceptional administrative inconvenience."

The other rules merely carry out the principles underlying those extracted and do not need to be set out.

To appreciate the points urged before us by the learned counsel for the appellant-State on the proper interpretation of these rules, it is necessary to set out the contentions respectively urged by the two parties in the Courts below and how they were dealt with. On behalf of the respondent the points urged were:

(1) That on a proper construction of rule 3, promotee-Sub-Inspectors referred to in departmental parlance as rank-promotees, as distinguished from those directly recruited were entitled to be appointed to a minimum of 30 per cent. of the cadre strength and that this rule was violated in that at the time of the respondent's reversion the force consisted only of less than 25 per cent. of rank-promotees and more than 75 per cent. of those directly recruited. If the rule as to the proportion of appointments as laid down in Rule 3 had strictly been followed there would have been no necessity for reverting the respondent as Head Constable.

(2) The 30 per cent. and the 70 per cent. laid down in rule 3 applied only at the stage of the initial recruitment of Sub-Inspectors and that when once that recruitment was made and the probation of the officers started, no difference could under the rules be thereafter made between the two classes of appointees but that both of them constituted one unified force the members of which were entitled to be appointed to substantive posts as full members of the Service solely on the basis of their *inter se* seniority (apart from misconduct or inefficiency, etc.). The appointment to substantive posts of officers directly recruited in preference to persons like the respondent whose probation had commenced at an earlier date was therefore a violation of rule 4 of the Service Rules.

(3) If at any time the cadre strength was reduced by the abolition of temporary posts there might have to be reversions, but in reverting officers the rule as to juniority laid down by rule 5 (*a*) had to be strictly followed. This rule made no distinction between Sub-Inspectors appointed directly and rank-promotees. Both formed a single category and among them those who had not completed their probation had to be reverted first and thereafter the approved probationers in the order of their juniority. In the present case the respondent urged that approved probationers like himself who were senior to several of the officiating Sub-Inspectors directly recruited had been reverted out of turn in violation of rule 5 (*a*).

(4) If in the circumstances stated by the Government (which would be mentioned later), the directly recruited Sub-Inspectors could not properly be reverted because of the assurances given to them, Government were bound to retain all rank-promotee approved probationers as officiating Sub-Inspectors until they could be appointed in substantive vacancies as full members thereof.

In answer to these contentions the case which the State put forward was as follows:—

(1) The rule as to the proportion between the rank-promotees and direct recruits laid down by rule 3 read with the Annexure fixed only the maximum percentage of rank-promotees. The words "up to, not more than" meant and could in the context mean only, that the maximum proportion of rank-promotees could be only 30 per cent. This was made clear by there being no limitation

placed on the proportion of direct recruits. In other words, the 30 per cent. was the ceiling fixed and not any minimum and the rule in effect guaranteed direct recruits a minimum proportion of 70 per cent. There was therefore no violation of this rule when the proportion of rank-promotees fell to a little below 25 per cent. at the relevant date.

(2) Even if rule 3 had been strictly followed the respondent would have derived no benefit from the operation of that rule because he was well below the level of rank-promotees who would even then had to be absorbed. It may be mentioned that it was because of this feature that the order of Balakrishna Iyer, J., took the form of directing the Government

"to forbear from giving effect to the order of reversion *if the petitioner by virtue of his seniority among promotees can be included among* 30 *per cent.*"

(3) On a proper construction of the rules, the proportions laid down in rule 3 applied whether or not at the stage of the initial recruitment, certainly at the stage of appointments to substantive posts, *i.e.*, absorption as full members of the permanent strength of the cadre. It was their further contention based on the above, that for considering confirmations provided for by rule 4 the category of direct recruits had to be treated as a class different from the category of rank-promotees and there was no question of seniority as between members of the two groups but only within each group. On this basis the State Government urged that at the stage of absorption governed by rule 4 the rule as to proportion had to be worked out and that consequently there had been no violation of that rule.

(4) There had been no violation of rule 5 either, on two grounds (*i*) based on denying that there was a unified category of Sub-Inspectors and in putting forward that the two classes which made up the Service, *viz.*, direct recruits and rank-promotees formed different categories, and (*ii*) that even if they formed a single category of officers after their initial appointments, there had been no violation of the rule fixed for reversion by rule 5 (*a*) by reason of the special circumstances of the case which brought their action within the specific provision in rule 5 (*b*). In connection with this last submission it was pointed out that at the time of the police action in Hyderabad a large number of persons were recruited direct as Sub-Inspectors to whom an assurance had been given that they would not be reverted. A large number of such temporary appointments were made and these directly recruited Sub-Inspectors had to be provided with posts when temporary posts were getting abolished. This introduced an administrative problem which could be solved only by reverting the rank-promotees.

We shall now proceed to a consideration of the points thus in controversy between the parties and which were urged on either side before us. The first point to be dealt with is as to whether there had been an infraction of rule 3 of the Service Rules by reason of the proportion of rank-promotees being less than 30 per cent. of the total number of Sub-Inspectors in service at the date of the respondent's reversion. As has already been pointed out, the learned Single Judge had rested his decision in favour of the respondent on an infraction of this rule, but the learned Judges of the High Court in appeal had taken a different view. Learned Counsel for the respondent sought to support the view that the words "up to, not more than 30 per cent." in the rule meant up to minimum of 30 per cent. the effect of the addition of the words "not more than" being merely to eliminate fractions and permit the number to be rounded off to the nearest lower integer. It would be seen that the learned Single Judge had stressed the use of the words "up to " and practically gave no effect to the words "not more than" in arriving at the construction that he adopted. We

consider that this construction is erroneous, particularly in the context of the provision as regards direct recruits, in regard to whom there is no limitation placed on the proportion which they could have in the Service. Taken in conjunction with this provision it is clear that the words "up to, not more than" merely fix the maximum percentage of rank-promotees in the category, leaving it to the appointing authorities to adopt any percentage below this figure. We consequently endorse the view which the learned Judges of the Andhra High Court took in dissenting from the construction which the learned Single Judge placed on the scope of rule 3. The reversion of the respondent cannot, therefore, be challenged on the ground that there had been an infraction of rule 3 of the Service Rules.

The next question is as to whether rule 4 of the Service Rules by which confirmations were regulated, had been violated in promoting the more junior direct recruits to substantive posts in preference to rank-promotees like the respondent who were senior to them in service in the sense that the latter's probation as officiating Sub-Inspectors commenced earlier. The application of these rule in the context of the facts of this case depends largely on whether rank-promotees and officers directly recruited form or do not form the same class or category becoming integrated into one Service on their initial appointment to the Service. It is common ground that the two classes become integrated as members of a unified Service after appointment as full members of the Service. The point in controversy is limited to the period between the date of their initial appointment and their absorption as full members. If up to that date they formed two categories and the seniority in each group has to be reckoned separately, the order of the Government would be perfectly in order and constitute no breach of the rules. But if on the other hand officers recruited by either of the two modes—Promotions from the rank of Head Constables and Sub-Inspectors directly recruited—form an integrated and unified force from the very commencement of their appointments, then on the application of rule 4 confirmations ought to depend on mere seniority (subject to factors relevant to merit or demerit) as officiating Sub-Inspectors without regard to the manner in which they were originally appointed. Though the learned Single Judge did not directly pronounce on the effect of rule 4, the Andhra High Court held that the rule of seniority prescribed by the rule had been violated. After expressing their disagreement with the learned Single Judge in his view that the minimum of 30 per cent. laid down by rule 3 had been violated, they observed:

> "Nor does it follow that we can countenance the argument of the learned Government Pleader that irrespective of the percentage of promotees on the cadre at a given time, all vacancies can be filled up, if the Government so chooses, only with direct recruits. We think that from both the classes of approved probationers, be it direct recruits or be it candidates from the ranks, selection should be made without any distinction, provided of course that so far as promotees are concerned the percentage of 30 is not exceeded. Now, it is admitted by the Government that the percentage of promotees, was only 24.5 at the time when the petitioner was sent back as Head Constable. That being so, it cannot be contended for the State that the ceiling will be exceeded if the petitioner is promoted. As we read the rules, when once an officer qualifies as an approved probationer, no distinction can be made between him and a direct recruit approved probationer."

We are unable to agree with the reasoning or the conclusion here expressed. It would be seen that the learned Judges have, though tacitly, accepted the case put forward by the Government, and in our view correctly, that the integration of the two groups is only after the stage of absorption as full members of the Service, and that at that stage the rule as to the proportion laid down in the Annexure to rule 3 comes into operations. If the 30 per cent. which is the limit set for rank-promotees for absorption as full members is merely a ceiling impos-

ed for the benefit of direct recruits, as rightly held by the learned Judges, it is difficult to see how the rule could be held to be violated because the proportion of rank-promotees confirmed fell below the figure of 30. We, therefore, consider that there was no violation of the rule as to seniority prescribed by rule 4 in the appointment of the direct recruits to substantive posts before the absorption of rank-promotees like the respondent.

We shall next proceed to deal with rule 5 which deals with the power of Government to effect reversions and the conditions and limitations prescribed therefor.

It would be seen that clause (*a*) of rule 5 substantially reverses for the purpose of discharge or reversion the order in which confirmations are to be made as set out in rule 4. We have held that the respondent had no right under the rules to insist on his being confirmed, on the terms of rule 4 read in the light of rule 3. On the same line of reasoning it would follow that as direct recruits and rank-promotees belonged to distinct classes the juniority for reversion had to be determined separately for each class and not on the basis of the two classes forming part of a unified force before confirmation. If this test were applied, it cannot be contended that the reversion of the respondent infringer rule 5 (*a*).

But this apart, the impugned order could also be sustained on the basis of the provision contained in clause (*b*) or rule 5 which reads:

"The order of discharge laid down in sub-rule (*a*) may be departed from in cases where such order would involve excessive expenditure on travelling allowance or exceptional administrative inconvenience."

In the present case the Government explained their reason for the order for reversion of rank-promotees in the affidavit which they filed to the writ petition in these terms:

"His reversion was necessitated by the fact that a large number of Sub-Inspectors on other duty in Hyderabad State reverted to this State and that a number of temporary posts created for special purposes during the disturbed period immediately following the police action in Hyderabad had to be abolished and that the direct recruited Sub-Inspectors had necessarily to be absorbed as Sub-Inspectors as they cannot be asked to work in any lower post being direct recruits to a particular category, *viz*., that of the Sub-Inspector. This reversion of rank-promoted Sub-Inspectors was rendered absolutely necessary in the exigencies of service and for administrative purposes and as such, it cannot be deemed to be arbitrary or contrary to rules or in the nature of punishment as alleged by the petitioner."

It was this circumstance that was stated before the High Court of Madras in the Writ Petition as that which brought the impugned order of reversion within "exceptional administrative inconvenience" provided for by the last words of the rule. The learned Single Judge accepted as correct the facts stated by the Government as the reason for the reversion, stating:

"Mr. Seshachalapathi explained that Government were in a difficult position as a consequence of the members taken in connection with the police action in Hyderabad. A large number of persons were directly recruited as Sub-Inspectors on the assurance that they would not be ousted. I do not suggest that Government should go back on any assurance that they may have given to these direct recruits. Far be it from me to encourage anything that might savour of bad faith on the part of Government..........But I would still say that in order that Government may keep faith with those whom they recruited directly as Sub-Inspectors they cannot break faith with or ignore the rights of those who were promoted as Sub-Inspectors."

If the facts were accepted as correct, and we might point out that their accuracy was never challenged at any stage either in the High Court or before us, it appears to us that the order of reversion passed would be justified as being covered by the last words of clause (*b*) even if the order laid down in

rule 5 (*a*) were infringed. In these circumstances it is not clear why the learned Judge should have observed:

> "The Government do not rest their case on rule 5 (*b*)"

when the facts stated by Government and accepted by him brought their action well within the scope of that clause. In their memorandum of grounds in Writ Appeal No. 122 of 1954 which the State filed to the High Court the appellants urged:

> "The learned Judge failed to accpreciate the specified circumstances of the situation which rendered the reversion necessary in the instant case."

When the matter was before the High Court of Andhra the learned Judges observed:

> "The learned Judge stated in his judgment that the Government do not rsst their case on rule 5 (*b*)."

In their turn they too accepted the case of the Government as regards the circumstances which necessitated the order of reversion and observed:

> "The Government frankly stated, however, that they were in a difficult position because of certain measures which they were compelled to take in connection with the police action in Hyderabad when a large number of persons were diretly recruited as Sub-Inspectors with the assurance that they would be entertained permanently. In order to keep that assurance with such persons they were constrained to revert the rank-promotees but there is no rule which enables the Government to do so."

We must express our dissent from the last sentence extracted above, because rule 5 (*b*) makes specific provision for an order of discharge laid down in clause (*a*) being departed from in cases where such order would entail "exceptional administrative inconvenience" and on the facts accepted both by the learned Single Judge and by the High Court of appeal the words extracted were attracted.

Before leaving rule 5 there is one other matter to which we desire to advert and that relates to the observation of the High Cocrt in the judgment now under appeal which seems to imply that if the Government found itself in dificulty owing to the assurances given to the officers directly recruited, they could under the rules have solved it, not by ordering the reversion of the rank-promotees but by continuing them in their officiating posts until they could be absorbed as full members of the Service. This was one of the contentions urged by the respondent and the learned Judges say:

> "It seems to us clear that whether they imposed merely a ceiling or whether there is an obligation upon the Government to fill up 30 per cent. of the vacancies from among promotees, the State cannot say, on the facts, before us, that there are no vacancies for promotees as such."

It looks to us impossible to support this view on any construction of the rules. In effect it means either that temporary posts could not be abolished, or that approved probationers could not be reverted. The first alternative could not obviously have been meant and the other is plainly contrary to the terms of rule 5 (*a*) which makes provision for the reversion of approved probationers. Of course, as a measure of relief to their subordinates and to avoid hardship to them Government might retain people in their officiating posts, but it is quite a different thing to import a legal and enforceable obligation on their part to do so.

In the view that we have taken that there has been no breach of the Service Rules in ordering the reversion of the respondent as a Head Constable, the question as to whether an infraction of a Service Rules confers a legal right which could be agitated in Court does not arise. We do not propose, there-

fore, to consider that question and indeed we did not call upon learned counsel for the appellant to argue that part of his case.

The appeal is accordingly allowed, the judgment of the High Court set aside and Writ Petition No. 524 of 1953 dismissed. In view of the order of the High Court dated February 3, 1956, by which the appellant was granted a certificate under Article 133 (1) (c) of the Constitution subject to the condition that the respondent would be entitled to his taxed costs incurred in this Court in any event from the appellant, there will be an order that the appellant will pay the costs of the respondents in the appeal, in this Court.

Appeal allowed.

SUPREME COURT OF INDIA.

(Original Juridiction).

PRESENT:—B. P. SINHA, *Chief Justice*, S. K. DAS, A. K. SARKAR, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Babulal Parate .. *Petitioner**

v.

The State of Maharashtra and others .. *Respondents.*

Criminal Procedure Code (V of 1898), *section* 144—*Scope*—Vires—*If infringes fundamental rights under Article* 19 (1) (a) *and* (b) *of the Constitution of India* (1950).

Broadly speaking section 144, Criminal Procedure Code, is intended to be availed of for preventing disorders, obstructions and annoyances and is intended to secure the public weal. The powers are exercisable by responsible Magistrates and these Magistrates have to act judicially. Moreover the restraints permissible under the provision are of a temporary nature and can only be imposed in an emergency. The restraints can be placed in the interest of 'public order', though the prevention of such activities would be in the 'public interest'. Clauses (2) to (6) of Article 19 of the Constitution do not require the making of a law solely for the purpose of placing the restrictions mentioned in them. Nor does the section confer an arbitrary power on the Magistrate in the matter of making an order.

Wide, though the power conferred by section 144, Criminal Procedure Code, appears to be, it can be exercised only in an emergency and for the purpose of preventing obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or disturbance of the public tranquillity or a riot or 'an affray'. These factors condition the exercise of the power and it would consequently be wrong to regard that power as being unlimited or untrammelled. No one has a right to cause 'obstruction, annoyance or injury,' etc. The section cannot be struck down on the ground that the Magistrate may possibly abuse his powers. It must be assumed that the powers will be exercised legitimately and honestly.

The rights guaranteed by Article 19 (1), clause (*a*) are not absolute rights but are subject to limitations specified in clause (2) of Article 19. Similarly, the rights to which sub-clause (*b*) relates are subject to the limitations found in clause (3) of Article 19. The provisions of the section 144, which commit the power in Magistrates (for maintaining law and order) cannot be regarded as unreasonable. The decision of the Magistrate would undoubtedly be a judicial one and he will have to set aside the order unless he comes to the conclusion that the grounds on which it rests are in law sufficient to warrant it. Though no appeal has been provided the High Court has power under section 435 read with section 439 of the Criminal Procedure Code to entertain an application for the revision of such an order. Again in a prosecution under section 188, Penal Code for infringement of an order under section 144, Criminal Procedure Code, the validity of the order could be challenged. It cannot therefore be said, that the remedy of judicial review is illusory.

The test laid down for taking action under section 144, Criminal Procedure Code, is not merely 'likelihood' or 'tendency'. The power under the section is exercisable not only where present danger exists but also when there is an apprehension of danger. Anticipatory action of the kind permissible under section 144 is not unpermissible under

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*Petition No. 90 of 1956. 12th January, 1961.

clauses (2) and (3) of Article 19 giving power to the legislature to make laws placing reasonable restrictions on the exercise of rights conferred by these clauses in the interest of among other things public order. Public order has to be maintained in advance in order to ensure it and, therefore it is competent to a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order. It cannot be said that the provision substitutes suppression of lawful activity or right for the duty of public authorities to maintain order.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

R. V. S. Mani, Advocate for Petitioner.

N. S. Bindra, Senior Advocate, (*K. L. Hathi* and *R. H. Dhebar*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Mudholkar, J.—This is a petition under Article 32 of the Constitution for issuing an appropriate writ to the respondents not to enforce the provisions of section 144 of the Criminal Procedure Code or an appropriate writ forbidding respondent No. 4 from proceeding further with the prosecution of the petitioner for offences under sections 143 and 188 of the Indian Penal Code read with section 117 thereof, for quashing the proceedings against the petitioner before respondent No. 4 and for the issue of a writ of *habeas corpus* to respondents 1 to 3 directing them to produce or to cause to be produced the petitioner to be dealt with according to law and to set him at liberty.

The facts which have led up to the petition are briefly as follows:

There are two unions of textile workers in Nagpur, one known as the Rashtriya Mill Majdoor Sangh and the other as Nagpur Mill Majdoor Sangh. The former is a branch of the Indian National Trade Union Congress. The Rashtriya Mill Majdoor Sangh entered into an agreement with the management of the Empress Mills regarding the closure of Empress Mill No. 1 for rebuilding it and regarding the employment of workers who were employed therein in a third shift. This agreement was opposed by the Nagpur Mill Majdoor Sangh. On January 25, 1956, a group of workers belonging to the Nagpur Mill Majdoor Sangh went in a procession to Gujar's Wada, Mahal, Nagpur where the office of the Rashtriya Mill Majdoor Sangh is located. It is said that a scuffle took place there between some members of the procession and some workers belonging to Rashtriya Mill Majdoor Sangh. Thereupon an offence under section 452 read with section 147 of the Indian Penal Code was registered by the police on January 27, 1956. A large procession consisting of the workers of the Nagpur Mill Majdoor Sangh was taken out. This procession marched through the city of Nagpur shouting slogans which, according to the District Magistrate, were provocative. On the same night a meeting was held at the Kasturchand Park in which it was alleged that the workers belonging to the Nagpur Mill Majdoor Sangh were instigated by the speakers who addressed the meeting to offer satyagraha in front of the Empress Mill No. 1 and also to take out a procession to the office of the Rashtriya Mill Majdoor Sangh. On January 28, 1956 the workers belonging to the Nagpur Mill Majdoor Sangh assembled in large numbers in Mahal Chowk and on Mahal road blocking the traffic on the road. It is said that these persons were squatting on the road and as they refused to budge the District Magistrate passed an order at 4.00 A.M. on January 29, 1956, which came into force immediately and was to remain in force for a period of fifteen days prohibiting, among other things, the assembly of five or more persons in certain areas specified in the order.

The petitioner entertained the view that the order promulgated by the District Magistrate under section 144 of the Code of Criminal Procedure was an encroachment on the fundamental rights of the citizens to freedom of speech and expression and to assemble peaceably and without arms, guaranteed under Article 19 (1) (*a*) and (*b*) of the Constitution and, therefore, he held a public meeting outside the area covered by the aforesaid order. It is alleged that at that meeting he criticised the District Magistrate and exhorted the workers to contravene his order and take out processions in the area covered by the order. Thereupon he was arrested by the Nagpur police for having committed the offences already referred to and produced before a magistrate. The magistrate remanded him to jail custody till February 15, 1956. The petitioner's application for bail was rejected on the ground that the accusation against him related to a non-bailable offence. Thereupon the petitioner moved the High Court at Nagpur for his release on bail but his application was rejected on February 22, 1956. The petitioner then presented a petition before the High Cocrt under section 491 of the Code of Criminal Procedure for a writ of *habeas corpus*. That petition was dismissed by the High Court on May 9, 1956. The petitioner then moved the High Court for granting a certificate under Article 132 of the Constitution. The High Court refused to grant the certificate on the ground that in its opinion the case did not involve any substantial question of law regarding the interpretation of the Constitution and was also not otherwise fit for grant of a certificate. On April 23, 1956, the petitioner presented the present petition before this Court. The petitioner also sought an *ex parte* order for the stay of the proceedings before the respondent No. 4 till the decision on the petition to this Court. This Court admitted the petition but rejected the application for stay. On May 6, 1956, the petitioner took out a notice of motion for securing stay of the proceedings before respondent No. 4. On May 28, 1956, this Court ordered that the entire prosecution evidence be recorded but the delivery of the judgment be stayed pending the decision of this petition.

After the proceedings were stayed by this Court, the petitioner was released on bail by the trying magistrate.

On behalf of the petitioner, Mr. Mani has raised the following contentions:

(1) That section 144 of the Code of Criminal Procedure in so far as it relates to placing of restrictions on freedom of speech and freedom of assembly confers very wide powers on the District Magistrate and certain other magistrates and thus places unreasonable restrictions on the rights guaranteed under Article 19 (1) (*a*) and (*b*) of the Constitution.

(2) The District Magistrate constitutes the whole legal machinery and the only check for control on his powers is by way of a petition to him to modify or rescind the order, that thus the District Magistrate becomes "a judge in his own cause"—presumably, what learned counsel means is a Judge with regard to his own decision—and so the remedy afforded by the section is illusory. Further the remedy by way of a revision application before the High Court against the order of the District Magistrate is also illusory and thus in effect there can be no judicial review of his order in the proper sense of that expression.

(3) Section 144 adopts "likelihood" or "tendency" as tests for judging criminality; the test of determining the criminality in advance is unreasonable.

(4) Section 144 substitutes suppression of lawful activity or right for the duty of public authorities to maintain order.

(5) Even assuming that section 144 of the Code of Criminal Procedure is not *ultra vires* the Constitution, the order passed by the District Magistrate in this case places restrictions which go far beyond the scope of clauses (2) and (3) of Article 19 and thus that order is unconstitutional.

Learned counsel also challenged the validity of the order on grounds other than constitutional, but we need not consider them here since it will be open to the petitioner to raise them at the trial. This being a petition under Article 32 of the Constitution, the petitioner must restrict himself to those grounds which fall within clause (1) thereof.

We think it desirable to reproduce the whole of section 144:

"(1) In cases where, in the opinion of a District Magistrate, a Chief Presidency Magistrate, Sub-Divisional Magistrate, or of any other Magistrate (not being a Magistrate of the third class) specially empowered by the 'State Government' or of the Chief Presidency Magistrate or the District Magistrate to act under this section, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable,

such Magistrate may, by a written order stating the material facts of the case and served in manner provided by section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed, *ex parte*.

(3) An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section by himself or any Magistrate subordinate to him, or by his predecessor in office.

(5) Where such an application is received, the Magistrate shall afford to the applicant an early opportunity of appearing before him either in person or by pleader and showing cause against the order; and, if the Magistrate rejects the application wholly or in part, he shall record in writing his reason for so doing.

(6) No order under this section shall remain in force for more than two months from the making thereof; unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the 'State Government', by notification in the official Gazette, otherwise directs".

Sub-section (1) confers powers not on the executive but on certain Magistrates. This provision has been amended in some States, as for instance, the former Bombay State where power has been conferred on the Commissioner of Police to pass an order thereunder. But we are not concerned with that matter here because that provision is not contained in the law as applicable to the former State of Madhya Pradesh, with which alone we are concerned, in the matter before us. Under sub-section (1) the Magistrate himself has to form an opinion that there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable. Again the sub-section requires the Magistrate to make an order in writing and state therein the material facts by reason of which he is making the order thereunder. The sub-section further enumerates the particular activities with regard to which the Magistrate is entitled to place restraints.

Sub-section (2) requires the Magistrate ordinarily to serve a notice on the person against whom the order is directed and empowers him to proceed *ex parte* only where the circumstances do not admit of serving such a notice in due time.

Sub-section (3) does not require any comment.

Sub-section (4) enables a Magistrate to rescind or alter an order made under this section and thus enables the person affected, if the order is addressed to a specified individual, or any member of the public, if the order is addressed to the public in general, to seek, by making an application, exemption from compliance with the order or to seek a modification of the order and thus gives him an opportunity to satisfy the Magistrate about his grievances. The Magistrate has to deal with applications of this kind judicially because he is required by sub-section (5) to state his reasons for rejecting, wholly or in part, the application made to him.

Finally the normal maximum duration of the order is two months from the date of its making. The restraints imposed by the order are thus intended to be of a temporary nature.

Looking at the section as a whole it would be clear that, broadly speaking, it is intended to be availed of for preventing disorders, obstructions and annoyances and is intended to secure the public weal. The powers are exercisable by responsible Magistrates and these Magistrates have to act judicially. Moreover, the restraints permissible under the provision are of a temporary nature and can only be imposed in an emergency.

Even so, according to the learned counsel these provisions place unreasonable restrictions on certain fundamental rights of citizens.

Firstly, according to learned counsel restrictions on the rights guaranteed by clauses (2) and (3) of Article 19 of the Constitution can be placed in the interest of "public order" and not in the interest of the "general public", which expression, according to him is wider in its ambit than public order and that since section 144 enables a Magistrate to pass an order in the interest of the general public the restrictions it authorises are beyond those permissible under clauses (2) and (3) of Article 19. It is significant to note that section 144 nowhere uses the expression "general public". Some of the objects for securing which an order thereunder can be passed are, "to prevent obstruction, injury......" etc. No doubt, the prevention of such activities would be in the "public interest" but it would be no less in the interest of maintenance of "public order".

Secondly, according to learned counsel, section 144 is an amalgam of a number of things to many of which there is no reference even in clause (2) of Article 19. In order to enable the State to avail of the provisions of clauses (2) and (3), he contends, a special law has to be passed and a provision like section 144 can serve no purpose. This contention has only to be mentioned to be rejected. Clauses (2) to (6) of Article 19 do not require the making of a law solely for the purpose of placing the restrictions mentioned in them.

Thirdly, according to learned counsel sub-section (1) of section 144 does not require the Magistrate to make an enquiry as to the circumstances which necessitate the making of an order thereunder. It is true that there is no express mention anywhere in section 144 that the order of the Magistrate should be preceded by an enquiry. But we must construe the section as a whole. The latter part of sub-section (1) of section 144 specifically mentions that the order of the Magistrate should set out the material facts of the case. It would not be possible for the Magistrate to set out the facts unless he makes an enquiry or unless he is satisfied about the facts from personal knowledge or on a report made to him which he *prima facie* accepts as correct. Clearly, therefore, the section does not confer an arbitrary power on the Magistrate in the matter of making an order.

It is contended that section 144 of the Code of Criminal Procedure confers very wide powers upon certain Magistrates and that in exercise of those powers the Magistrates can place very severe restrictions upon the rights of citizens to freedom of speech and expression and to assemble peaceably and without arms.

It seems to us, however, that wide though the power appears to be, it can be exercised only in an emergency and for the purpose of preventing obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity or a riot, or "an affray". These factors condition the exercise of the power and it would consequently be wrong to regard that power as being unlimited or untrammelled. Further, it should be borne in mind that no one has a right to cause "obstruction, annoyance or injury, etc.," to anyone. Since the judgment has to be of a Magistrate as to whether in the particular circumstances of a case an order, in exercise of these powers, should be made or not, we are entitled to assume that the powers will be exercised legitimately and honestly. The section cannot be struck down on the ground that the Magistrate may possibly abuse his powers.

It is also true that initially it is the Magistrate concerned who has to form an opinion as to the necessity of making an order. The question, therefore, is whether the conferral of such a wide power amounts to an infringement of the rights guaranteed under Article 19 (1) (*a*) and (*b*) of the Constitution. The rights guaranteed by sub-clause (*a*) are not absolute rights but are subject to limitations specified in clause (2) of Article 19 which runs thus:

> "Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence."

Similarly the rights to which sub-clause (*b*) relates are subject to the limitations to be found in clause (3) of Article 19, which runs thus:

> "Nothing in sub-clause (*b*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause."

The Code of Criminal Procedure was an existing law at the commencement of the Constitution and so, in the context of the grounds on which its validity is challenged before us, what we have to ascertain is whether the conferral thereunder of a power on a Magistrate to place restrictions on the rights to which sub-clauses (*a*) and (*b*) of Article 19 relate is reasonable. It must be borne in mind that the provisions of section 144 are attracted only in an emergency. Thereunder, the initial Judge of the emergency is, no doubt, the District Magistrate or the Chief Presidency Magistrate or the Sub-Divisional Magistrate or any other Magistrate specially empowered by the State Government. But then, the maintenance of law and order being the duty and function of the executive department of the State it is inevitable that the question of formation of the opinion as to whether there is an emergency or not must necessarily rest, in the first instance, with those persons through whom the executive exercises its functions and discharges its duties. It would be impracticable and even impossible to expect the State Government itself to exercise those duties and functions in each and every case. The provisions of the section therefore which commit the power in this regard to a Magistrate belonging to any of the classes referred to therein cannot be regarded as unreasonable. We may also point out that the satisfaction of the Magistrate

as to the necessity of promulgating an order under section 144 of the Code of Criminal Procedure is not made entirely subjective by the section. We may also mention that though in an appropriate case a magistrate is empowered to make an order under this section *ex parte* the law requires that he should, where possible serve a notice on the person or persons against whom the order is directed before passing that order. Then sub-section (4) provides that any magistrate may either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section. This clearly shows that even where an *ex parte* order is made the person or persons affected thereby have a right to challenge the order of the Magistrate. Sub-section (5) provides that where such a challenge is made, the Magistrate shall give an early opportunity to the person concerned of appearing before him and showing cause against the order. The decision of the Magistrate in such a proceeding would undoubtedly be a judicial one inasmuch as it will have been arrived at after hearing the party affected by the order. Since the proceeding before the Magistrate would be a judicial one, he will have to set aside the order unless he comes to the conclusion that the grounds on which it rests are in law sufficient to warrant it. Further, since the propriety of the order is open to challenge it cannot be said that by reason of the wide amplitude of the power which section 144 confers on certain Magistrates it places unreasonable restrictions on certain fundamental rights.

Learned counsel, however, says that the right conferred on the aggrieved person to challenge the order of the Magistrate is illusory as he would be a Judge with regard to his own decision. This argument would equally apply to an application for review made in a civil proceeding and we do not think that it is at all a good one. Again, though no appeal has been provided in the Code against the Magistrate's order under section 144, the High Court has power under section 435 read with section 439 of the Code to entertain an application for the revision of such an order. The powers of the High Court in dealing with a revision application are wide enough to enable it to quash an order which cannot be supported by the materials upon which it is supposed to be based. We may point out that sub-section (1) of section 144 requires a Magistrate who makes an order thereunder to state therein the material facts upon which it is based and thus the High Court will have before it relevant material and would be in a position to consider for itself whether that material is adequate or not. As an instance of a case where the High Court interfered with an order of this kind, we may refer to a decision in *P. T. Chandra, Editor, Tribune* v. *Emperor*.[1] There, the learned Judges correctly pointed out that the propriety of the order as well as its legality can be considered by the High Court in revision, though in examining the propriety of the order the High Court will give due weight to the opinion of the District Magistrate who is the man on the spot and responsible for the maintenance of public peace in the district. In that case the learned Judges set aside an order of the District Magistrate upon the ground that there was no connection between the act prohibited and the danger apprehended to prevent which the order was passed. We would also like to point out that the penalty for infringing an order under section 144 is that provided in section 188, Indian Penal Code. When, therefore, a prosecution is launched thereunder, the validity of the order under section 144, Criminal Procedure Code could be challenged. We are, therefore, unable to accept Mr. Mani's contention that the remedy of judicial review is illusory.

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1. A.I.R. 1942 Lah. 171.

The argument that the test of determining criminality in advance is unreasonable, is apparently founded upon the doctrine adumbrated in *Scheneck's case*[1] that previous restraints on the exercise of fundamental rights are permissible only if there be a clear and present danger. It seems to us, however, that the American doctrine cannot be imported under our Constitution because the fundamental rights guaranteed under Article 19 (1) of the Constitution are not absolute rights but, as pointed out in *State of Madras* v. *V. G. Row*[2] are subject to the restrictions placed in the subsequent clauses of Article 19. There is nothing in the American Constitution corresponding to clauses (2) to (6) of Article 19 of our Constitution. The Fourteenth Amendment to the U. S. Constitution provides, among other things, that

"no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;........"

The framework of our Constitution is different from that of the Constitution of the United States. Then again, the Supreme Court of the United States has held that the privileges and immunities conferred by the Constitution are subject to social control by resort to the doctrine of police power. It is in the light of this background that the test laid down in *Scheneck's case*,[1] has to be understood.

The language of section 144 is somewhat different. The test laid down in the section is not merely 'likelihood'' or ''tendency''. The section says that the Magistrate must be satisfied that immediate prevention of particular acts is necessary to counteract danger to public safety, etc. The power conferred by the section is exercisable not only where present danger exists but is exercisable also when there is an apprehension of danger.

Apart from this it is worthy of note that in *Scheneck's case*,[1] the Supreme Court was concerned with the right of freedom of speech and it observed:

"It well may be that the prohibition of law abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose............We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done........ The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Whatever may be the position in the United States it seems to us clear that anticipatory action of the kind permissible under section 144 is not impermissible under clauses (2) and (3) of Article 19. Both in clause (2) (as amended in 1951) and in clause (3), power is given to the legislature to make laws placing reasonable restrictions on the exercise of the rights conferred by these clauses in the interest, among other things, of public order. Public order has to be maintained in advance in order to ensure it and, therefore, it is competent to a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order. We must, therefore, reject the contention.

It is no doubt true that since the duty to maintain law and order is cast upon the Magistrate, he must perform that duty and not shirk it by prohibit-

1. *Scheneck* v. *U.S.* 249 U.S. 47.
2. (1952) S.C.J. 253: (1952) 2 M.L.J. 135: (1952) S.C.R. 597.

ing or restricting the normal activities of the citizen. But it is difficult to say that an anticipatory action taken by such an authority in an emergency where danger to public order is genuinely apprehended is anything other than an action done in the discharge of the duty to maintain order. In such circumstances that could be the only mode of discharging the duty. We, therefore, reject the contention that section 144 substitutes suppression of lawful activity or right for the duty of public authorities to maintain order.

Coming to the order itself we must consider certain objections of Mr. Mani which are, in effect, that there are three features in the order which make it unconstitutional. In the first place, according to him, the order is directed against the entire public though the Magistrate has stated clearly that it was promulgated because of the serious turn which an industrial dispute had taken. Mr. Mani contends that it is unreasonable to place restrictions on the movements of the public in general when there is nothing to suggest that members of the public were likely to indulge in activities prejudicial to public order. It is true that there is no suggestion that the general public was involved in the industrial dispute. It is also true that by operation of the order the movements of the members of the public would be restricted in particular areas. But it seems to us that it would be extremely difficult for those who are in charge of law and order to differentiate between members of the public and members of the two textile unions and, therefore, the only practical way in which the particular activities referred to in the order could be restrained or restricted would be by making those restrictions applicable to the public generally.

The right of citizens to take out processions or to hold public meetings flows from the right in Article 19 (1) (*b*) to assemble peaceably and without arms and the right to move anywhere in the territory of India. If, therefore, any members of the public unconnected with the two textile unions wanted to exercise these rights it was open to them to move the District Magistrate and apply for a modification of the order by granting them an exemption from the restrictions placed by the order.

Mr. Mani's contention, and that is his second ground of attack on the Magistrate's order, is that the only exception made in the order is with respect to funeral processions and religious processions and, therefore, it would not have been possible to secure the District Magistrate's permission for going out in procession for some other purpose or for assembling for some other purpose in the area to which the order applied. So far as the customary religious or funeral processions are concerned, the exemption has been granted in the order itself that if anyone wanted to take out a procession for some other purpose which was lawful it was open to them under section 144, sub-section (4) to apply for an alteration of the order and obtain a special exemption. Mere omission of the District Magistrate to make the exemption clause of the order more comprehensive would not, in our opinion, vitiate the order on the ground that it places unreasonable restrictions on certain fundamental rights of citizens.

The third and last ground on which Mr. Mani challenged the constitutionality of the order was that while the order prohibits the shouting of provocative slogans in public places, etc., it does not give any definition of what was meant by the expression "provocative slogans" Therefore, according to Mr. Mani, this order is vague and must be deemed to be placing unreasonable restrictions on the rights of free speech of citizens. It seems to us that the expression "provocative slogans" has necessarily to be understood in the context in which it has been used in the order and, therefore, it cannot be regarded as vague.

We have, therefore, reached the conclusion that the order of the District Magistrate is not unconstitutional either because section 144 is itself violative of fundamental rights recognised in Article 19 or on the ground that it is vague and places unreasonable restrictions on those fundamental rights. We, therefore, dismiss this petition.

Shortly after this petition was made to this Court, the petitioner presented a Special Leave petition in which he seeks to challenge the judgment of the Nagpur High Court, dated April 9, 1956 dismissing his writ petition to that High Court. The points raised in the Special Leave Petition are similar to those raised in this petition. Since we are dismissing this petition, there can be no question of granting the Special Leave to the petitioner to appeal against the judgment of the Nagpur High Court.

Petitions dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

The Oriol Industries, Ltd. .. *Appellants**

v.

The Bombay Mercantile Bank, Ltd. .. *Respondents.*

Companies Act (VII of 1913), section 89—Applicability—Bank honouring cheques drawn by Managing Agents without indicating in the cheques that they were drawn on account of the company—Bank if liable to repay company.

Before a company can be bound by a negotiable instrument one of the essential conditions is that the instrument on its face must show that it has been drawn, made, accepted or endorsed by the company. Failure to comply with this essential requirement of section 89 of the Companies Act, 1913 must mean that the negotiable instrument in question defectively issued cannot be enforced against the company. It is only in the matter of enforcement of negotiable instruments against a company that the principle comes into play and it cannot be extended to a claim made by a company against its bank on the ground that the cheque which the bank accepted and honoured was defective in that it did not comply with the requirements of section 89 and could not have been enforced against it.

Appeal from the Judgment and Decree dated the 5th August, 1955, of the Bombay High Court in Appeal No. 128|X of 1954.

S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra,* Advocates of *Messrs. Rajinder Narain & Co.,* for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (*Tarachand Brijmohan Lal,* Advocate, with him) for Respondents.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This appeal which has come to this Court with a certificate issued by the Bombay High Court raises for our decision a short and interesting question about the scope and effect of the provisions contained in section 89 of the Indian Companies Act, 1913, in relation to the law of banking. This question arises in this way. The appellant, the Oriol Industries, Ltd., (hereafter called the company) was incorporated on May 15, 1945, and it appointed as its managing agents M|s. Poddar Chacko &

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*C. A. No. 221 of 1956. 31st January, 1961.

Co. Soon after its incorporation the company passed a resolution on May 21, 1945, whereby it decided to open an account with the respondent, the Bombay Mercantile Bank, Ltd., (hereafter called the bank) and in accordance with the said resolution an account was opened with it on May 28, 1945. Twenty-eight cheques were drawn on this account aggregating the total amount of Rs. 28,882-13-0 during the period between May 28, 1945, and July 31, 1945. These cheques were drawn by K. Poddar and M. J. Chacko in pursuance of the authority conferred on them by the company. On September 28, 1948, by its liquidator the company brought the present suit claiming to recover from the bank the said amount of Rs. 28,882-13-0. The case for the company as set out in the plaint was that the payment of the said amount had been made by the bank wrongfully and negligently and the amount drawn under the said cheques had been wrongfully debited to the company in its account kept by the bank. It appears that the resolution for winding up of the company was held by the Court to be null and void, and so the plaint was subsequently amended whereby the name of the liquidator was struck out and the suit then purported to be one which was instituted by the company itself. The plea raised by the company that the cheques in question had been negligently and wrongfully honoured by the bank was seriously disputed by the bank in its statement. Mr. Justice Tendolkar, who tried the suit on the Original Side of the Bombay High Court, however, upheld the plea raised by the company and came to the conclusion that the cheques had been wrongfully honoured. Even so, Mr. Justice Tendolkar held that out of the total amount in dispute an amount of Rs. 8,882-13-0 had been actually received by the company and so on equitabe grounds he rejected the company's claim in regard to the said amount. The company's claim was, however, decreed in respect of the balance of Rs. 20,000.

The decree thus passed by Tendolkar, J. was challenged by the bank in its appeal, whereas the rejection of the company's claim in respect of Rs. 8,882-13-0 by the trial judge gave rise to cross-objections by the company. The Court of Appeal has reversed the finding of Tendolkar, J., and has held that the bank was not liable to repay any amount to the company since it had accepted and honoured the cheques issued on it in good faith. It may be stated at this stage that the plea of negligence which had been originally urged by the company in its plaint was expressly given up at the trial. Since the Appeal Court accepted the bank's case on the principal question of law it did not think it necessary to consider the question of limitation or the question about the applicability of the equitable doctrine on which the trial judge had relied. In the result the appeal filed by the bank was allowed, the cross-objections preferred by the company were rejected, and the suit filed by the company was dismissed with costs. The company then moved the High Court for a certificate, and on a certificate being granted it has come to this Court; and on its behalf Mr. Andley has urged that in coming to the conclusion that the company's claim was unsustainable the Appeal Court has misjudged the effect of the provisions of section 89 of the Indian Companies Act in relation to the conduct of the bank in the present case. That is how the principal question which falls for our decision is about the scope and effect of the provisions of section 89 of the Indian Companies Act.

Before dealing with the said question of law it is necessary to dispose of a minor point raised by Mr. Andley. He contends that the cheques issued by K. Poddar and M. J. Chacko and honoured by the bank had not been issued in the form required by the resolution which gave them authority to operate

on the company's account with the bank. The relevant resolution passed by the company provided that

> "the banking accounts of the company be opened with the bank and another bank and that the said banks be and hereby authorised to honour cheques, bills of exchange and promissory notes, drawn, accepted or made on behalf of the company by the Managing Agents M|s. Poddar Chacko & Co., by both the Directors of the Managing Agents firm, namely, Mr. Keshavdeo Poddar and Mr. M. J. Chacko and to act on any instructions so given relating to the account whether the same be overdrawn or not or relating to the transactions of the company".

The argument is that two conditions had to be satisfied before the bank could accept a cheque issued under this resolution; the cheque had to be signed by both the Directors of the Managing Agents firm, and it had to be drawn on behalf of the company. In point of fact, all the cheques have been signed by the two individuals without describing themselves as Directors of the Managing Agents firm and without showing that they had drawn them on behalf of the company. These defects, it is urged, made the cheques irregular and inconsistent with the mandatory requirements of the resolution, and the bank was therefore not justified in honouring the said cheques. In our opinion, this argument is unsound. On a fair and reasonable construction of the resolution it is difficult to uphold the contention that the resolution required the drawers of the cheques to specify on each cheque that they were made or drawn on behalf of the company. The object of the resolution as well as its effect merely was to conform to the requirements of section 89 of the Indian Companies Act to which we will presently refer. It cannot be said that the resolution required that the drawers of the cheques had to comply with the said condition apart from the requirements of section 89; and so it would be unreasonable to treat the said requirement as a condition prescribed by the resolution independently of section 89.

In this connection the subsequent resolution passed by the company is significant. It appears that on October 22, 1945, a resolution was passed by the company authorising M. J. Chacko to sign cheques for the company, and when this resolution was communicated to the bank it was told that the cheques on behalf of the company would thereafter be signed as: "For and on behalf of the Oriol Industries, Limited, For Poddar Chacko & Co."; in other words, by this communication the bank was told that it is only cheques signed by M. J. Chacko in the manner specified in the communication that the bank should honour. This communication affords an eloquent contrast to the communication made by the company to the bank in regard to the earlier resolution by which Messrs. Poddar and Chacko were authorised to issue cheques on its behalf. Therefore, in our opinion, the argument that the impugned cheques accepted by the bank were inconsistent with the specific mandatory requirements authorised by the resolution cannot be accepted.

That takes us to the principal question of law. In dealing with the said question it is first necessary to refer to section 26 of the Negotiable Instruments Act, 1881 (XXVI of 1881). This section provides that

> "every person capable of contracting according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, endorsements, delivery and negotiation of a promissory note, bill of exchange or cheque".

The section further provides, *inter alia*, that

> "nothing herein contained shall be deemed to empower a corporation to make, indorse or accept such instruments except in cases in which, under the law for the time being in force, they are so empowered".

This section does not purport to make any provision of substantive or procedural law. The latter part of the section merely brings out that a company cannot claim authority to issue a cheque under its first part. The law in regard to the company's power to issue negotiable instruments has to be found in the relevant provisions of the Companies Act itself. We must, therefore, turn to section 89 of the said Act.

Section 89 provides that

> "a bill of exchange, hundi or promissory note shall be deemed to have been made, drawn or accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the name of, or by or on behalf of, or on account of, the company by any person acting under its authority express or implied".

It is clear that in order that a company may be bound by a negotiable instrument purporting to have been issued on its behalf two conditions must be satisfied; the instrument must be drawn, made, accepted or endorsed in the name of or by or on behalf of or on account of the company, and the person who makes, draws, endorses or accepts the instrument must have the authority given to him by the company on that behalf. This authority may be either express or implied. There is thus no doubt that before a company can be bound by a negotiable instrument one of the essential conditions is that the instrument on its face must show that it has been drawn, made, accepted or endorced by the company. This may be done either by showing the name of the company itself on the instrument, or by the statement of the person making the instrument that he is doing so on behalf of the company. In other words, unless the plain tenor of the negotiable instrument on its face satisfies the relevant requirement the instrument cannot be validly treated as an instrument drawn by the company. This position is not disputed.

The importance and significance of the said requirement can be illustrated by reference to a decision of the Privy Council which had occasion to consider a similar requirement under section 27 of the Negotiable Instruments Act. The section provides that

> "every person capable of binding itself or of being bound, as mentioned in section 26, may so bind himself or be bound by a duly authorised agent acting in his name".

In *Sadasuk Janki Das* v. *Sir Kishan Persad*[1], the Privy Council held that

> "the name of the person or the firm to be charged upon a negotiable document should be stated clearly on the face or on the back of the document so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand. It is not sufficient that the name of the principal should be in some way disclosed; it must be disclosed in such a way that on any fair interpretation of the instrumtnt his name is the real name of the person liable on the bill".

According to the Privy Council

> "sections 26, 27 and 28 of the Negotiable Instruments Act contained nothing inconsistent with the principles just set out, and there was nothing to support the contention urged before it that in an action on a bill of exchange or promissory note against a person whose name properly appears as a party to the instrument it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal".

This decision was no doubt given under section 27 of the Negotiable Instruments Act, but the principles enunciated in it apply with equal force to a negotiable instrument issued under section 89 of the Indian Companies Act.

1. (1919) 36 M.L.J. 429: L.R. 46 I.A. 33: I.L.R. 46 Cal. 663.

The inevitable consequence of this requirement is that wherever a negotiable instrument is issued without complying with the said requirement it would not bind the company and cannot be enforced against it. In *The Bank of Bombay* v. *H. R. Cormack*[1] it was held by the Bombay High Court that in order to make a company liable on a bill or note it must appear on the face of such bill or note that it was intended to be drawn, accepted or made on behalf of the company, and no evidence *dehors* the bill or note is admissible under section 47 of the Indian Companies Act X of 1866, equal to section 89 of the present Act. In support of this decision Sargent, C. J., has cited the observations of Lord Justice James in *Miles' Claim*[2]

> "that it is the law of this country, and always has been the law of this country, that nobody is liable upon a bill of exchange, unless his name, or the name of some partnership, or body of persons of which he is one, appears either on the face or the back of the bill".

Thus there can be no doubt that the failure to comply with the essential requirements of section 89 must necessarily mean that the negotiable instrument in question defectively issued cannot be enforced against the company.

But the question which arises for our decision is whether this principle can be invoked in the present case where the action is not based on a negotiable instrument. The present dispute is between the bank and its constituent the company, and the claim made by the latter proceeds on the assumption that in honouring the cheques irregularly drawn the bank has acted improperly and exposed itself to the charge that it has honoured the cheques wrongfully and improperly. In considering this question it may be relevant to recall that both the Courts below have found that the bank has acted *bona fide* and that the charge of negligence levelled against it by the company had been expressly given up. It is also necessary to bear in mind that when the company opened its account with the bank it was furnished with a book of cheques and it is from the said book that the impugned cheques have been issued. Evidence also shows that K. Poddar and M. J. Chacko had no other joint account with the bank so that it is clear that when the impugned cheques were issued the bank was justified in thinking that the said cheques must have been issued by the two drawers on behalf of the only account on which they could operate, and that the bank thought was done in pursuance of the authority conferred on them by the company by its resolution. In such a case, if the bank honours the cheques can it be said that the company on whose behalf the cheques were purported to have been issued can contend that the cheques should not have been honoured and that the amount debited to the company by the bank in its accounts has been improperly and wrongfully debited? It would be noticed that the principle underlying section 89 which is a very healthy and salutary principle affords to the companies protection against claims made on negotiable instruments defectively or irregularly drawn; but, when we deal with a dispute between a company and the bank of which it is a constituent it is difficult to extend the said principle. The said principle in terms is applicable only when a claim is made against a company on a negotiable instrument; in other words, it is only in the matter of enforcement of negotiable instrument against a company that the principle comes into play. It is, therefore, difficult to see how the principle enunciated in section 89 can be extended to a claim made by the company against the bank. In our opinion, therefore, the High Court was right in

1. (1880) I.L.R. 4 Bom. 275. 2. L.R. 9 Ch. App. 635.

coming to the conclusion that section 89 cannot be invoked by the company against the bank in making the present claim. The decisions on which the company relied are all decisions in cases where a negotiable instrument was sought to be enforced against the company and had thus given rise to a cause of action. No case has been cited before us in which section 89 has been extended to a claim like the present.

On the other hand, there is authority of the House of Lords in support of the view which the High Court has taken in the present case. In *Mahony* v. *East Holyford Mining Co.*[1] a similar, point arose for the decision of the House of Lords. One of the two points in that case had reference to eight cheques which had been defectively or irregularly drawn on behalf of the company and honoured by the bank. In rejecting the company's claim against the bank in respect of the amount covered by the said cheques Lord Chelmsford observed as follows:

> "With respect to the objection that the name of the company is not on eight of the cheques paid by the Bank, and therefore by the Companies Act, 1862, they are invalid, and the official liquidator is entitled, at all events, to the amount of these cheques the short answer, is, that although the bankers might have perhaps required that these cheques should be made formally correct before they were paid; yet having paid them upon the demand of the only persons whom they knew as representing the company in the operations upon the account, there is not the slightest pretence for insisting upon the liability of the Bank to repay the amount of these cheques on the ground of an unauthorised payment of them".

The Lord Chancellor Lord Cairns disposed of the point in these words:

> "The question being merely as to the authority given to the bankers to make the payment, it appears to me that when those who drew and those who honoured the cheque knew the account on which it was intended to operate, the result was the same as if the account had been mentioned on the face of the cheque, and that no distinction is to be made as to the money paid upon these cheques".

Lord Penzance agreed with this opinion and observed that

> "looking at the way in which the cheques were drawn, and understood by those who drew them, and by those who paid them, they stand in no different way from the rest of the cheques in the case".

It would thus be clear that the authority of this decision of the House of Lords is in favour of the view taken by the High Court that the principle enunciated by section 89 of the Indian Companies Act cannot be extended to a claim made by a company against its bank on the ground that the cheque which the bank accepted and honoured was defective in that it did not comply with the requirements of section 89 and could not have been enforced against it. We ought to add that section 47 of the corresponding English Act of 1862 is exactly in the same terms as section 89 of the Indian Act.

It also appears that Chalmers has expressed the same opinion for he says,

> "So, too, bankers may be justified in paying cheques out of the funds of a company, where clearly, by the form of the cheques the company would not be liable as drawers if they should not be paid[2]."

Similarly, Halsbury approves of the same principle in these words:

> "although documents omitting the name of the company therefore cannot be relied on as against the company, monies paid under them to persons known to represent the company are not on that account payable over again".[3]

The result is the appeal fails and is dismissed with costs.

Appeal dismissed.

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1. (1875) 7 Eng. and Irish Reports 869.
2. Chalmers on "Bills of Exchange", p. 63.
3. Halsbury's Laws of England, 3rd Edn. Vol. 6, p. 429, paragraph 830.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, AND J. C. SHAH, JJ.

Governor-General in Council (Now Union of India) .. *Appellant**

v.

Musaddi Lal .. *Respondent.*

Railways Act (IX of 1890), section 77—Scope—Suit for compensation for non-delivery of goods consigned falls within section 77.

Section 77 of the Railways Act imposes a restriction on the enforcement of liability declared by section 72. The liability declared by section 72 is for loss or destruction or deterioration. Failure to deliver is the consequence of loss or destruction of goods; it does not furnish a cause of action on which a suit may lie against the railway administration, distinct from a cause of action for loss or destruction. A suit for compensation for loss because of non-delivery of goods falls within section 77 of the Act and if a notice of the claim is not given within six months of the delivery of the goods for carriage by railway, the claim is not maintainable.

Madras and Southern Mahratta Railway v. *Haridas Banmalidas,* (1918) I.L.R. 41 Mad. 871: 35 M.L.J. 35; *Hill Sawyers & Co.* v. *Secretary of State,* (1921) I.L.R. 2 Lah. 133; *Martab Ali* v. *Union of India,* (1954) 56 Bom.L.R. 150; *Union of India* v. *Mitayagiri Pullappa,* I.L.R. (1958) A.P. 323: (1958) 1 An.W.R. 510; *Assam-Bengal Railway Co., Ltd.* v. *Radhika Mohan Nath,* A.I.R. 1923 Cal. 397 and *Bengal-Nagpur Railway* v. *Hamir Mull Chhagan Mull,* (1926) I.L.R. 5 Pat. 106, *approved and relied on.*

Governor-General in Council v. *Mahabir Ram,* I.L.R. (1953) 1 All. 64 and *Jai Ram Ramrekha Das* v. *G. I. P. Railway,* (1929) I.L.R. 8 Pat. 545, *overruled.*

Appeal from the Judgment and Decree, dated the 25th July, 1952, of the Allahabad High Court in Second Appeal No. 2547 of 1946.

R. Ganapathy Iyer and *T. M. Sen,* Advocates, for Appellant.

K. P. Gupta, Advocate, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—On January 30, 1943, Bhola Nath Sambhu Ram as agent of the respondent L. Musaddilal delivered a bale of cloth to the railway administration E. I. Rly. at Agra railway station for carriage by railway to the Chola Station in the E. I. Rly. The consignment was accepted by the railway administration and a railway receipt was issued in the name of the consignor Bhola Nath Sambhu Ram. Bhola Nath Sambhu Ram endorsed the railway receipt in favour of the respondent and sent it by post to the respondent. The bale of cloth did not reach Chola, and the railway administration was unable despite efforts to trace it. There was correspondence between the railway administration and the respondent about the consignment. Failing to obtain satisfaction for the loss suffered by him, the respondent served a composite notice under section 77 of the Indian Railways Act and section 80 of the Civil Procedure Code on December 7, 1943 and thereafter on May 18, 1944, filed suit No. 283 of 1944 in the Court of the II Munsif, Bulandshahr, for a decree for Rs. 782-3-6 being the "price of the bale" and Rs. 200 'for loss on account of non-delivery'. The railway administration resisted the claim on the pleas among others that the suit was not maintainable without an effective notice under section 77 of the Railways Act and that the suit was barred because at the date of the institution of the suit, the period of limitation prescribed by Article 31 of the Limitation Act had expired. The trial Court decreed the suit. In appeal, the Additional Civil Judge, Bulandshahr, reversed the decree passed

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*C. A. No. 313 of 1956. 31st January, 1961.

by the trial Court and dismissed the suit. A Full Bench of the High Court of Allahabad reversed the decree passed by the first Appellate Court and restored the decree of the trial Court. With certificate of fitness under Article 133 (1) (*c*) of the Constitution, this appeal has been preferred by the Union of India.

Section 77 of the Railways Act in so far as it is material provides:

"A person shall not be entitled to........compensation for the loss, destruction, or deterioration of........goods delivered to be..........carried unless his claim to......compensation has been preferred in writing by him or on his behalf with the railway administration within six months from the date of delivery of the........goods for carriage by railway."

Section 77 manifestly prescribes a condition precedent to the maintainablity of a claim for compensation for goods lost, destroyed or deteriorated while in the custody of the railway administration. The notice prescribed was not served by the respondent upon the railway administration within six months from the date on which the goods were delivered for carriage, and *prima facie* the suit would be barred for non-compliance of a statutory condition precedent. But the respondent pleaded and the plea has found favour with the High Court that the suit filed by him was for compensation not for loss, destruction or deterioration of the goods, but "for non-delivery of the goods". In the view of the High Court, a claim for compensation for non-delivery of goods is a claim distinct from a claim for compensation for loss, destruction or deterioration of goods and to the enforcement of a claim of the former variety by action in a Court of law sectiion 77 is not a condition precedent.

The railway administration in India is not an insurer of goods: it is merely a bailee of goods entrusted to it for carriage. Section 72 of the Railways Act prescribes the measure of the general responsibility of a railway administration as a carrier of goods. By that section, the responsibility of a railway administration for loss, destruction or deterioration of goods delivered to be carried by railway is subject to other provisions of the Act to be that of a bailee under section 152 and section 161 of the Indian Contract Act, 1872. Sections 151 and 152 of the Indian Contract Act deal with the duties of a bailee. If a bailee takes as much care of the goods bailed to him as a person of ordinary prudence would under similar circumstances of his own goods of the same bulk, quality and value as the goods bailed to him, in the absence of a special contract, he is not responsible for loss, destruction or deterioration of the goods bailed. By sections 160 and 161 of the Indian Contract Act, the bailee is under an obligation to return or deliver according to the bailor's direction the goods bailed as soon as the time for which the goods were bailed has expired or the purpose for which the goods where bailed has been accomplished and if on account of default of the bailee the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods. The railway administration being a bailee of the goods delivered for carriage to it is therefore a bailee during the period when the goods remain in its custody for the purpose and in the course of carriage and for the purpose of delivery after the goods are carried to the destination. But the quantum of care which the railway administration is required to take is that care which it would take having regard to the bulk, quality and value of its own similar goods.

Section 77 of the Railways Act is enacted with a view to enable the railway administration to make enquiries and if possible to recover the goods and to deliver them to the consignee and to prevent stale claims. It imposes a restriction on the enforcement of liability declared by section 72. The liability declared by section 72 is for loss, destruction or deterioration. Failure to

deliver is the consequence of loss or destruction of goods; it does not furnish a cause of action on which a suit may lie against the railway administration, distinct from a cause of action for loss or destruction. By the use of the expression, "loss, destruction or deterioration", what is contemplated is loss or destruction or deterioration of the goods and the consequent loss to the owner thereof. If because of negligence or inadvertence or even wrongful act on the part of the employees of the railway administration, goods entrusted for carriage are lost, destroyed or deteriorated, the railway administration is guilty of failing to take the degree of care which is prescribed by section 72 of the Railways Act.

There are undoubtedly two distinct articles, Articles 30 and 31 in the First Schedule of the Indian Limitation Act dealing with limitation for suits for compensation against carriers. Article 30 prescribes the period of limitation for suits against a carrier for compensation against loss or injury to goods and Article 31 prescribes the period of limitation for suits for compensation against a carrier for non-delivery or delay in delivering the goods. The period of limitation under each of these articles is one year but the points of time from which that period is to be reckoned are different. But because the Indian Limitation Act provides different points of time from which the period of limitation is to run, it is not possible to infer that the claim covered by either article is not for compensation for loss, destruction or deterioration of the goods. We are unable to project the provisions of Articles 30 and 31 of the Limitation Act upon sections 72 and 77 of the Railways Act and to hold that a suit for compensation for loss because of non-delivery of goods does not fall within section 77. The view we have expressed is supported by a large volume of authority in the Courts in India—for instance *The Madras and Southern Mahratta Railway Co. Ltd.* v. *Haridoss Banmalidoss*,[1] *Hill Sawyers & Co.* v. *Secretary of State*,[2] *Martab Ali* v. *Union of India*,[3] *Union of India* v. *Mitayagiri Pullappa*,[4] *Assam Bengal Railway Co., Ltd.* v. *Radhika Mohan Nath and others*[5] and *Bengal Nagpur Railway Co.* v. *Hamir Mull Chhagan Mull and another*.[6]

The view expressed to the contrary in the Allahabad High Court in *Governor-General in Council and others* v. *Mahabir Ram and another*[7] and by Patna High Court in *Jais Ram Ramrekha Das* v. *G. I. P. Railway and another*,[8] is in our judgment erroneous.

This appeal will therefore be allowed and the respondent's suit will stand dismissed. As the Union of India was permitted to appeal for obtaining the decision of this Court which may settle the conflict of views even though the amount involved is small, we think that it is just and proper that there should be no order as to costs throughout.

Appeal allowed.

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1. (1918) 35 M.L.J. 35 : I.L.R. 41 Mad. 871.
2. (1921) I.L.R. 2 Lah. 133.
3. (1954) 56 Bom.L.R. 150.
4. (1958) 1 An. W.R. 510 : I.L.R. (1958) A.P. 323.
5. A.I.R. 1923 Cal. 397.
6. (1926) I.L.R. 5 Pat. 106.
7. (1953) I.L.R. 1 All. 64.
8. (1929) I.L.R. 8 Pat. 545.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

National Cement Mines Industries, Ltd. .. *Appellant**

v

The Commissioner of Income-tax, West Bengal, Calcutta .. *Respondent.*

Income-tax Act (XI of 1922)—Amount received annually in consideration of assignment of benefits of four leases for the unexpired period for winning limestone and manufacturing cement—Payment to assignor at 0. 13 As. for every ton of cement manufactured and sold by the assignee—If capital or revenue receipts—Tests.

The assessee assigned the benefits of four leases for the unexpired period for winning of limestone and manufacture of cement. The payment was agreed at 0. 13 As. for every ton of cement manufactured and sold by the assignee though the assignor had no control over the production of limestone and manufacture of cement or the sale of flux stone and limestone. On a question as to the nature of the receipts by the assessee—capital or revenue—

Held: In assessing the true character of the receipt for the purpose of the Income-tax Act, inability to ascribe to the transaction a definite category is of little consequence. It is not the nature of the receipt under the general law but in commerce that is material. It is often difficult to distinguish whether an agreement is for payment of a debt in instalments or for making annual payments in the nature of income. The Court has on an appraisal of all the facts, to assess whether a transaction is commercial in character yeilding income or is one in consideration of parting with property for repayment of capital in instalments. No single test of universal application can be discovered for solution of the problem. The name which the parties may give to the transaction which is the source of the receipt and the characterisation of the receipt by them are of little moment, and the true nature and character of the transaction have to be ascerained from the covenants of the contract in the light of the surrounding circumstances. The decision of the question is however not left to the application of any arbitrary standards.

There are certain broad principles which guide the determination of the character of the receipt. The distinction between a capital receipt and revenue receipt though fine is real. The dividing line may be thin, and often at first sight imperceptible.

Where capital is repaid in instalments, it is not liable to income-tax; for instance when a person sells his property and agrees to receive the price stipulated in instalments by whatever name such instalments are called, they are not liable to income-tax. But where property is conveyed in consideration of what in truth is annuity payable for a definite or definable period, the annuity is not payment on capital account and is taxable. Again, if property is conveyed in consideration of periodical payments, the payment being a share of profits of a business or profession, or a mineral royalty depending upon the quantity of minerals raised, or computed on sales of manufactured articles, or a percentage of gross profits made in the exploitation of a secret process, is income and taxable.

[In the instant case on a true construction of the conveyance the assessee had not sold the entirety of the rights under the lease. The transaction was substantially a commercial transaction for sharing the profits of the commercial activities of the assignees of the rights in the leases. The payment at the rate of 0. 13 As. per ton of cement sold was accordingly of the nature of income and not capital.]

Appeal by Special Leave from the Judgment and Order, dated the 22nd|23rd December, 1955, of the Calcutta High Court in I.T.R. No. 24 of 1953.

N. C. Chatterjee, Senior Advocate (*D. P. Pal* and *D. N. Mukherjee*, Advocates, with him), for Appellant.

Hardayal Hardy and *D. Gupta*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—M|s. National Cement Mines Industries Ltd.—hereinafter referred to as the appellants—are a public limited company incorporated to

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*Civil Appeal No. 84 of 1958. 17th January, 1961.

"carry on the businesses of cement and lime manufacture and also of limestone supply and for the purposes of such businesses to acquire rights and concessions pertaining to limestone, coal and surface lands from the Dewarkhand Karanpura Mines and Industries, Ltd."

and also to

"work mines or quarries and to find, win, get, work, etc. or otherwise deal with clay and bauxite."

Dewarkhand Karanpura Mines and Industries Ltd.—hereinafter called the "Karanpura Company" had obtained three leases on November 29, 1930, first for mining limestone from Maharaja Pratap Narain Udai Nath Shah Deo from limestone beds in certain villages in Dewarkhand, second from Maharaj Kumar Nand Kishore Nath Shah Deo of the surface rights necessary to exercise the powers and privileges in respect of the first lease and the third from Maharaj Kumar Raj Kishore Nath Shah Deo of surface rights in respect of Hoyer village. The period in each of the three leases was thirty years. On March 17, 1932, the Karanpura Company conveyed the rights and options under the three leases to the appellants. On September 30, 1934, the appellants acquired the limestone and surface rights in respect of limestone beds in village Umedanda for 95 years from Maharaja Pratap Narain Uday Nath Shah Deo and Maharaj Kumar Raj Kishore Nath Shah Deo. On the same date, the appellants entered into two agreements, one with Maharaja Pratap Narain Uday Nath Shah Deo which is called the "bauxite option agreement" thereby acquiring the first option to take a lease or leases of any area or areas of bauxite deposits in certain villages, and another from the said Maharaja for the first option to take a lease or leases of limestone beds in Tori District. By a fourth agreement also, dated September 30, 1934, between the Karanpura Company, Maharaja Pratap Narain Udai Nath Shah Deo acting with the consent of Maharaj Kumars Raj Kishore Nath Shah Deo and Nand Kishore Nath Shah Deo, the royalties reserved under the original deeds dated November 29, 1930, were reduced and the periods of the leases were extended to 99 years from the date of the original leases.

By deed, dated May 7, 1935, the appellants conveyed to Dewarkhand Cement Company Ltd. (which later came to be known as Associated Cement Ltd. and will be referred to hereinafter by that name) the benefits of the four leases and the two agreements for the unexpired periods. By this deed, for a present consideration of Rs. 25,000 "for trouble and expenses in obtaining the leases and agreements" and for further payment under several covenants which will be presently set out, the appellants conveyed the rights vested in them subject to certain reservations. In the year of account June 1, 1944 to May 31, 1945, the appellants received from the Associated Cement Ltd. under the first covenant of the deed, Rs. 77,820 being the amount computed at the rate of 0-13 As. per ton of cement manufactured from limestone won from the lands and sold by the company. The Income-tax Officer, Companies District I, Calcutta, included this amount in the total assessable income of the appellants in the assessment year 1946-47. This order was confirmed in appeal by the Appellate Assistant Commissioner and by the Income-tax Appellate Tribunal. At the instance of the appellants, the Tribunal referred the following question with another not material for this appeal to the High Court of Judicature at Calcutta:

"Whether on a proper construction of the Deed of Assignment, dated 7th of May, 1935, and on the facts and in the circumstances of this case, the Tribunal was right in holding that the sum of Rs. 77,820 represented a receipt of a revenue nature in the hands of the Applicant and assessable as such?"

The following facts were held proved by the Tribunal. The principal objects of incorporation of the appellants were to carry on the business of

manufacturing cement and lime and sale of limestone and the appellants were formed with the object of acquiring the rights and concessions of the Karanpura Company. By their Memorandum of Association, the appellants were authorised to sell or dispose of the undertakings or any part thereof as they thought fit, and to sell, lease, mortgage, dispose of, turn to account or otherwise deal with all or any part of their property and rights and in pursuance of these objects the rights and concessions of the Karanpura Company were acquired and extension of leases and concessions were obtained and were transferred to the Associated Cement Ltd. The appellants were therefore carrying on in the year of account 1944-45 the business for which they were incorporated.

After reciting the prefatory clauses, it was stated in the deed,

"WHEREAS it was agreed *inter alia* that the purchaser should pay to the vendor the sum of rupees twenty five thousand for trouble and expenses in obtaining the leases and agreements, dated the thirtieth day of September one thousand nine hundred and thirty four hereinbefore recited and hereinafter expressed to be hereby transferred and whereas the purchaser hath paid to the vendor the said sum of rupees twenty-five thousand as the vendor doth hereby acknowledge NOW THIS INDENTURE WITNESSETH that in consideration of the covenants on the part of the purchaser hereinafter contained the vendor hereby grants assigns and transfers unto the purchaser and the Karanpura Company at the request and by the direction of the vendor hereby grants assigns transfers and confirms unto the purchaser.".

The deed then proceeds to set out the description of the various leases and concessions and agreements and the covenants which the Associated Cement Ltd. undertook in favour of the appellants. These covenants are:

(1) That it will pay to the vendor a sum equal to thirteen annas in respect of every ton of cement sold by it which shall have been manufactured from the limestone won by it from the lands hereby transferred and comprised in the hereinbefore recited leases and agreements.

(2) That it will not sell any fluxstone won by it from the said lands to the Tata Iron and Steel Company, Ltd., at a price less than rupees one and annas fourteen per ton F.O.R. the siding nearest to the quarry or place from which it shall be won without the consent of the vendor.

(3) That it shall pay to the vendor one half the profit (if any) which it shall make by selling Fluxstone to the Tata Iron and Steel Company, Ltd., or to any other person such profits to be ascertained after deduction from the price received all costs, charges and expenses including the royalty payable to the Maharaja in respect thereof but before deducting overhead charges. Such accounts to be closed and adjusted on the thirtieth day of June and the thirty-first day of Deember in each and every year.

(4) That it will not grant to the Tata Iron & Steel Company, Ltd., the right to quarry and remove fluxstone from the lands hereby transferred at a royalty of less than ten annas per ton, and will pay to the Vendor one half of any royalty so charged and received.

(5) That in the event of the payments made under clauses one, three and four above in any one year not amounting to the minimum hereinafter set out the purchaser shall pay in lieu and in full discharge therefor the following minimum:

(*a*) During the first year to be computed from the first day of January one thousand nine hundred and thirty-five, Rupees ten thousand.

(*b*) During the second year Rupees thirty thousand.

(*c*) During every subsequent year Rupees fifty thousand.

Out of the above minimum payment of Rupees fifty thousand per year for the purposes of account, the sum of Rupees twenty thousand shall be deemed to have been paid in respect of payment under clause three above.

(6) That the Purchaser or the persons deriving title under the purchaser will at all times from the date hereof duly pay all rents royalties and payments becoming due under the (four) hereinbefore recited Indenture of Lease (subject as regards the Limestone

lease to the modifications effected by the agreement for reduction of royalty, dated the thirtieth day of September, One thousand nine hundred and thirty four, hereinabove recited) in respect of the premises agreements options rights or benefits hereby assigned and transferred and observe and perform the covenants agreements stipulations and conditions therein contained and henceforth on the part of the lessee or grantee to be observed and performed in respect of the aforesaid premises or under the said Bauxite agreement or under the said Tori Option agreement or under the said agreement for reduction of royalty and also will at all times from the date hereof save harmless and keep indemnified the vendor its successors and assigns from and against all proceedings, costs, claims and expenses on account of any omission to pay the said rent, royalty or payments or any breach of any of the said covenants agreements stipulations and conditions.

(7) That the purchaser will not work raise remove or use stone or clay in the properties comprised in the leases and agreements hereby transferred to it for making lime.

(8) That the purchaser shall not by any of its actions or omissions cause leases and agreements, mentioned above and in respect of properties hereby transferred, to be determined, or the rights thereunder, including the right of renewal, to be prejudiced.

(9) That in areas comprised in the leases and agreements herein above expressed to be hereby assigned and not containing limestone to vendors rights under leases and agreements from the Maharaja of Chotanagpur or Maharaja Kumar Nand Kishore Nath Shah Deo other than the leases and agreements above referred to shall not be jeopardised or affected by this Indenture.

(10) That the clay and shales lying within areas, which do not contain Limestone, can be removed and utilised by the vendor for all purposes except that of cement manufacture."

The deed then proceeded after setting out certain other covenants:

"AND IT IS HEREBY EXPRESSLY AGREED AND DECLARED that if the Limestone within the areas comprised in the leases hereby transferred available for manufacturing cement is exhausted the purchaser will be entitled to determine this Indenture on giving to the vendor six months notice in writing in which case the purchaser, if so required, will retransfer the leases and agreements aforesaid."

By clauses (1), (3) and (4), the Associated Cement Ltd. undertook to make certain payments to the appellants. By clause (1) they agreed to pay 0-15 As. for every ton of cement manufactured from the limestone won from the lands and sold; by clause (3), the Associated Cement Ltd. agreed to pay half the profits which they made by selling fluxstone to the Tata Iron & Steel Co., or to any other person; and by clause (4), they agreed to pay half the royalty received from the Tata Iron & Steel Company for the right to quarry and remove fluxstone from the lands. By clause (5), provision was made for minimum payment in the event of the aggregate under clauses (1), (3) and (4) not reaching the sums specified therein. Clauses (2), (4), (7), (8) and (9) were in the nature of restrictive covenants. By clause (2), the Associated Cement Ltd. were prohibited from selling any fluxstone won from the lands to the Tata Iron & Steel Company for less than Re. 1-14 As. per ton F.O.R.. By clause (4), an obligation not to convey the right to quarry and remove fluxstone for royalty less than 0-10 As. per ton was imposed. By clause (7), the Associated Cement Ltd. undertook not to remove or use or allow any one to raise work, remove or use stone or clay in the lands. By clause (8), the Associated Cement, Ltd. undertook not to do any acts or omissions causing the leases and agreements to be detemined or the rights thereunder to be prejudiced. By clause (9), rights of other persons under leases and agreements in lands not containing limestone were not to be affected. By clause (10), the right of the appellants to utilise clay and shale lying within the areas not contaiing limestone except for the purpose of manufacturing cement was retained. There were certain exceptions to this and the ninth clause

whereby the Associated Cement Ltd. were entitled to excavate, use or remove all kinds of clays in and from the areas within the boundary lines marked in the plan and they were also authorised to make permanent structures and use certain strips of lands. By clause (6) the Associated Cement Ltd. agreed to pay rent stipulated under the original leases and agreements and also undertook to keep indemnified the appellants from and against all proceedings, costs, claims and expenses on account of any omission to pay the rent, royalty or payments or an breach of any of the covenants agreements and the leases.

There was also the covenant authorising the Associated Cement Ltd. to terminate the deed in the event of limestone in the land comprised in the leases being exhausted. The appellants undoubtedly did not part with all their rights in favour of the Associated Cement Ltd. by this deed, dated May 7, 1935. The consideration under the deed consisted of a fixed component and annual payments fluctuating with the business activity of the Associated Cement Ltd. A fixed amount of Rs. 25,000 was paid "for trouble and expenses in obtaining the leases and agreements" and additional payments were to be made under clauses (1), (3) and (4) subject to the minimum prescribed by clause (5). It is difficult to categorise a transaction of this character. It is not a conveyance of all the rights of the appellants nor can it be regarded as a sale even of the rights which were conveyed. Numerous restrictions were imposed by the deed upon the rights of the transferee which were inconsistent in their very nature with the character of a sale, and the covenant authorising termination of the deed in the event of the limestone being exhausted removes all doubt in that behalf. Nor is it a lease: it is not a transfer of a right to enjoy property for a certain time in consideration of periodical payments. It also does not evidence a transaction in the nature of a joint venture between the appellants and the Associated Cement Ltd. Cement was to be manufactured by the Associated Cement Ltd. out of limestone to be won from the lands and in consideration of the rights conveyed, payments at specified rates were agreed to be made out of the price to be obtained by sale of cement, fluxstone and limestone. The appellants had no control over the production of limestone and manufacture of cement, or on the sale of fluxstone and limestone. But in assessing the true character of the receipt for the purpose of the Income-tax Act, inability to ascribe to the transaction a definite category is of little consequence. It is not the nature of the receipt under the general law but in commerce that is material. It is often difficult to distinguish whether an agreement is for payment of a debt by instalments or for making annual payments in the nature of income. The Court has on an appraisal of all the facts, to assess whether a transaction is commercial in character yielding income or is one in consideration of parting with property for repayment of capital in instalments. No single test of universal application can be discovered for solution of the problem. The name which the parties may give to the transaction which is the source of the receipt and the characterization of the receipt by them are of little moment, and the true nature and character of the transaction have to be ascertained from the covenants of the contract in the light of the surrounding circumstances. The decision of the question is however not left to the application of any arbitrary standards. There are certain broad principles which guide the determination of the character of the receipt. The distinction between a capital receipt and revenue receipt though fine is real. The dividing line may be thin, and often at first sight imperceptible.

Where capital is repaid in instalments, it is not liable income-tax; for instance when a person sells his property and agrees to receive the price stipulated in instalments, by whatever name such instalments are called, they are not

liable to Income-tax—see *Foley* v. *Fletcher*,[1] *Secretary of State for India*, v. *Andrew Scoble*,[2] *Oswald* v. *Kirkalady Magistrates*[3] and *Commissioners of Inland Revenue* v. *Ramsay*.[4]

But where property is conveyed in consideration of what in truth is annuity payable for a definite or a definable period, the annuity is not payment on capital account and is taxable—see *State of Bihar* v. *Sir Kameshwar Sing*,[5] *Captain Maharaj Kumar Gopal Saran* v. *Commissioner of Income-tax, Bihar and Orissa*,[6] *Chadwick* v. *Pearl Life Assurance Co.*[7]

Again, if property is conveyed in consideration of periodical payments, the payment being a share of profits of a business or profession—*Jones* v. *Commissioners of Inland Revenue*.[8] or a mineral royalty depending upon the quantity of minerals raised—*Raja Bahadur Kamakshya Narain Singh of Ramgarh* v. *Commissioner of Income-tax, Bihar and Orissa*,[9] or computed on sales of manufactured articles—*Commissioners of Inland Revenue* v. 36|49 *Holdings Ltd.*[10] or a percentage of gross profits made in the exploitation of a secret process—*Delage* v. *Nugget Polish Co., Ltd.*[11] is income and taxable.

Counsel for the appellants submitted that the receipt under clause (1) of the terms of the deed, dated May 7, 1935, was in the nature of capital payment and relied upon certain decisions in support of that submission.

In *Minister of National Revenue* v. *Catherine Spooner*,[12] decided by the Judicial Committee of the Privy Council in an appeal from the Supreme Court of Canada, the respondent Catherine Spooner had sold her rights, title and interest in land owned by her in freehold to a company in consideration of a certain sum in cash, besides shares of the company, and an agreement to deliver 10 per cent. of oil produced from the land on which the company convenanted to carry out drilling and, if oil was found, pumping operations. These were described as royalties. Oil was struck in the lands and the respondent was paid 10 per cent of the gross proceeds of the oil produced in lieu of oil. The Supreme Court of Canada held that the sum so received was not an annual profit or gain within the meaning of section 3 of the Income War Tax Act, but a receipt of a capital nature and therefore not chargeable to tax. According to the Judicial Committee, there was between the respondent and the company no relation of lessor or lessee: the transaction was one of sale and purchase, and the transaction had taken the form which it did because of the uncertainty whether oil would be found by the purchaser. As the value of the land depended on this contingency, the price, not unnaturally was made to depend in part on the event of oil being struck. The judgment lays down no new principle; it proceeded merely upon interpretation of the document in the light of the circumstances.

In *Trustees of Earl Haig* v. *Commissioners of Inland Revenue*,[13] the question which fell to be determined was whether a share of the royalties received in consideration of allowing the use of the diaries of the late Earl Haig for writing his biography were, in the hands of the trustees under the will of Earl Haig, capital receipts. That was undoubtedly a case in which payments received by the trustees were dependent upon the professional activities of the author

1. (1858) 3 H. & N. 769.
2. L.R. (1903) A.C. 299.
3. (1919) S.C. 147.
4. 20 T.C. 79.
5. (1952) 21 I.T.R. 382.
6. (1935) I.T.R. 237 (P.C.).
7. L.R. (1905) 2 K.B. 507.
8. 7 T.C. 310 : L.R. (1920) 1 K.B. 711.
9. L.R. 70 I.A. 180: (1943) 2 M.L.J. 410 (P.C.).
10. 25 T.C. 173.
11. 21 Times Law Reports 454.
12. L.R. (1933) A.C. 684.
13. 22 T.C. 725.

and the proceeds derived from the sales of the biography he wrote. By the agreement, the author was authorised to extract and publish from the diaries what he thought fit. The diaries were undoubtedly an asset, and after they were used by the author for publication of the biography, their value as an asset was, if not wholly, largely exhausted and their future value was negligible. The agreement was therefore regarded as conveying an asset in its entirety to the author in consideration of a share in the royalties and the receipt of this share was regarded as receipt of capital. That decision proceeded upon the special character of the agreement and the nature of the asset transferred and did not seek to lay down any general principle.

In *Nethersole* v. *Withers,*[1] *N* who had acquired under an agreement the exclusive right to dramatise a novel of Rudyard Kipling received under an agreement with the widow of the author, a third share of a lump sum for which the sound and film rights were granted exclusively to a film company for a period of ten years. The film right of a comprehensive character having been granted by the legal representative of the author against payment of the sum stipulated, the question arose whether the payment received by *N* was taxable under the Income-tax Act under Case II of Schedule D or under Case VI of Schedule D. It was held that *N* having ceased to be the owner of the portion of the copyright she had assigned, the proceeds were not annual profits or gains within the meaning of Schedule D, Case VI. That was a case in which *N* had wholly sold and disposed of a part of the property and the amount received by her was the price paid in lump and was not in the nature of income. That case also proceeded upon the special character of the transaction.

The case of *The Commissioners of Inland Revenue* v. *The Marine Steam Turbine Co., Ltd.*[2] on which reliance was sought to be placed by counsel for the appellants needs no detailed consideration. In that case, a company which was on the facts found not carrying on a trade or business was held not assessable to Excess Profits Duty, because the condition of liability was the carrying on of trade or business.

The appellants had however not sold the entirety of the rights acquired by them from the Karanpura Company. The conveyance was subject to several restrictions and the appellants retained in part rights in the land conveyed. The transaction was substantially a commercial transaction for sharing the profits of the commercial activities of the Associated Cement, Ltd. The High Court was therefore right in holding that the transaction, dated May 7, 1935, was a commercial transaction and the payment under clause (1) thereof at the rate of 0.13 annas per ton of cement sold was of the nature of income and not capital.

In that view of the case, the appeal fails and is dismissed with costs.

Appeal dismissed.

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1. 28 T.C. 501. 2. 12 T.C. 174.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Mohamed Noorulla, representing the Estate of Late Khan Sahib Mohd. Oomer Sahib (In all the Appeals) .. *Appellant**

v.

The Commissioner of Income-tax, Madras (In all the Appeals) .. *Respondent.*

Income-tax (XI of 1922), section 3—Association of persons—Business belonging to estate of deceased Mahomedan carried on on behalf of the coheirs—If assessable as an "association of persons".

Where the business of manufacture and sale of a particular brand of beedies belonging to the estate of a deceased Mahomedan was carried on as a single business by consent of all the coheirs (by the widow and another and later by joint receivers appointed in a suit for administration of the estate or partition), the income of such business is assessable as an income of an "association of persons". The mere fact that a suit was pending at the time for the administration of the estate of the deceased or for the separation of the shares of the coheirs does not affect the incidence of taxation because the business was carried on as one business, with unitary control and by the consent of the parties.

C. I. T., Bombay v. *Indira Balakrishna,* (1961) 1 S.C.J. 153, *applied.*

Appeals by Special Leave from the Judgment and Order, dated the 14th May, 1957, of the Madras High Court, in Case Referred No. 111 of 1953.†

R. Ganapathy Iyer, Advocate and *G. Gopalakrishnan,* Advocate of *M/s. Gagrat & Co.,* for Appellant (In all the Appeals).

K. N. Rajagopal Sastri, Senior Advocate, (*D. Gupta,* Advocate, with him), for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Kapur, J.—These appeals are brought by Special Leave against the Judgment and Order of the High Court of Madras in an Income-tax reference under section 66 (1) of the Indian Income-tax Act, hereinafter termed the 'Act'. The question referred was:—

"Whether the income-tax assessment of the business of 'Spade Clover Beedies' belonging to the estate of the deceased and carried on during the previous years 1943 to 1946 as an association of persons for the assessment years 1944-45 to 1947-48 is valid?"

And this question was decided in the affirmative and therefore against the appellants.

The facts leading to the appeals are that one Khan Sahib Mahomed Oomer Sahib, who was carrying on the business of manufacture and sale of Spade Clover brand Beedies, died on December 17, 1942, leaving a minor son Mohamed Noorullah (the appellant) by his pre-deceased wife, a widow Luthfunnissa Begum and four children by her who were all minors at the date of the death of Oomer Sahib. Noorullah through his next friend applied to sue *in forma pauperis* and during the pendency of those proceedings two Advocates of the Madras High Court were appointed joint receivers of the properties of the deceased on March 17, 1943. This appointment was by consent of parties. On May 10, 1943, the widow Luthfunnissa filed a suit for partition and also applied for the continuance of the joint receivers. Noorullah opposed this application but by an order, dated May 25, 1943, the receivers were ordered to be continued and they carried on the business as before. In due course a preliminary decree

*Civil Appeals Nos. 303 to 307 of 1960. 18th January, 1961.

†(1957) 2 M.L.J. 321.

for partition was passed. The High Court has observed that none of the parties wanted to break the continuity of the business after the death of the father. In the beginning Luthfunnissa and Dawood carried on the business and from the date of their appointment, *i.e.*, May 17, 1943, the joint receivers continued the business till November 25, 1946, when during the course of the proceedings the business was put up for sale by auction between the co-heirs and was purchased by Noorullah.

The years of assessment are 1944-45 to 47-48, the relevant accounting years for which were the calendar years 1943 to 1946. The profits of the business were assessed to tax in the hands of the receivers as the income of an association of persons and the contention of the appellant that the share of the profits of each of the co-heirs should have been separately taxed, was rejected by the Income-tax authorities as well as by the Income-tax Appellate Tribunal. The only question which was raised both before the department as well as before the Tribunal was the assessment to tax of the income of the business. There was no dispute in regard to the income of the properties which was taxed under section 9 (3) of the Act.

The business was inherited by the heirs of Oomer Sahib and was carried on without break during the accounting years first by the widow and Dawood and then jointly by the receivers. The nature of the business was such that it could not be divided up and had to be carried on as one whole with a unity of control and all the parties desired to preserve and did preserve this unity. The opposition by the appellant to the application for receivership filed on behalf of Luthfunnissa, the widow, was only on the ground that the appellant wanted different persons to be appointed and not to the continuance of the business or to the unity of control. The Income-tax Appellate Tribunal in its order stated:

> "In fact, there was no change in the continuity of the business and from the date of death of Md. Oomer Sahib up to 24th March, 1943, the business was carried on by mutual agreement and consent by Luthfunnissa Begum acting on her own behalf and on behalf of her minor children and her minor step-son Md. Noorullah. There can, therefore, be no gainsaying the fact that immediately after the death of Md. Oomer his estate was inherited and run by combination of individuals who had pooled their resources for the common purpose of earning income."

And the High Court has observed:

> "The opposition was apparently to the persons to be appointed receivers and not to the continuance of the business or to the unity of control that was necessary. Noorullah himself had realised that when he applied earlier for the appointment of receivers to conduct the business among other things. Despite Noorullah's opposition when Luthfunnissa asked for the continuance of receivers in her application No. 1162 of 1943, the existence of the desire of all the co-sharers including Noorullah for the continuance of the business with proper persons to take charge of the business under the orders of Court was clear. That intention was material on which the Department authorities and the Tribunal which agreed with them could find that the co-sharers did constitute an "association of persons"."

From the finding of the Tribunal it is obvious that the business was such that it was not capable of division, it being the manufacture and sale of "Beedies' of a particular brand and the finding of the Tribunal was that the business was carried on with the consent of the parties. On this finding it has to be decided whether the business was the business of an "association of persons" and its profits are assessable as such?

The contention of counsel for the appellant was (1) that on the death of Mahomed Oomer his estate including the business devolved upon his heirs in specific shares; and (2) there was no consensus of opinion between the heirs which is shown by the fact that the appellant filed an applieation to sue *in forma*

pauperis and before that application could be decided the widow sued for partition and even though receivers were appointed objection was taken by the appellant to the appointment of receivers. But these facts do not assist the case of the appellant. As has been said above, the business was in the first instance carried on by the widow and Dawood on behalf of the heirs of Oomer and subsequently when the suits were brought none of the parties wanted to break the unity of control of the business nor its continuity and it was of such a nature that it could not be carried on without such consensus and therefore the receivers carried on the business. On these findings the High Court has rightly come to the conclusion that the business was a business of an association of persons.

This Court in *Commissioner of Income-tax, Bombay* v. *Indira Balkrishna*[1] considered the question as to what an association of persons means. The test laid down in three cases: In re *B. N. Elias and others,*[2] *Commissioner of Income-tax* v. *Laxmi Das Devi Das and another*[3] and In re *Dwarkanath Haris Chandra Pitale*[4] was accepted by this Court as correctly laying down the crucial test for determining what is an association of persons and that in each case the conclusion has to be drawn from the circumstances. In the first case the test was laid down as applying to combinations of individuals who were engaged together in some joint enterprise but not constituting a partnership. Such a combination of persons formed for the promotion of a joint enterprise banded together as if they were 'co-adventurers' it was held would constitute an association of individuals. In the second case, that is, *Commissioner of Income-tax* v. *Laxmi Das Devi Das and another*[3] Beaumont, C. J., at page 589 laid down the test as follows:—

> "In my opinion, the only limit to be imposed on the words 'other association of individuals' is such as naturally follows from the fact that the words appear in an Act imposing a tax on income, profits and gains, so that the association must be one which produces income, profits or gains. It seems to me that an association of two or more persons for acquisition of property which is to be managed for the purpose of producing income, profits or gains falls within the words 'other association of individuals'. in section 3; and under section 9 of the Act, the association of individuals is the owner of the property and as such is assessable."

In that case it was also held that the fact that one of the assessees was a minor during the year of the assessment did not affect the question. In In re *Dwarkanath Haris Chandra Pitale*[4] the assessees were two brothers who became entitled to certain house properties as tenants in common and held and managed the properties as such and derived profit therefrom. It was held that though the assessees in the first instance did not constitute an association of individuals, they became so when they elected to retain the property and manage it as a joint venture producing income. The test there laid down was that as soon as there was election to retain the property and manage it as a joint venture the persons so electing became an association of individuals. The Rangoon High Court in the *Commissioner of Income-tax, Burma* v. *M. A. Baporia and others*[5] also laid down the same interpretation of the words 'association of individuals'. That was a case of Mohammedan co-heirs and it was held that by merely inheriting a share of property no person can become a member of an association of individuals unless there is some forbearance or act upon his part to show that his intention and will accompanied the new status, that is, an association of individuals. One of the co-heirs in that case was appointed an agent to realise the income from the properties left to the co-heirs by their father and mother under

1. (1961) 1 S.C.J. 153 : (1960) 39 I.T.R. 546.
2. (1935) 3 I.T.R. 408.
3. (1937) 5 I.T.R. 584.
4. (1937) 5 I.T.R. 716.
5. (1939) 7 I.T.R, 225.

Mohammedan Law and that was held to be sufficient to constitute them an association of individuals.

It is unnecessary to refer to other cases. Taking the test as laid down by this Court in *Indira Balkrishna's case*[1] it appears to us that the appellant and other co-heirs were rightly assessed as an association of persons. No doubt a suit for partition had been filed which was preceded by an application made by the appellant to sue *in forma pauperis*, but the suit in reality was for ensuring the proper conduct of the business and not its discontinuance. During the period that the suit was pending and even before that, *i.e.*, after the death of the father the business was carried on by the consent of all parties as one unit as indeed it had to be, because it had to be carried on as one unit with unity of control and therefore the co-heirs did form an association of persons within the meaning of section 3 of the Act.

Counsel for the appellant relied on *S. C. Mazumdar, Receiver, Trigunait Brothers' Estate* v. *Commissioner of Income-tax*.[2] That was a case of persons who formed a joint family being governed by the Mitakshara School of Hindu Law. A suit for partition was filed and the Court appointed a receiver and a preliminary decree was passed but the receiver was continued in regard to certain portion of the property and the income was assessed by the Taxing authorities as the income of an association of persons. It was held that the income from property could not be taxed as such because the shares of the parties were definite and ascertainable. The amount paid by the lessees could not be taxed in a lump sum as being the profits of a business carried on by an association of persons and the assessment was, therefore, made in accordance with the provisions of S. 9 (3) It was also held that the assessee were not carrying on a trade or business themselves and there was no association of persons as contemplated by the Act. But that case can be of no assistance in the decision of the matter now before us. The income to be assessed there was not income of any business carried on by or on behalf of the assessees and it was held that letting out property was not a trade or business. With regard to the income received by the receiver who employed contractors to carry on the business of coal cutting and raising it on the pit head, it was held that that was not the income of an association of persons on the ground (1) that the receiver was in possession and he employed contractors for coal-cutting and raising of coal; (2) that the assessees had no hand in the business which produced royalty and (3) that the assessees had disassociated themselves from each other because of this partition suit. In our opinion the case so far as it relates to the carrying on of the business and in so far as it is contrary to the opinion expressed by this Court in *Indira Balkrishna's case*,[1] is not correctly decided. Another case relied upon by the counsel for the appellant was *Buldana District Main Cloth Importers' Group, Khamgaon* v. *Commissioner of Income-tax, Nagpur*.[3] In that case a certain group of persons were directed to import cloth in the district and had to work a scheme for the distribution and sale of cloth which had been evolved by the District authorities. That was held not to be an association of persons. It appears that although they were appointed as a group of importers, all of them did not participate in that scheme during the entire period. There were changes in the personnel of the group from time to time and there was no compulsion to work the scheme. On these facts it was held that the group did not agree to carry on the business or share the profits. That case must be taken to have been decided on its own facts and does not in any way affect the meaning of the phrase 'association of persons'. Counsel also relied on *Khan Bahadur H.*

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1. (1961) 1 S.C.J. 153: (1960) 39 I.T.R. 546.
2. (1947) 15 I.T.R. 484.
3. (1956) 30 I.T.R. 61.

Habibur Rahman v. *Commissioner of Income-tax, Bihar* and *Orissa*[1] in which a waqf deed was executed by which the assessee dedicated the income with ultimate benefit to the poor and constituted himself the sole mutwali of the trust. The deed provided that the beneficiaries should be benefited concurrently and in the same proportion. It was held that section 41 (1) was inapplicable and the assessee should, therefore, be taxed on the basis of profits falling to the share of each beneficiary and not on the footing that all the beneficiaries constituted an association of persons. Fazl Ali, C. J., (as he then was) there observed at page 194:—

> "It seems to me therefore that the finding of the Tribunal that there were only 24 persons who were entitled to share the profits in the accounting year and that they were entitled to equal shares therein must be accepted. As it does not seem to have been contended that the assessee had any other relations than those enumerated by the Tribunal who would be entitled to share the profits, it is academic to discuss whether the various categories of persons referred to by the Appellate Commissioner of Income-tax were included in the term 'family' or not".

On this ground the income was not assessed as the income of an association of persons and that case was also decided on its own facts.

The question in the present case is as to what income was to be taxed. The income was the income of a business which was carried on as a single business by the consent of all the parties. The mere fact that a suit was pending at the time for the administration of the estate of the deceased or for the separation of the shares of the co-heirs does not affect the incidence of taxation in this case, because the business was carried on, as said above, as one business with unitary control and by the consent of the parties. The High Court was right in holding that the income was assessable as an income of an association of persons.

The appeals must, therefore, be dismissed with costs. One hearing fee.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

C. A. Abraham .. *Appellant**

v.

The Income-tax Officer, Kottayam, and another .. *Respondents.*

Income-tax Act (XI of 1922), section 44—Scope—Proceeding for imposing penalty under section 28 on surviving partner after discontinuation of business of the firm—Sustainability.

By section 44 of the Income-tax Act, the joint and several liability which is declared is liability to assessment in respect of income, profits or gains of a firm which has discontinued its business, but if in the process of assessment of income, profits or gains, any other liability such as payment of penalty or liability to pay penal interest as is provided under section 25 (2) or under section 18-A (4), (6), (7), (8) and (9) is incurred, it may also be imposed, discontinuation of the business notwithstanding. Section 28 imposing penalty for defaults is a provision enacted for facilitating the proper assessment of taxable income and can properly be said to apply to an assessment made under Chapter IV.

Mareddi Krishna Reddy v. *Income-tax Officer, Tenali*, (1957) 1 An.W.R. 207: 31 I.T.R. 678, *approved.*

Commissioner of Income-tax v. *Rayalaseema Oil Mills*, (1959) 2 An.W.R. 94: I.L.R. (1959) A.P. 570: 37 I.T.R. 208 (F.B.) and *S. V. Veerappa Chettiar* v. *Commis-*

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1. (1944) 13 I.T.R. 189.

*C.A. No. 517 of 1958. 29th November, 1960.

sioner of Income-tax, Madras, (1957) 2 M.L.J. 286: I.L.R. (1957) Mad. 1204: 32 I.T.R. 411, *dissented.*

Appeal from the Judgment and Order, dated the 31st October, 1957, of the Kerala High Court in O. P. No. 215 of 1957.

G. B. Pai and *Sardar Bahadur,* Advocates, for Appellant.

Hardyal Hardy and *D. Gupta,* Advocates for Respondents.

The Judgment of the Court was delivered by

Shah, J.—C. A. Abraham hereinafter referred to as the appellant and one M. P. Thomas carried on business in food grains in partnership in the name and style of M. P. Thomas & Company at Kottayam. M. P. Thomas died on October 11, 1949. For the account years 1123, 1124 and 1125 M. E. corresponding to August 1947-July 1948, August 1948-July 1949 and August 1949-July 1950, the appellant submitted as a partner returns of the income of the firm as an unregistered firm. In the course of the assessment proceedings, it was discovered that the firm had carried on transactions in different commodities in fictitious names and had failed to disclose substantial income earned therein. By order, dated November 29, 1954, the Income-tax Officer assessed the suppressed income of the firm in respect of the assessment year 1124 M. E. under the Travancore Income-tax Act and in respect of assessment years 1949-50 and 1950-51 under the Indian Income-tax Act and on the same day issued notices under section 28 of the Indian Income-tax Act in respect of the years 1949-50 and 1950-51 and under section 41 of the Travancore Income-tax Act for the year 1124 M. E., requiring the firm to show cause why penalty should not be imposed. These notices were served upon the appellant.

The Income-tax Officer after considering the explanation of the appellant imposed penalty upon the firm of Rs. 5,000 in respect of the year 1124 M. E., Rs. 2,000 in respect of the year 1950-51 and Rs. 22,000 in respect of the year 1951-52. Appeals against the orders passed by the Income-tax Officer were dismissed by the Appellate Assistant Commissioner. The appellant then applied to the High Court of Judicature of Kerala praying for a writ of *certiorari* quashing the orders of assessment and imposition of penalty. It was claimed by the appellant *inter alia* that after the dissolution of the firm by the death of M. P. Thomas in October, 1949, no order imposing a penalty could be passed against the firm. The High Court rejected the application following the judgment of the Andhra Pradesh High Court in *Mareddi Krishna Reddy* v. *Income-tax Officer, Tenali.*[1] Against the order dismissing the petition, this appeal is preferred with certificate of the High Court.

In our view the petition filed by the appellant should not have been entertained. The Income-tax Act provides a complete machinery for assessment of tax and imposition of penalty and for obtaining relief in respect of any improper orders passed by the Income-tax authorities, and the appellant could not be permitted to abandon resort to that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Tribunal. But the High Court did entertain the petition and has also granted leave to the appellant to appeal to this Court. The petition having been entertained and leave having been granted, we do not think that we will be justified at this stage in dismissing the appeal *in limine.* On the merits, the appellant is not entitled to relief. The Income-tax Officer found that the appellant had, with a view to evade payment of tax, deliberately concealed material particulars of his income. Even though the firm was carrying on transactions in food grains in diverse names, no entries in respect of those

1. (1957) 1 An.W.R. 207: 31 I.T.R. 678.

transactions in the books of account were posted and false credit entries of loans alleged to have been borrowed from several pesons were made. The conditions prescribed by section 28 (1) (*c*) for imposing penalty were therefore fulfilled. But says the appellant, the assessee firm had ceased to exist on the death of M. P. Thomas, and in the absence of a provision in the Indian Income-tax Act whereby liability to pay penalty may be imposed after dissolution against the firm under section 28 (1) (*c*) of the Act, the order was illegal. Section 44 of the Act at the material time stood as follows:

> "Where any business, ... carried on by a firm......has been discontinued........ every person who was at the time of such discontinuance ...... a partner of such firm,...... shall in respect of the income, profits and gains of the firm be jointly and severally liable to assessment under Chapter IV for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment."

That the business of the firm was discontinued because of the dissolution of the partnership is not disputed. It is urged however that a proceeding for imposition of penalty and a proceeding for assessment of income-tax are matters distinct, and section 44 may be resorted to for assessing tax due and payable by a firm business whereof has been discontinued, but an order imposing penalty under section 28 of the Act cannot by virtue of section 44 be passed. Section 44 sets up machinery for assessing the tax liability of firms which have discontinued their business and provides for three consequences, (1) that on the discontinuance of the business of a firm, every person who was at the time of its discontinuance a partner is liable in respect of income, profits and gains of the firm to be assessed jointly and severally, (2) each partner is liable to pay the amount of tax payable by the firm, and (3) that the provisions of Chapter IV, so far as may be, apply to such assessment. The liability declared by section 44 is undoubtedly to assessment under Chapter IV, but the expression "assessment" used therein does not merely mean computation of income. The expression "assessment" as has often been said is used in the Income-tax Act with different connotations. In *Commissioner of Income-tax, Bombay Presidency and Aden* v. *Khemchand Ramdas*,[1] the Judicial Committee of the Privy Council observed:

> "One of the peculiarities of most Income-tax Acts is that the word 'assessment' is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the tax-payer. The Indian Income-tax Act is no exception in this respect............".

A review of the provisions of Chapter IV of the Act sufficiently discloses that the word "assessment" has been used in its widest connotation in that chapter. The title of the chapter is "Deductions and Assessment". The section which deals with assessment merely as computation of income is section 23; but several sections deal not with computation of income, but determination of liability, machinery for imposing liability and the procedure in that behalf. Section 18-A deals with advance payment of tax and imposition of penalties for failure to carry out the provisions therein. Section 23-A deals with power to assess individual members of certain companies on the income deemed to have been distributed as dividend, section 23-B deals with assessment in case of departure from taxable territories, section 24-B deals with collection of tax out of the estate of deceased persons, section 25 deals with assessment in case of discontinued business, section 25-A with assessment after partition of Hindu Undivided families and sections 29, 31, 33 and 35 deal with the issue of demand notices and the filing of appeals and for reviewing assessment and section 34 deals with assessment of incomes which have escaped assessment. The expres-

1. (1938) 2 M.L.J. 115: I.L.R. (1938) 414 (P.C.). Bom. 487: L.R. 65 I.A. 236: 6 I.T.R.

sion "assessment" used in these sections is not used merely in the sense of computation of income and there is in our judgment no ground for holding that when by section 44, it is declared that the partners or members of the association shall be jointly and severally liable to assessment, it is only intended to declare the liability to computation of income under section 23 and not to the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof. Nor has the expression, "all the provisions of Chapter IV shall so far as may be apply to such assessment" a restricted content: in terms it says that all the provisions of Chapter IV shall apply so far as may be to assessment of firms which have discontinued their business. By section 28, the liability to pay additional tax which is designated penalty is imposed in view of the dishonest contumacious conduct of the assessee. It is true that this liability arises only if the Income-tax Officer is satisfied about the existence of the conditions which give him jurisdiction and the quantum thereof depends upon the circumstances of the case. The penalty is not uniform and its imposition depends upon the exercise of discretion by the Taxing authorities; but it is imposed as a part of the machinery for assessment of tax liability. The use of the expression "so far as may be" in the last clause of section 44 also does not restrict the application of the provisions of Chapter IV only to those which provide for computation of income. By the use of the expression "so far as may be" it is merely intended to enact that the provisions in Chapter IV which from their nature have no application to firms will not apply thereto by virtue of section 44. In effect, the Legislature has enacted by section 44 that the assessment poceedings may be commenced and continued against a firm of which business is discontinued as if discontinuance has not taken place. It is enacted manifestly with a view to ensure continuity in the application of the machinery provided for assessment and imposition of tax liability notwithstanding discontinuance of the business of firms. By a fiction, the firm is deemed to continue after discontinuance for the purpose of assessment under Chapter IV.

The Legislature has expressly enacted that the provisions of Chapter IV shall apply to the assessment of a business carried on by a firm even after discontinuance of its business, and if the process of assessment includes taking steps for imposing penalties, the plea that the Legislature has inadvertently left a lacuna in the Act stands refuted. It is implicit in the contention of the appellant that it is open to the partners of a firm guilty of conduct exposing them to penalty under section 28 to evade penalty by the simple expedient of discontinuing the firm. This plea may be accepted only if the Court is compelled, in view of unambiguous language, to hold that such was the intention of the Legislature. Here the language used does not even tend to such an interpretation. In interpreting a fiscal statute, the Court cannot proceed to make good deficiencies if there be any; the Court must interpret the statute as it stands and in case of doubt in a manner favourable to the tax-payer. But where as in the present case, by the use of words capable of comprehensive import, provision is made for imposing liability for penalty upon tax-payers guilty of fraud, gross negligence or contumacious conduct, an assumption that the words were used in a restricted sense so as to defeat the avowed object of the Legislature qua a certain class will not be lightly made.

Counsel for the appellant relying upon *Mahankali Subbarao* v. *Commissioner of Income-tax*,[1] in which it was held that an order imposing penalty under section 28 (1) (c) of the Indian Income-tax Act upon a Hindu Joint Family after it had disrupted, and the disruption was accepted under section 25-A (1) is invalid, because there is a lacuna in the Act, submitted that a similar

1. (1957) 1 An.W.R. 163: 31 I.T.R. 867.

lacuna exists in the Act in relation to dissolved firms. But whether on the dissolution of a Hindu Joint Family the liability for penalty under section 28 which may be incurred during the subsistence of the family cannot be imposed does not fall for decision in this case; it may be sufficient to observe that the provisions of section 25-A and section 44 are not in *pari materia*. In the absence of any such phraseology in section 25-A as is used in section 44, no real analogy between the content of that section and section 44 may be assumed. Undoubtedly, by section 44, the joint and several liability which is declared is liability to assessment in respect of income, profits or gains of a firm which has discontinued its business, but if in the process of assessment of income, profits or gains, any other liability such as payment of penalty or liability to pay penal interest as is provided under section 25, sub-section (2) or under section 18-A, sub-sections (4), (6), (7), (8) and (9) is incurred, it may also be imposed, discontinuation of the business notwithstanding.

In our view, Chief Justice Subba Rao has correctly stated in *Mareddi Krishna Reddy's case*[1], that:

"Section 28 is one of the sections in Chapter IV. It imposes a penalty for the concealment of income or the improper distribution of profits. The defaults made in furnishing a return of the total income, in complying with a notice under sub-section (4) of section 22 or sub-section (2) of section 23 and in concealing the particulars of income or deliberately furnishing inadequate particulars of such income are penalised under that section. The defaults enumerated therein relate to the process of assessment. Section 28, therefore, is a provision enacted for facilitating the proper assessment of taxable income and can properly be said to apply to an assessment made under Chapter IV. We cannot say that there is a lacuna in section 44 such as that found in section 25-A of the Act.

We are unable to agree with the view expressed by the Andhra Pradesh High Court in the later Full Bench decision in *Commissioner of Income-tax* v. *Rayalaseema Oil Mills*,[2] which purported to overrule the judgment in *Mareddi Krishna Reddy's case*.[1] We are also unable to agree with the view expressed by the Madras High Court in *S. V. Veerappan Chettiar and another* v. *Commissioner of Income-tax, Madras and another*[3].

In the view taken by us, the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

The Commissioner of Income-tax, Bombay City I, Bombay .. *Appellant**

v.

Messrs. Jagannath Kissonlal, Bombay .. *Respondents.*

Income-tax Act (XI of 1922), section 10 (2) (xv)—*Assessee having to discharge whole of joint and several liability in respect of joint borrowings because of joint borrower becoming bankrupt—If entitled to deduct as business loss.*

It was found that there was a well recognised commercial practice in Bombay of carrying on business by borrowing money from Banks on joint and several liability. It was also found that by so doing the borrower could borrow money at a lower rate of interest than he otherwise would have paid. The assessee had in accordance with the commercial

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1. (1957) 1 An.W.R. 207 : 31 I.T.R. 678.
2. (1959) 2 An.W.R. 94 : I.L.R. (1959) A.P. 570 : 37 I.T.R. 208 (F.B.).
3. (1957) 2 M.L.J. 286 : I. L.R. (1957) Mad. 1204 : 32 I.T.R. 411.

*C. A. No. 358 of 1958. 24th November, 1960.

practice, borrowed the money, the whole of which he had to return because the joint promissor had become bankrupt; mutuality was also held proved.

Held: In the circumstances proved and on the facts established and the findings given, the assessee was rightly held to be entitled to deduct the loss which was sustained by him in the transaction in dispute.

Appeal by Special Leave from the Judgment and Order, dated 8th March, 1956, of the former Bombay High Court in I. T. R. No. 55 of 1955.

A. N. Kripal and *D. Gupta,* Advocates for Appellant.

N. A. Palkhivala, Senior Advocate, (*B. P. Maheshwari,* Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal by Special Leave against the judgment and order of the High Court of Bombay in Income-tax Reference No. 55 of 1955, in which two questions of law were stated for opinion and both were answered in favour of the assessee and against the Commissioner of Income-tax who is the appellant before us and the assessee is the respondent.

The facts of this case are these:

The respondent is a registered firm carrying on business as commission agents in Bombay. For purposes of its business it borrowed money from time to time from Banks on joint promissary notes executed by it and by others with joint and several liability. On September 26, 1949, the respondent borrowed Rs. 1,00,000 from the Bank of India on a pronote executed jointly with one Kishorilal. Out of this amount a sum of Rs. 50,000 was taken by the respondent for purposes of its business and the rest by Kishorilal. Kishorilal however failed to meet his liability and became a bankrupt. The respondent had therefore to pay the Bank the whole amount, *i.e.*, Rs. 1,00,000 with interest. Out of the amount taken by Kishorilal the respondent received in the accounting year, from the Official Assignee, a sum of Rs. 18,805 and claimed the balance, *i.e.*, Rs. 31,740 as deduction. The accounting year was from August 26, 1949 to July 17, 1950, the assessment year being 1951-52 .This claim was disallowed both by the Income-tax Officer as well as the Appellate Assistant Commissioner. On Appeal to the Income-tax Appellate Tribunal this sum was allowed as an allowable deduction under section 10 (2) (*xv*) of the Income-tax Act and as business loss.

At the instance of the Commissioner a case was stated to the High Court of Bombay by the Income-tax Appellate Tribunal. In the statement of the case which was agreed to by both parties the Tribunal said:

"For the purpose of his business, he borrows from time to time money on joint and several liability from banks. The Commercial practice is to borrow money from banks on joint and several liability. An illustration will explain what we mean. *A* and *B* require Rs. 50,000 each. They find that the Bank would not advance Rs. 50,000 to each on his individual security. They however, find that the Bank would be prepared to advance Rs. 1,00,000 on their joint and several liability. They take Rupees one lac on joint and several liability and then divide the money equally between themselves."

It also found that the Banks advanced monies to some constituents on their personal security also but they had to pay a higher rate of interest than when the money was borrowed on joint and several responsibility; that Rs. 1,00,000 borrowed from the Bank was in accordance with the commercial practice of Bombay.

On these facts the following two questions of law were referred to the High Court:—

"(1) Whether the assessee's claim is sustainable under section 10 (2) (*xv*) of the Act?

(2) Whether the Asessee's claim that the loss was a business loss and, therefore, allowable as a deduction in computing the profits of the assessee's business is sustainable under law?"

Both these questions were answered in favour of the respondent and against the appellant.

Counsel for the Commissioner challenged the findings of the Tribunal in regard to the existence of commercial practice in Bombay but this ground of attack is not available to him because not only did the Tribunal give this finding in its Order, but in the agreed statement of the case also this finding was repeated as is shown by the passage quoted above. The High Court also has proceeded on the basis of this commercial practice. In the judgment under appeal the learned Chief Justice said:

"The finding of the Tribunal is clear and explicit that what the assessee was doing was not something out of the ordinary, but in borrowing this money, on joint and several liability he was following a practice which was established as a commercial practice. Therefore, the transaction was clearly in the course of the business and incidental to the business and it is this transaction which resulted in a loss to the assessee, he having to pay the liability of the surety."

Therefore this appeal has to be decided on the basis that a commercial practice of financing business by borrowing money on joint and several liability was established.

It was argued on behalf of the appellant that this Court in *Madan Gopal Bagla* v. *Commissioner of Income-tax, West Bengal*[1], had decided against the allowability of such losses. But the facts of that case when carefully scrutinised are distinguishable and the decision does not support the contentions of the appellant. No doubt certain features of that case and the present one are similar but they differ in essential features. In that case the assessee was a timber merchant who obtained a loan of Rs. 1 lakh from the Bank of India on the joint security of himself and one Mamraj, which the assessee paid off. Mamraj also obtained a loan of Rs. 1 lakh on the joint security of himself and the assessee. Mamraj became an insolvent and the assessee had to pay the whole of the amount borrowed with interest thereon. The assessee there received a certain amount of money by way of dividends from the Receiver and the balance he wrote off as bad debt in the assessment year and claimed it as an allowable deduction under section 10. The High Court there held that the debt could not be said to be a debt in respect of the business of the assessee as he was not carrying on the business of standing surety for other persons nor was he a money-lender, he being simply a timber merchant; that it had not been established nor was it alleged that he was in the habit of standing surety for other persons "along with them for purposes of securing loans for their use and benefit" and even if money had been so borrowed and there had been a loss the loss would have been a capital loss and not a business loss to the assesse. This statement of the law was approved by this Court but there mutuality, as an essential ingredient of the custom established, was found to be lacking as is shown by the following passage from the judgment of the Court.

"The custom stated before the Appellate Assistant Commissioner was that persons carrying on business in Bombay used to borrow monies on joint security from the Banks in order to facilitate getting financial assistance from the Banks and that too at lower rates of interest. A business man could procure financial assistance from Banks on his own, but he would in that case have to pay a higher rate of interest. He would have to pay a lower rate of interest if he could procure as surety another businessman, who would

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1. 1956 S.C.J. 668: (1956) 2 M.L.J. (S.C.) 60: 1956 An. W.R. (S.C.) 254: (1956) S.C. R. 551.

be approved by the Bank. This, however, did not mean that mutual accommodation by businessmen was necessarily an ingredient part of that custom. *A* could procure *B*, *C* or *D* to join him as surety in order to achieve this objective, but it did not necessarily follow that if *A* wanted to procure *B*, *C* or *D* to thus join him as surety he could only do so if he in his own turn joined *B*, *C* or *D* as surety in the loans which *B*, *C* or *D* procured in their turns from the Banks for financing their respective businesses. Unless that factor was established, the mere procurement by *A* of *B*, *C* or *D* as surety would not be sufficient to establish the custom sought to be relied upon by appellant so as to make the transaction of his having joined Mumraj Rambhagat as surety in the loan procured by Mumraj Rambhagat from Imperial Bank of India, a transaction in the course of carrying on his own timber business and to make the loss in the transaction a trading loss or a bad debt of the timber business of the appellant."

Continuing at page 558 it was observed:

"There were thus elements of mutuality and the essential ingredient in the carrying on of the money-lending business, which were elements of the custom proved in that case, both of which are wanting in the present case before us."

Mr. Palkhivala for the respondent rightly argued that *Madan Gopal Bagla's case*[1], was decided against the assessee because the custom of persons standing surety for each other for borrowing money and the element of mutuality which was an essential ingredient in the case of *Commissioner of Income-tax, Madras* v. *S. A. S. Ramaswamy Chettiar*[2], was not proved. In the latter case it was established that there was a well-recognised custom amongst Chettiars of raising funds for their business of money-lenders by the execution of joint pronotes and that if a loss was sustained by one of the executants having to pay the whole on account of inability of the other it was a deductible loss.

The appellant also relied on a judgment of the Madras High Court in *Commissioner of Income-tax* v. *S. R. Subramanya Pillai.*[3] In that case the assessee was a book-seller who from time to time jointly with another person borrowed money out of which he employed a portion in his business. One of such amounts borrowed was Rs. 16,200 out of which the assessee took Rs. 10,450 for his business needs and the other debtor took the balance. The latter became insolvent and the assessee had to pay the whole of the money borrowed and claimed it as allowable deduction under section 10 (2) (*xi*) or section 10 (2) (xv) of the Act or as business loss and it was held that he was not entitled, because the loss sustained by the assessee was too remote from the business of book-selling carried on by him and was not sufficiently connected with the trade and therefore fell outside the range of those amounts which could properly be brought into proofit and loss account of the business. The decision in *Commissioner of Income-tax* v. *S. A. S. Ramaswamy Chettiar*[2], was there distinguished on the ground that the decision must be confined to its own peculiar facts and did not apply to business as the one in *Subramanya Pillai's case.*[3] The folllowing passage from the judgment of Viswanatha Sastri, J., in that case is relevant:—

"But there the business was one of money-lending and the Court found that according to the well-known and well-recognised mercantile custom of Nattukottai bankers, they were in the habit of raising funds which formed the stock-in-trade of their money-lending usiness by the execution of joint promissory notes in favour of bankers. That was apparently the usual technique of obtaining credit adopted by the Nattukottai Chetti community money-lenders. In the context this Court held that where a Nattukottai Chetti money-lender paid off in their entirety the debts jointly due by him and another as a result of the latter's inability to pay, the loss sustained as a result of this transaction was a loss of the money lending business itself and therefore a deductible item in computing profits."

In the instant case it has been found that there was a well-recognised commercial practice in Bombay of carrying on business by borrowing money from

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1. (1956) S.C.J. 668 : (1956) 2 M.L.J. (S.C.) 60 : 1956 An.W.R. (S.C.) 254: (1956) S.C.R. 551.
2. (1946) 1 M.L.J. 330 : 14 I.T.R. 236.
3. (1950) 1 M.L.J. 215 : 18 I.T.R. 85.

Banks on joint and several liability. It was also found that by so doing the borrower could borrow money at a lower rate of interest than he otherwise would have paid; that the respondent had, in accordance with the commercial practice, borrowed the money, the whole of which he had to return because the joint promisor Kishori Lal had become bankrupt; mutuality was also held proved. It cannot be said that the essential feature of the case now before us is in principle different from that of the *Commissioner of Income-tax* v. *S. A. S. Ramaswamy Chettiar*[1]. In both cases the finding is that there is mutuality and custom of borrowing money on joint pronotes for the carrying on of business. In our opinion in the circumstances proved in the present case, and on the facts established and on the findings given, the respondent was rightly held to be entitled to deduct the loss which was suffered by him in the transaction in dispute.

Counsel for the appellant drew our attention to a Privy Council judgment *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue*[2], but that case can have no application to the facts of the present case because it was found there as a fact that the assessees's financial arrangements were quite distinct from the activities by which they earned their income and expenditure incurred in relation to the financing of their business was not expenditure in the earning of their income within the statute.

It was then contended that the loss of the respondent was a capital loss and for this again reliance was placed on the judgment of this Court in *Madan Gopal Bagla's case*[3] and particullarly on the observation at page 559 where Bhagwati, J., quoted with approval the observations of the High Court in the judgment but as we have pointed out the facts of that case are distinguishable and what was said there has no application to the facts and circumstances proved in the present case.

In our view the judgment of the High Court is right and we therefore dismiss this appeal with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

R. G. S. Naidu & Co. (In all the Appeals) .. *Appellants**

v.

The Commissioner of Income-tax and Excess Profits Tax, Madras (In all the Appeals) .. *Respondent.*

Excess Profits Tax Act (XV of 1940), section 15—Rule 9 of Schedule 1 of the Act—Applicability.

It is manifest that by the assessment of income made on the assumption that the chargeable accounting period and the accounting period of the company tallied, there resulted under-assessment in the computation of tax liability for Excess Profits Tax, and it was open to the Tax Officer to take action under section 15 of the Excess Profits Tax Act and reopen the assessment for 1945-1946.

If, for the performance of the entire contract, remuneration is payable at rates stipulated, the profit earned out of that remuneration must be apportioned in the manner provided by Rule 9 of Schedule I of the Act, if the performance of the contract extends beyond the accounting period.

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1. (1946) 1 M.L.J. 330 : 14 I.T.R. 236.
2. (1945) 13 I.T.R. (Supp.) 1.
3. (1956) S.C.J. 668 : (1956) 2 M.L.J. (S.C.) 60 : (1956) An.W.R. (S.C.) 254 : (1956) S.C.R. 551.

*C.A. Nos. 181 to 184 of 1960. 14th December, 1960.

E. D. Sassoon & Co. Ltd. v. The Commissioner of Income-tax, Bombay City, (1954) S C J 77: (1955) 1 S.C.R. 313, distinguished.

Appeals from the Judgment and Order, dated the 16th March, 1955, of the Madras High Court in Case Referred No. 43 of 1950.

A. V. Viswanatha Sastri, Senior Advocate, (*R. Ganapathy Iyer*, Advocate and *G. Gopalakrishnan*, Advocate of *Gagrat and Co.*, with him), for Appellants.

Hardayal Hardy and *D. Gupta*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—These appeals relate to excess profits tax liability of the appellants in respect of two chargeable accounting periods April 1, 1944 to March 31, 1945 and April 1, 1945 to March 31, 1946.

The appellants were under an agreement, dated July 11, 1945, appointed managing agents for 20 years of the Coimbatore Spinning and Weaving Co. Ltd.—hereinafter referred to as the company. Prior to October 1, 1944, the appellants were the Managing Agents of the Coimbatore Mills Agency Ltd. —hereinafter referred to as the Agency Company who were the Managing Agents of the Company. The year of account of the appellants ended on March 31, of the Company on June 3, and the Agency Company on September 30. Under the agreement by which the appellants were appointed managing agents, the following remuneration was provided:

1. Office allowance at Rs. 1,500 per mensem;

2. Commission at 1 per cent. on all purchases of cotton and stores and 2½ per cent. on all capital expenditure incurred from time to time; and

3. Commission at 10 per cent. on the net profits of the company due and payable yearly immediately after the accounts of the company were closed.

For the assessment year 1945-46, the appellants submitted a return of their income inclusive of the following items:

1.	Remuneration from the Agency Company ..	Rs. 36,000.
2	Commission at 10 per cent. on profits from the Agency Company upto 30-9-1944 ..	Rs. 37,953.
3.	Remuneration from company from 1-10-1944 to 31-3-1945 ..	Rs. 9,000.
4.	Commission at 1 per cent. on cotton and stores purchased during this period ..	Rs. 21,704.

This return was accepted by the Additional Income-tax Officer, Coimbatore I & II Circles, and the appellants were assessed to income-tax. Excess Profits tax was also worked out on the same basis for the chargeable accounting period ending March 31, 1945. For the assessment year 1946-47, the appellants submitted a return of their income which included the following items:

1.	Remuneration from the company for one year from 1-4-1945 ..	Rs. 18,000.
2	Commission at 10 per cent. on the profits of the company paid in December 1945 (1-10-44 to 30-6-1945) ..	Rs. 1,90,889.
3.	Commission at 1 per cent. on purchases of cotton and stores from 1-4-1945 to 30-6-1945 ..	Rs. 16,777.
4	Commission at 2½ per cent. on capital expenditure from 1-10-1944 to 30-6-1945 ..	Rs. 1,690.

The Tax Officer in charge of the assessment directed that the commission on purchases and capital expenditure be taken into account for the year April 1, 1945 to March 31, 1946 and that the receipts be computed accordingly. The amount of Rs. 1,127 attributable out of item 4 was accordingly taken into the account of the previous year after reopening the assessment under section 34 of the Income-tax Act, and the commission on the profits of the company was apportioned between the period October 1, 1944 to March 31, 1945 and April 1, 1945 to June 30, 1945, by the application of rule 9 of Schedule 1 of the Excess Profits Tax Act The Tax Officer also determined the proportionate commission payable under items 3 and 4, for the period ending March 31, 1946, and as a result of the apportionment, the liability of the appellants, original and revised, for income-tax and excess profits tax for the assessment year 1945-46 and chargeable accounting period April, 1944 to M4arch 31, 1945, stood as follows:

Original assessment of income-tax	.. Rs. 1,04,654.
Excess profits tax	.. Rs. 45,292.
Revised figures	
Income-tax (loss)	.. Rs. 36,182.
Excess profits tax	.. Rs. 1,41,962-11-0.

For the assessment year 1946-47 and chargeable accounting period April 1, 1945 to March 31, 1946, tax liability was computed at:

Income-tax	.. Rs. 1,66,271.
Excess profits tax	.. Rs. 1,13,163-5-0.

The orders of assessment for income-tax and excess profits tax were confirmed by the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal. On the applications of the appellants for reference under section 66 (1) of the Income-tax Act and section 21 of the Excess Profits Tax Act, the Tribunal drew up a statement of the case and submitted the following four questions to the High Court of Judicature at Madras.

1. Whether on the facts and in the circumstances of the case, the Income-tax Officer| Excess Profits Tax Officer was right in taking action under section 34 and 15 of the Income-tax and the Excess Profits Tax Act?

2. Whether on the facts and in the circumstances of this case, the provisions of rule 9, section 1, were properly applied?

3. Whether on the facts and in the circumstances of the case, the Income-tax Officer|Excess Profits Tax Officer was correct in including the proportionate commission income of Rs. 1,127 for income-tax assessment 1945-46 and Rs. 1,43,163 plus Rs. 1,127 for excess profits tax assessment Tax for the chargeable accounting period ending 31st March 1945, and

4. Whether on the facts and in the circumstances of the case, the proportionate commission of Rs. 37,129 and Rs. 2,299 were rightly assessed for the assessment year 1946-47?

The High Court answered all the questions against the appellants and in favour of the Department. Against the order passed by the High Court, these appeals have been preferred with certificate granted under section 66-A (2) of the Income-tax Act read with section 21 of the Excess Profits Tax Act.

Two questions were canvasesd in these appeals:

1. Whether it was open to the Taxing Officer to re-open the assessment for 1945-46; and

2. Whether the commission received by the appellants was liable to be apportioned under rule 9 of Schedule 1 of the Excess Profits Tax Act.

The appellants maintained their books of account on cash basis and commission received from the company was credited after the accounts of the company were closed. The amounts received by the appellants from the company were included in their return and assessment for the year 1945-46 was completed for the purposes of the Excess Profits Tax by the Tax Officer without apportionment appropriate to the chargeable accounting periods. In so doing, the Tax Officer committed an error. He overlooked the fact that the chargeable accounting period for the assessment of excess profits tax and the year of account of the company did not tally. Under section 15 of the Excess Profits Tax Act, if the Tax Officer discovers, in consequence of definite information which has come into his possession that profits of any chargeable accounting period chargeable to excess profits tax have esaped assessment, or have been under-assessed, he may serve on the person liable to pay such tax a notice containing all or any of the requirements which may be included in a notice under section 13 and may proceed to assess or reassess the profits. The provision is substantially similar to section 34 (1) of the Income-tax Act before it was amended in the year 1948. It is manifest that by the assessment of income made on the assumption that the chargeable accounting period and the accounting period of the company tallied, there resulted under-assessment in the computation of tax liability for excess profits tax, and it was open to the Tax Officer to take action under section 15 of the Excess Profits Tax Act.

Determination of the second question depends upon rule 9, Schedule 1, of the Excess Profits Tax Act. By section 2 (19) of the Excess Profits Tax Act, the expression "profits" means pofits as determined in accordance with Schedule 1. That Schedule sets out rules for computation of profits for the purpose of the Excess Profits Tax Act; and by rule 9, it is provided in so far as it is material that:

"Where the performance of a contract extends beyond the accounting period, there shall (unless the Excess Profits Tax Officer, owing to any special circumstances, otherwise directs) be attributed to the accounting period such proportion of the entire profits or loss which has resulted, or which it is estimated will result, from the complete performance of the contract as is properly attributable to the accounting period, having regard to the extent to which the contract was performed therein."

The performance of the contract of managing agency extended beyond the period of account of the company which was July 1, 1945 to June 30, 1946: it covered parts of two accounting periods. The Tax Officer was therefore obliged to apportion to the chargeable accounting periods the entire profits resulting from the complete performance of the contract in proportions properly attributable to the accounting periods and this, he proceeded to do. Counsel for the appellants contends that the contracts contemplated by rule 9 are those of the nature of engineering or works contracts and the like where execution of the contract involves a profit making operation *de die in diem* and not contracts where remuneration is payable at a certain time for services performed throughout the stipulated period. It is true that remuneration was paid to the appellants after the expiry of the year of account of the company; but the contract was one the performance of which extended through the year of account of the company. The appellants were the managing agents of the company and they had to perform their duties as managing agents for the whole year. It is not disputed that the contract of agency for 20 years is to be regarded for assessment of excess profits tax as an annual contract. The perfomance of the contract unmistakably cut across the accounting period is also manifest. The remunera-

tion for performance of the contract is not computed at daily rate, but is computed on a percentage of the commission on the profits of the company for the whole year, but on that account, the contract is not one in which performance does not extend throughout the year of account. Normally in a managing agency contract, the managing agent may not suffer loss, but that does not rule out the application of rule 9 to managing agency contracts. The terms in which rule 9 is enacted are general: the rule is applicable to all contracts which are intended to be operative for a fixed period. If, for the performance of the entire contract, remuneration is payable at rates stipulated, the profits earned out of that remuneration must be apportioned in the manner provided by rule 9 if the performance of the contract contract extends beyond the accounting period.

The judgment of this Court in *E. D. Sassoon & Co., Ltd.* v. *The Commissioner of Income Tax, Bombay City*[1], on which strong reliance was placed by the appellants has no application to this case. In that case, M|s. E. D. Sassoon & Co., Ltd. who were managing agents of three different companies transferred the managing agencies to three other companies on several dates during the accounting year. A question arose in the computation of income-tax payable by M|s. E. D. Sassoon & Co., Ltd., whether the managing agency commission was liable to be apportioned between M|s. E. D. Sassoon & Co., Ltd. and their respective transferees in the proportion of the services rendered as managing agents for the respective periods of the accounting year. It was held by this Court (Jagannadhadas, J., dissenting) that on a true interpretation of the managing agency agreements in each case the contract of service between the companies and the managing agents was entire and indivisible and the remuneration or commission became due by the companies to the managing agents only on completion of definite periods of service and at stated intervals; that complete performance was a condition precedent to the recovery of wages or salary in respect thereof and the remuneration payable constituted a debt only at the end of each period of service completely performed, no remuneration or commission being payable to the managing agents for broken periods; that no income was earned by or accrued to M|s. E. D. Sassoon & Co., Ltd. and as the transfer of the agencies did not include any income which E. D. Sassoon & Co., Ltd. had earned, they were not liable to be taxed under the Income-tax Act. But that was a case dealing with liability of the assessees who did not receive any income and to whom no income had accrued to pay income-tax on the amounts of remuneration paid to their transferees. The Court was not called upon to apply to income received by the assessee the principle of apportionment under rule 9 of Schedule 1 of the Excess Profits Tax Act, or any provision similar thereto. It is rule 9 of Schedule 1 which attracts the principle of apportionment. The rule enunciated in *M|s. E. D. Sassoon & Co's. case*[1] has therefore no application to this case, and the High Court was right in holding that the assessment made by the Excess Profits Tax Officer by apportionment of the commission income between the chargeable accounting periods was correct.

The appeals therefore fail and are dismissed with costs. One hearing fee.

Appeal dismissed.

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1. (1954) S.C.J. 771: (1955) 1 S.C.R. 313.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Bayyana Bhimayya and Sukhdevi Rathi .. *Appellants**

v.

The Government of Andhra Pradesh .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), *section* 2 (b)—A *agreeing to purchase gunnies from mills at certain rates for future delivery—Mills agreeing to give deliveries to third parties producing delivery orders from* A—A *charging extra to third parties to whom he gave delivery orders—Transactions if 'sales' by* A *to third parties liable to sales tax.*

A entered into contracts with Mills agreeing to purchase gunnies at a certain rate for future delivery. *A* also entered into agreements with the Mills, by which the Mills agreed to deliver the goods to third parties if requested by *A*. The Mills, however, did not accept the third parties as contracting parties but only as agents of *A*. Before the date of delivery, *A* entered into agreements with third parties, by which *A* charged something extra from the third parties and handed over to them the delivery orders, which were known as *kutcha* delivery orders. The Mills delivered the goods on such *kutcha* delivery orders to the third parties. It was contended by *A* that the agreement and delivery of the *kutcha* delivery order did not amount to a sale of goods but was only an assignment of a right to obtain delivery of the gunnies; that there was only one transaction of sale between the Mills and the third parties, who, on the strength of the assignment of the right to take delivery had received the goods from the Mills. Negativing the contention.

Held: In so far as the third parties were concerned, they had purchased the goods by payment of an extra price, and the transaction must, in law and in fact, be considered a fresh transaction of sale between *A* and the third parties. A delivery order is a document of title to goods and the possessor of such a document has the right not only to receive the goods but also to transfer it to another by endorsement or delivery. At the moment of delivery by the Mills to the third parties, there were, in effect, two deliveries, one by the Mills to *A* represented, in so far as the Mills were concerned, by *A's* agents the third parties, and the other, by *A* to the third parties as buyers from *A*. These two deliveries might synchronise in point of time, but were separate, in point of fact and in the eye of law. There being two separate transactions of sale, tax was payable at both the points.

Decision of the High Court in (1957) 1 An.W.R. 69, affirmed.

State of Andhra v. *Kolla Sree Ramamurthy,* (1958) 2 An.W R. 298, distinguished.

Appeals from the Order, dated the 23rd November, 1956, of the Andhra Pradesh High Court, Hyderabad, in Tax Revision Cases Nos. 17 & 18 of 1956.[1]

C. K. Daptary, Solicitor-General of India (*T. V. R. Tatachari,* Advocate, with him), for Apellants.

K. N. Rajagopal Sastri, Senior Advocate (*D. Gupta,* Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—These are two appeals on certificates granted by the High Court of Andhra Pradesh against a common judgment in a sales tax revision filed by the appellants in the High Court.

The facts are as follows: In the year 1952-53, for which the assessment of sales tax was in question, the appellants dealt in gunnies, and purchased them from two Mills in Vishakapatnam District and in respect of which they issued delivery orders to third parties, with whom they had entered into separate transactions. The procedure followed by the appellants was this: They first entered into contracts with the Mills agreeing to purchase gunnies at a certain rate for future delivery. Exhibit A-1 is a specimen of such contracts.

*C.A. Nos. 223 & 224 of 1960. 14th December, 1960.

1. (1957) 1 An.W.R. 69.

The appellants also entered into agreements with the Mills, by which the Mills agreed to deliver the goods to third parties if requested by the appellants. The Mills, however, did not accept the third parties as contracting parties but only as agents of the appellants. Exhibits A-2 and A-2 (*a*) are specimen agreements of this kind. Before the date of delivery, the appellants entered into agreements with third parties, by which they charged something extra from the third parties and handed over to them the delivery orders, which were known as *kutcha* delivery orders. Exhibits A-3 and A-4 are specimens of the agreement and the delivery orders respectively. The Mills used to deliver the goods against the *kutcha* delivery orders along with an invoice and a bill, of which Exhibits A-6 and A-7 are specimens respectively, and collected the sales tax from the third parties. The tax authorities, however, treated the transaction between the appellants and third parties as a fresh sale, and sought to levy sales tax on it again, which the appellants, contended, was not demandable, as there was no second sale.

The appellants failed in their contentions before the Deputy Commercial Tax Officer, Guntur, and their appeals to the Deputy Commissioner of Commercial Taxes, Guntur and the Andhra Sales Tax Appellate Tribunal, Guntur, were unssuccessful. The appellants then went up in revision to the High Court under the Madras General Sales Tax Act, 1939 (as amended by Madras Act VI of 1951), but were again unsuccessful. The High Court, however, granted certificates, on which these appeals have been filed.

The contentions of the appellants are that the agreement and the delivery of the *kutch* delivery order did not amount to a sale of goods, but was only an assignment of a right to obtain delivery of the gunnies, which were not in existence at the time of the transaction with third parties, and were not appropriated to the contract, or, in the alternative, that this was only an assignment of a forward contract. They seem to have relied in the High Court upon the decisions of this Court reported in *The Sales Tax Officer, Pilibhit* v. *Messrs. Budh Prakash Jai Prakash*[1] and *Poppatlal Shah* v. *The State of Madras*[2], to show that these transactions were not sales. These cases were not relied upon by the appellants before us, presumably because the High Court has adequately shown their inapplicability to the facts here.

The learned Solicitor-General appearing for the appellants rested his case entirely upon the first contention, namely, that there was only an assignment of a right to obtain delivery of the gunnies and not a sale. He contended that there was only one transaction of sale between the Mills and the third parties, who, on the strength of the assignment of the right to take delivery, had received the goods from the Mills. In our opinion, this does not represent the true nature of the transactions, either in fact, or in law.

To begin with, the Mills had made clear in their agreements that they were not recognising the third parties as contracting parties having privity with them, and that delivery would be given against the *kutcha* delivery orders to the third parties as agents of the appellants. The Mills, therefore, recognised only the appellants as contracting parties, and there was thus a sale to the appellants from the Mills, on which sales tax was correctly demanded and was paid. In so far as the third parties were concerned, they had purchased the goods by payment of an extra price, and the transaction must, in law and in fact, be considered a fresh transaction of sale between the appellants and the third parties. A delivery order is a document of title to goods (*Vide* section 2 (4) of the Sale

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1. (1954) S.C.J. 573: (1954) 2 M.L.J. 124: (1955) 1 S.C.R. 243.

2. (1953) S.C.J. 369: (1953) 1 M.L.J. 739: (1953) S.C.R. 677.

of Goods Act), and the possessor of such a document has the right not only to receive the goods but also to transfer it to another by endorsement or delivery. At the moment of delivery by the Mills to the third parties, there were, in effect, two deliveries, one by the Mills to the appellants, represented, in so far as the Mills were concerned, by the appellants' agents, the third parties, and the other, by the appellants to the third parties as buyers from the appellants. These two deliveries might synchronise in point of time, but were separate, in point of fact and in the eye of law. If a dispute arose as to the goods delivered under the *kutcha* delivery order to the third parties against the Mills, action could lie at the instance of the appellants. The third parties could proceed on breach of contract only against the appellants and not against the Mills. In our opinion, there being two separate transactions of sale, tax was payable at both the points, as has been corectly pointed out by the tax authorities and the High Court.

The appellants relied upon at decision of the Andhra Pradesh High Court in *The State of Andhra* v. *Kolla Sreeramamurty*,[1] but there, the facts were different, and the Division Bench itself in dealing with the case, distinguished the judgment under appeal, observing that there was no scope for the application of the principles laid down in the judgment under appeal, because in the cited case,

> "the property in the goods did not pass from the Mills to the assessee and there was no agreement of sale of goods to be obtained in future between the assessee and the third party".

In the result, the appeals fail, and are dismissed with costs. One hearing fee.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

Shri Ambica Mills Co. Ltd. .. *Appellant**

v.

Shri S. B. Bhatt and another .. *Respondents.*

Constitution of India (1950), Article 226—Scope of jurisdiction under—Error of law apparent on the face of the record—Writ can issue to correct—Payment of Wages Act (IV of 1936), sections 15 and 22—Nature and extent of jurisdiction of authority under.

The writ of *certiorari* can be issued not only in cases of illegal exercise of jurisdiction but also to correct errors of law apparent on the face of the record whether or not a *certiorari* can issue to correct an error of fact on the ground that the impugned finding of fact is not supported by any legal evidence. As to when an error of law can be said to be apparent on the face of the record it is difficult to lay down tests. In a sense it would be correct to say that an error of law which can be corrected by a writ of *certiorari* must be self evident and should not need elaborate examination of the record or merits. Though judicial opinions may differ whether an error of law is self-evident or not, it is usually not difficult to decide whether the impugned error of law is apparent on the face of the record or not.

[In the instant case the construction placed by the appellate authority on the clauses in an agreement was patently and manifestly erroneous based on a plain misreading of the provisions and the High Court was within its jurisdiction in issuing the writ of *certiorari* to correct the error. It is not a case where two alternative conclusions are possible.]

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1. (1958) 2 An.W.R. 298.

*C.A. No. 243 of 1959. 12th December, 1960.

The only claims which can be entertained by the authority under section 15 of the Payment of Wages Act are claims arising out of deductions or delay made in payment of wages. The jurisdiction thus conferred on the authority to deal with these two categories of claims is exclusive; for section 22 of the Act provides that matters which lie within the jurisdiction of the authority are excluded from the jurisdiction of ordinary civil Courts. But the limited and exlusive jurisdiction of the authority would extend to the determination of incidental questions also. Thus where the only dispute is whether or not a particular employee falls within one category or another, that would be incidental to the decision of the main question as to what the terms of the contract are and the auhority will have jurisdiction to decide that question.

Appeal by Special Leave from the Judgment and Order, dated the 24th April, 1958, of the Bombay High Court in Special Civil Application No. 874 of 1958.

M. C. Setalvad, Attorney-General for India (*G. P. Vyas* and *I. N. Shroff,* Advocate, with him), for Appellant.

Vithalbhai Patel, S. S. Shukla, C. T. Daru and *E. Udayarathnam,* Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The principal question which this appeal by Special Leave raises for our decision, relates to the nature and extent of the jurisdiction conferred on the authority by section 15 of the Payment of Wages Act, (IV of 1936) (hereafter called the Act). This question arises in this way. The appellant Shri Ambica Mills Co. Ltd., is a textile mill working at Ahmedabad. Three of its employees named Punamchand, Shamaldas and Vishnuprasad made an application to the authority under section 16 of the Act and prayed for an order against the appellant to pay them their delayed wages. In order to appreciate, the contentions raised by the appellant disputing the validity of the respondents' claim it is necessary to set out the background of the dispute in some detail. It appears that an award called the Standardisation Award which covered the mill industry in Ahmedabad was pronounced by the Industrial Tribunal on April 21, 1948, in Industrial Reference No. 18 of 1947. This award fixed the wages for different categories of workers working in the textile mills at Ahmedabad, but left over the question of clerks for future decision. Amongst the operatives whose wages were determined by the award the case of hand-folders was specifically argued before the Industrial Tribunal. The Labour Association urged that the rate of Rs. 36-9-0 awarded to them was too low and it was pointed out on their behalf that they did the same work as cut-lookers did in Bombay where a head cut-looker was given Rs. 52—and a cut-looker Rs. 42-4-0. On the other hand the mill owners contended that the rate should have been fixed at Rs. 34-2-0 instead of Rs. 36-9-0. The Tribunal found it difficult to decide the point because enough evidence had not been produced before it to show the kind of work that hand-folders were doing at Ahmedabad; that is why the Tribunal was unable to raise the wage of hand-folders to that of cut-lookers in Bombay. However, it made a significant direction in that behalf in these words: "At the same time", it was observed, "we desire to make it clear that if there are persons who are doing cut-looking as well as folding, they should be paid the rate earned by the cut-lookers in Bombay". This question has been considered by the Tribunal in paragraph 16 of its award.

The question of clerks, the decision of which had been adjourned by the Tribunal was later considered by it and an award pronounced in that behalf. However, the said award was later terminated by the clerks in 1949, and that led to an agreement between the Ahmedabad Mill Owners' Association and the Textile Labour Association in the matter of wages payable to clerks. This

agreement was reached on June 22, 1949. Clauses (2) and (5) of this agreement are material for the purpose of this appeal. Let us therefore read the two clauses:

"(2) That this agreement shall apply to all the Clerks employed in the local mills, *i.e.*, persons doing clerical work, that is those who do routine work of writing, copying or making calculations and shall also include compounders and assistant compounders who are qualified and who are employed in the local mills.

5. A separate scale for those of the employees who occupy the position lower than that of a full-fledged Clerk but higher than that of an operative will be provided as under:—

Rs. 40-3-70-EB-4-90-5-105.

This scale will be applicable in case of ticket-boy, ticket-checker, coupons-seller, talley-boy, scale-boy, production-checker, thread-counter, cloth-measurer or yard-counter, fine-reporter, cloth|yarn-examiner, department storeman, cut-looker and those others who have not been included above but who can properly fall under the above category."

After this agreement was thus reached persons doing the work of cut-lookers began to feel that they were entitled to the benefit of clause 5 and some claims were put forth on that basis against the employers. Vishnuprasad and Punamchand applied before the authority (Applications Nos. 39 and 40 of 1954) and claimed delayed wages against the appellant on the ground that they were entitled to higher wages under paragraph 16 of the award in Reference No. 18 of 1947. This claim was resisted by the appellant. The appellant urged that the applications were not maintainable under the Act, that they were barred in view of an arbitration award which was then in operation and that on the merits the applicants were not doing the work of cut-looking. All these contentions were rejected by the authority. It examined the duties performed by the applicants, and it came to the conclusion that both the applicants were folders doing cut-looking, and consequently they were entitled each to Rs. 42-4-0 per month; in other words, the authority came to the conclusion that the applicants properly fell under the category specified in paragraph 16 of the award referred to above and as such they were entitled to recover the difference between Rs. 36-9-0 per month which was paid to each one of them and Rs. 42-4-0 which was due to each one of them. This decision was announced on September 2, 1954.

On July 11, 1955, the present respondents moved the authority under section 16 of the Act. They urged that they were semi-clerks and occupied a position lower than that of a full-fledged clerk and higher than that of an operative, and as such they were governed by clause 5 of the agreement and were entitled to increment provided by the said clause. This claim was resisted by the appellant on several grounds. It was urged that the present applications were barred by *res judicata,* that the authority had no jurisdiction to entertain the applications, and that on the merits the respondents were not semi-clerks as contemplated by clause 5 of the agreement. On these contentions the authority raised four issues. It held against the respondents and in favour of the appellant on issues 1 and 2 which related to the plea of *res judicata* and the status of the respondents. In view of the said findings it thought it unnecessary to decide the two remaining issues which dealt with the quantum of amount claimed by the respondents. It appears that the question of jurisdiction, though urged in its pleading by the appellant, was not raised as an issue and has not been considered by the authority. The finding of *res judicata* was recorded against Punamchand and Vishnuprasad. Shamaldas had not made any previous application and so no question of *res judicata* arose against his application. His application was dismissed only on the ground that he could not claim the status of a semi-clerk. The same finding was recorded against

the two other respondents. It appears that at the trial before the authority the parties filed a joint Pursis which enumerated the duties performed by the respondents in paragraphs 2 to 7. The authority took the view that

"the duties performed by them cannot be said to be the duties of persons doing the routine work of writing, copying and making calculations".

In the result it was held that the respondents were governed by the Standardisation Award and did not fall under the subsequent agreement.

This decision was challenged by the respondents before the District Judge who was the appellate authority under the Act. The appellate authority also was asked to consider the question of jurisdiction. It examined the relevant provisions of the Act and held that the authority had jurisdiction to entertain the applications made before it by the respondents. On the question of *res judicata* it agreed with the finding of the authority, and held that the claims made by Punamchand and Vishnuprasad were barred by *res judicata.* Similarly, on the question of the status of the respondents it agreed that they were not semi-clerks. It is clear from the judgment of the appellate authority that in determining the status of the respondents, the appellate authority applied the same test as was invoked by the authority, and it considered the question as to whether the duties performed by the respondents were similar to the duties performed by clerks. It is obvious that the tests applied are tests relevant to the employees falling under clause 2 of the agreement, and since the application of the said test led to the conclusion that the respondents did not fall under clause 2 the appellate authority held that clause 5 was inapplicable to them; in other words, the judgments of both the authority and the appellate authority clearly show that they took the view that clause 2 was wholly determinative of the issue, and that unless an employee fell under clause 2 he cannot claim to be covered by any part of the agreement including clause 5. That is why the appeals preferred by the respondents were dismissed by the appellate authority on September 2, 1954.

These appellate decisions were challenged by the respondents by filing a writ petition under Articles 226 and 227 of the Constitution before the Bombay High Court. The Bombay High Court has held that the decision of the appellate authority was patently erroneous in law in that it proceeded on the assumption that unless clause 2 of the agreement was satisfied clause 5 would be inapplicable. It also held that the finding concurrently recorded by the authorities below on the question of *res judicata* against two of the respondents was manifestly erroneous. On these findings the High Court allowed the writ petition filed by the respondents, set aside the orders of the authorities below and sent the case back to the authority for dealing with it in accordance with law in the light of the judgment delivered by the High Court. It is against this decision that the appellant has preferred the present appeal by Special Leave.

The first contention which the learned Attorney-General has raised before us on behalf of the appellant is that the High Court has exceeded its jurisdiction under Articles 226 and 227 in interfering with the decision of the appellate authority. He contends that at the highest the error committed by the appellate authority is one of law but it is not an error apparent on the face of the record, and he argues that it was not within the competence of the High Court to sit in appeal over the judgment of the appellate authority and examine meticulously the correctness or the propriety of the conclusions reached by it.

The question about the nature and extent of the jurisdiction of the High Courts in issuing a writ of *certiorari* under Article 226 has been the subject-matter of several decisions of this Court. It is now well settled that the said writ can be issued not only in cases of illegal exercise of jurisdiction but also

to correct errors of law apparent on the face of the record. In this connection it may be pertinent to refer to the observations made by Denning, L. J., in *Rex* v. *Northumberland Compensation Appeal Tribunal.*[1] "The writ has been supposed to be confined to the correction of excess of jurisdiction", observed Lord Justice Denning,

"and not to extend to the correction of errors of law; and several judges have said as much. But the Lord Chief Justice has, in the present case, restored *certiorari* to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record even though they do not go to jurisdiction."

There is no doubt that it is only errors of law which are apparent on the face of the record that can be corrected, and errors of fact, though they may be apparent on the face of the record, cannot be corrected (Vide: *Nagendra Nath Bora and another* v. *The Commissioner of Hills Division and Appeals, Assam and others.*[2] It is unnecessary for us to consider in the present appeal whether or not a *certiorari* can issue to correct an error of fact on the ground that the impugned finding of fact is not supported by any legal evidence. Thus it would be seen that the true legal position in regard to the extent of the Court's jurisdiction to issue a writ of *certiorari* can be stated without much difficulty. Difficulty, however, arises when it is attempted to lay down tests for determining when an error of law can be said to be an error apparent on the face of the record. Sometimes it is said that it is only errors which are self-evident, that is to say, which are evident without any elaborate examination of the merits that can be corrected, and not those which can be discovered only after an elaborate argument. In a sense it would be correct to say that an error of law which can be corrected by a writ of *certiorari* must be self-evident; that is what is meant by saying it is an error apparent on the face of the record, and from that point of view, the test that the error should be self-evident and should not need an elaborate examination of the record may be satisfactory as a working test in a large majority of cases; but, as observed by Venkatarama Ayyar, J., in *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque and others*[3],

"there must be cases in which even this test might break down because judicial opinions also differ; and an error that may be considered by one judge as self-evident might not be so considered by another."

Judicial experience, however, shows that though it cannot be easy to lay down an unfailing test of general application it is usually not difficult to decide whether the impugned error of law is apparent on the face of the record or not.

What then is the error apparent on the face of the record which the High Court has corrected by issuing a writ of *certiorari* in the present case? According to the High Court the construction placed by the appellate authority on clauses 2 and 5 of the agreement is patently and manifestly erroneous. The appellate authority held on a construction of the said two clauses that clause 2 was the determinative clause, and that unless an employee satisfied the requirements of the said clause he could not claim the benefit of clause 5. In deciding whether the High Court should have issued the writ or not it is necessary to examine the said two clauses. On looking at the two clauses it seems to us that the conclusion is inescapable that the error committed by the appellate authority is manifest and obvious. Clause 2 applies to clerks employed in the local mills, and as such it describes the nature of the work which is required to be done by persons falling under that clause. Clause 5, on the other hand, obviously provides for a separate scale for those employees who are not clerks nor operatives; these employees occupied a position higher than that of an operative and below that

1. L.R. (1952) 1 K.B. 338.
2. (1958) S.C.J. 798 : (1958) S.C.R. 1240.
3. (1955) S.C.J. 267 : (1955) 1 M.L.J. (S.C.) 157 : (1955) 1 S.C.R. 1104 at 1123.

of a full-fledged clerk. Therefore there is no doubt that persons falling under clause 5 cannot fall under clause 2, and should not therefore be expected to satisfy the test prescribed by the said clause. A bare perusal of the list of employees specified by designation as falling under clause 5 will show that the application of the test which is relevant under clause 2 would in their case be wholly inappropriate and irrelevant. Therefore, in our opinion, the error committed by the appellate authority was of such a manifest character that the High Court was justified in correcting the said error by the issue of a writ of *certiorari*. The question involved in the decision of the dispute is not so much of construction of the document as of giving effect to the plain terms of the document. If clause 5 expressly provides for employees not falling under clause 2, and if that intention is clarified by the list of designations which fall under clause 5 and yet the appellate authority read that clause as subject to clause 2, that must be regarded as an error patent on the face of the record. It is not a case where two alternative conclusions are possible; it is a case of plain misreading of the two provisions ignoring altogether the very object with which the two separate provisions were made. In our opinion, therefore, the contention raised by the learned Attorney-General that by issuing the writ the High Court has exceeded its jurisdiction is not well-founded.

That takes us to the second, and in fact the principal, contention which has been seriously argued before us by the learned Attorney-General. He urged that the applications made by the respondents' Union on behalf of the three employees were incompetent under section 15 of the Act and the authority exceeded its juridiction in entertaining them. It is true that this point was not specifically urged before the authority, but it appears to have been argued before the appellate authority and the High Court, and it is this contention which raises the problem of construing section 15 of the Act. The case for the appellant is that the jurisdiction conferred on the authority under section 15 is a limited jurisdiction, and it would be unreasonable to extend it on any inferential ground or by implication.

The scheme of the Act is clear. The Act was intended to regulate the payment of wages to certain classes of persons employed in industry, and its object is to provide for a speedy and effective remedy to the employees in respect of their claims arising out of illegal deductions or unjustified delay made in paying wages to them. With that object section 2 (*vi*) of the Act has defined wages. Section 4 fixes the wage period. Section 5 prescribes the time of payment of wages; and section 7 allows certain specified deductions to be made. Section 15 confers jurisdiction on the authority appointed under the said section to hear and decide for any specified area claims arising out of deductions from wages, or delay in payment of wages, of persons employed or paid in that area. It is thus clear that the only claims which can be entertained by the authority are claims arising out of deductions or delay made in payment of wages. The jurisdiction thus conferred on the authority to deal with these two categories of claims is exclusive; for section 22 of the Act provides that matters which lie within the jurisdiction of the authority are excluded from the jurisdirtion of ordinary civil Courts. Thus in one sense the jurisdiction conferred on the authority is limited by section 15, and in another sense it is exclusive as prescribed by section 22.

In dealing with claims arising out of deductions or delay made in payment of wages the authority inevitably would have to consider questions incidental to the said matters. In determining the scope of these incidental questions care must be taken to see that under the guise of deciding incidental matters the limited jurisdiction is not unreasonably or unduly extended. Care must also be taken to see that the scope of these incidental questions is not unduly limited

so as to affect or impair the limited jurisdiction conferred on the authority. While considering the question as to what could be reasonably regarded as incidental questions let us refer to the definition of wages prescribed by section 2 (*vi*). Section 2 (*vi*) as it then stood provided, *inter alia* that 'wages' means all remuneration capable of being expressed in terms of money which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and it includes any bonus or other additional remuneration of the nature aforesaid which would be so payable and any sum payable to such person by reason of the termination of his employment. It also provided that the word "wages" did not include five kinds of payments specified in clauses (*a*) to (*e*). Now, if a claim is made by an employee on the ground of alleged illegal deduction or alleged delay in payment of wages several relevant facts would fall to be considered. Is the applicant an employee of the opponent?; and that refers to the subsistence of the relation between the employer and the employee. If the said fact is admitted, then the next question would be: what are the terms of employment? Is there any contract of employment in writing or is the contract oral? If that is not a point of dispute between the parties then it would be necessary to enquire what are the terms of the admitted contract. In some cases a question may arise whether the contract which was subsisting at one time had ceased to subsist and the relationship of employer and employee had come to an end at the relevant period. In regard to an illegal deduction a question may arise whether the lockout declared by the employer is legal or illegal. In regard to contracts of service sometimes parties may be at variance and may set up rival contracts, and in such a case it may be necessary to enquire which contract was in existence at the relevant time. Some of these questions have in fact been the subject-matter of judicial decisions. (Vide: *A. R. Sarin* v. *B. C. Patil*[1]; *Vishwanath Tukaram* v. *The General Manager, Central Railway, V. T., Bombay*[2] and *Maharaja Sri Umaid Mills, Ltd.* v. *Collector of Pali and others*[3]; but we do not propose to consider these possible questions in the present appeal, because, in our opinion, it would be inexpedient to lay down any hard and fast or general rule which would afford a determining test to demarcate the field of incidental facts which can be legitimately considered by the authority and those which cannot be so considered. We propose to confine our decision to the facts in the present case.

What are the facts in the present case? The relationship of employer and employee is not in dispute. It is admitted that the three workmen are employed by the appellant, and do the work of bleach-folders. These folders are classified into Uttarnars and Chadhavnars. Indeed, the items of work assigned to these categories of folders are admitted. The appellant contends that the employment of the three workmen is governed by the Award which is in operation, whereas the respondent Union contends that they are governed by clause 5 of the subsequent agreement. It is common ground that both the Award and the agreement are in operation in respect of the persons governed respectively by them, so that it is not disputed by the appellant that the persons who are specified by their designation under clause 5 would be entitled to the benefit of the said clause and would not be governed by the Award. If an employee is called a cut-looker by any mill he would naturally fall under clause 5; in other words, all the specified categories of employees named by designation in that clause would not be governed by the Award though at one

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1. 53 Bom.L.R. 674.
2. 59 Bom.L.R. 892.
3. (1960) 2 L.L.J. 364.

stage they were treated as operatives but they would be governed by clause 5 of the agreement; and if a person bearing that designation applied under section 15 of the Act his application would be competent. The appellant's argument, however, is that when the last part of clause 5 refers to other employees "who have not been included above but who can properly fall under the above category" no designation is attached to that class, and in such a case it would be necessary to enquire whether a particular employee can properly fall under the said category, and that, it is urged, means that such an employee cannot apply under section 15 but must go to the industrial Court under the ordinary industrial law. Thus the controversy between the parties lies within a very narrow compass. An employee designated as a cut-looker can apply under section 15 and obtain relief from the authority; an employee not so designated but falling under the said category by virtue of the work assigned to him, it is said, cannot apply under section 15 because the authority cannot deal with the question as to whether the said employee properly falls under the said category or not. In our opinion, on these facts, the question as to whether a particular employeee is an operative falling under the Award or one who is above an operative and below the clerk falling under clause 5 is a question which is so intimately and integrally connected with the problem of wages as defined under section 2 (*vi*) that it would be unreasonable to exclude the decision of such a question from the jurisdiction of the authority under section 15. If a contract of employment is admitted and there is a dispute about the construction of its terms, that obviously falls within section 15 of the Act. If that is so, what is the difference in principle where a contract is admitted, its terms are not in dispute, and the only point in dispute is which of the two subsisting contracts applies to the particular employee in question. If the appellant's argument were to prevail it would lead to this anomalous position that if a general contract of employment provides for payment of wages to different categories of employees and describes the said categories by reference to the duties discharged by them, none of the employees can ever avail himself of the speedy remedy provided by section 15 of the Act. In such a case every time a dispute may arise about the duties assigned to a particular employee before his wages are determined. In our opinion, to place such an artificial limitation on the limits of the jurisdiction conferred on the authority by section 15 is wholly unreasonable. That is the view taken by the High Court in the present case and we see no reason to differe from it.

The question about the nature and scope of the limited jurisdiction conferred on the authority under section 15 has been considered by the Court in the case of *A. V. D'Costa* v. *B. C. Patel and another*[1]. In that case the scheme of the Act has been examined by Sinha, J., as he then was, who spoke for the majority view, and it has been held that

> "if an employee were to say that his wages were Rs. 100 per month which he actually received as and when they fell due but that he would be entitled to higher wages if his claims to be placed on the higher wages scheme had been recognised and given effect to, that would not be a matter within the ambit of the authority's jurisdiction. The authority has the jurisdiction to decide what actually the terms of the contract between the parties were, that is to say, to determine the actual wages; but the authority has no jurisdiction to determine the question of potential wages".

The Court took the view that the employee's complaint in that case fell within the latter illustration. It would thus be seen that according to this decision the authority has jurisdiction to determine what the terms of the contract between the parties are, and if the terms of the contract are admitted and the only

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1. (1955) S.C.J. 263 : (1955) 1 M.L.J. (S.C.) 213 : (1955) 1 S.C.R. 1353.

dispute is whether or not a particular employee falls within one category or another, that would be incidental to the decision of the main question as to what the terms of the contract are, and that precisely is the nature of the dispute between the parties in the present case.

The learned Attorney-General has relied very strongly on the decision of the Bombay High Court in *Anthony Sabastin Almeda* v. *R. M. T. Taylor*[1]. In that case the employer and the employee went before the Court on the basis of different contracts and the Court held that it was not within the jurisdiction of the authority to decide which of the two contracts held the field, which of them was subsisting, and under which of them the employer was liable to pay wages. It would be clear from the facts in that case that two rival contracts were pleaded by the parties, according to whom only one contract was subsisting and not the other, and so the question for decision was which contract was really subsisting. We do not purpose to express any opinion on the correctness of the view taken by the Bombay High Court on this question. All we are concerned to point out is that in the present appeal the dispute is substantially different. Both contracts admittedly are subsisting. The only point of dispute is: do the three workmen fall within the category of cut-lookers or do they not? If they do then clause 5 applies; if they do not the Award will come into operation. That being so, we do not see how the decision in *Almeda's case*[1] can really assist the appellant.

In this connection we may point out that it is common ground that in Ahmedabad textile mills do not have a class of employees called cut-lookers as in Bombay. The work of cut-looking along with other kind of work is done by bleach-folders and other folders. That was the finding made by the authority on an earlier occasion when Punamchand and Vishnuprasad had moved the authority under section 15 of the Act The learned Attorney-General has strenuously contended that it is unfair to give the same pay to the three workmen who are doing the work of cut-lookers only for a part of the time and were substantially doing the work of bleach-folders; that, however, has no relevance in determining the present dispute. The only point which calls for decision is whether or not the work done by the three respondents takes them within the category of cut-lookers specified under clause 5, and as we have already pointed out, on an earlier occasion the authority has found in favour of two of the three respondents when it held that they were folders doing cut-looking. If the said finding amounts to *res judicata* it is in favour of the two respondents and not in favour of the appellant; that is why the learned Attorney-General did not seriously dispute the correctness of the decision of the High Court on the question of *res judicata.*

In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

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1. 58 Bom.L.R. 899.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

K. R. C. S. Balakrishna Chetty & Sons & Co. .. *Appellant**

v.

The State of Madras .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), section 5—Exemption under licence ceases on breach of conditions in licence.

On a proper interpretation of section 5 of the Madras General Sales Tax Act it only means that the exemption under the licence is conditional upon the observance of the conditions prescribed and upon the restrictions which are imposed by and under the Act whether in the Rules or in the licence itself; that is, a licensee is exempt from assessment as long as he conforms to the conditions of the licence and not that he is entitled to exemption whether the conditions upon which the licence is given are fulfilled or not. The use of the words "subject to" has reference to effectuating the intention of the law and the correct meaning is "conditional upon."

Appeals from the Judgment and Decree, dated the 18th February, 1955, of the Madras High Court in Second Appeals Nos. 2038 and 2039 of 1950†

N. R. Raghavachariar, Advocate and *K. R. Krishnaswami*, Advocate for *T. V. R. Tatachari*, Advocate for Appellant.

R. Ganapathi Iyer and *D. Gupta*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—Two suits were brought by the appellants for a declaration against the levy of sales tax by the State of Madras and an injunction was also prayed for. Both the suits were decreed by the Subordinate Judge of Salem and the decrees were confirmed on appeal by the District Judge of Salem. Two appeals were taken to the High Court by the State of Madras against those decrees and by a judgment, dated February 18, 1955, the decrees were set aside by a common judgment. Against these decrees the appellants have brought these appeals by a certificate of that Court.

The appellants are merchants dealing in cotton yarn. They obtained a license under section 5 of the Madras General Sales Tax Act (IX of 1939), hereinafter referred to as the 'Act'. This license exempted them from assessment to sales tax under section 3 of the Act on the sale of cotton yarn and on handloom cloth "subject to such restrictions and conditions as may be prescribed including as to license and license fees". The license was issued on March 31, 1941 and was renewed for the following years. On September 20, 1944, the Commercial Tax Authorities made a surprise inspection of the premises of the appellants and discovered that they were maintaining two separate sets of account on the basis of one of which the appellants submitted their returns to the Department. Because the other set of account books showed black-market activities of the firm Balakrishna Chetty was prosecuted and sentenced to six months' imprisonment for an offence connected with the breach of Cotton Yarn Control Order. During the pendency of those proceedings the Deputy Commercial Tax Officer made assessments for the years 1943-44 and 1944-45, the tax for the former was Rs. 37,039 and for the latter Rs. 3,140. The appellants unsuccessfully appealed against these assessments and their revisions also failed. On August 24, 1945, the appellants brought a suit for a declaration and injunction in regard to the first assessment alleging that the

*C. A. Nos. 490 and 491 of 1958. 29th November, 1960.

† I.L.R. (1956) Mad. 728.

assessment was against the Act. On September 2, 1946, a similar suit was brought in regard to the second assessment. It is out of these suits that the present appeal has arisen.

The controversy between the parties centres round the interpretation of the words "subject to" in section 5 of the Act. The High Court has held that on a true interpretation of the provisions of the Act and the rules made thereunder, the observance of conditions of the license was necessary for the availability of exemption under section 5; that as the appellants had contravened these conditions they were liable to pay tax for both the years notwithstanding the license which had been issued to them under section 5 of the Act.

It will be convenient at this stage to refer to the provisions of the Act which are relevant for the purpose of this appeal.

Section 2 (*b*) " "dealer" means any person who carried on the business of buying or selling goods;".

Section 2 (*f*) " "prescribed" means prescribed by rules made under this Act;"

Section 3 (1) "Subject to the provisions of this Act, every dealer shall pay in each year a tax in accordance with the scale specified below:—

(*a*) ....

(*b*) if his turnover exceeds twenty thousand rupees. — One half of 1 per cent. of such turnover".

Section 5 "Subject to such restrictions and conditions as may be prescribed, including the conditions as to licenses and license fees, the sale of bullion and specie, of cotton, of cotton yarn and of any cloth woven on handlooms and sold by persons dealing exclusively in such cloth shall be exempt from taxation under section 3."

Section 13 "Every dealer and every person licensed under section 8 shall keep and maintain a true and correct account showing the value of the goods sold and paid by them; and in case the accounts maintained in the ordinary course, do not show the same in an intelligible form, he shall maintain a true and correct account in such form as may be prescribed in this behalf:".

The following rules are relevant for the purpose of this appeal and we quote the relevant portions:

Rule 5 "(1) Every person who—

(*a*) ....

(*b*) deals with cotton and|or cotton yarn,

(*c*) ....

(*d*) ....

(*e*) ...., shall if he desires to avail himself of the exemption provided in sections 5 and 8 or of the concession of single point taxation provided in section 6, submit an application in Form I for a licence......................"

and the relevant portion of Form III is as follows:

"Form III

Licence to a dealer in { Cotton | Cotton yarn | cloth woven on handlooms.

See rule 6 (5).

Licence No. dated

having paid a licence fee of Rs.

(in words)

hereby licensed as a dealer in Cotton|Cotton yarn|Cotton woven on handlooms for the year ending at (place of business) subject to the provisions of the Madras General Sales Tax Act, 1939, and the rules made thereunder and to the following conditions:".

Rule 8. "Every licence granted or renewed under these rules shall be liable to cancellation by the Deputy Commercial Tax Officer in the event of a breach of any of the provisions of the Act, or of the Rules made thereunder or of the conditions of the licence."

The contention raised on behalf of the appellants was that as long as they held the licence it was immaterial if they were guilty of any infraction of the law and that they were not liable to any assessment of sales tax under the provisions of the Act and the only penalty they incurred was to have their licence cancelled and|or be liable to the penalty which under the criminal law they had already suffered. The contention comes to this that in spite of the breaches of the terms and conditions of the licence, having a licence was sufficient for the purpose of exemption under the Act. This contention, in our opinion, is wholly untenable. Section 3 is the charging section and section 5 gives exemption from taxation but that section clearly makes the holding of a licence subject to restrictions and conditions prescribed under the provisions of the Act and the Rules made thereunder because the opening words of that section are "subject to such restrictions and conditions as may be prescribed."

Under section 13 an important condition imposed under the Act is the keeping by the dealer and every person licensed of true and correct accounts showing the value of the goods sold and paid by him. Next there is rule 5 of the General Sales Tax Rules which provided that if any person desired to avail himself of the exemption provided in section 5, he had to submit an application in Form I for a licence and the Form of the licence shows that the licence was subject to the provisions of the Act and the Rules made thereunder which required the licensee to submit returns as required and also to keep true accounts under section 13. This shows that the giving of the licence was subject to certain conditions being observed by the licensee and the licence itself was issued subject to the Act and the Rules. But it was contended that the words "subject to" do not mean "conditional upon" but "liable to the Rules and the provisions" of the Act. So construed section 5 will become not only inelegant but wholly meaningless. On a poper interpretation of the section it only means that the exemption under the licence is conditional upon the observance of the conditions prescribed and upon the restrictions which are imposed by and under the Act whether in the Rules or in the licence itself; that is, a licensee is exempt from assessment as long as he conforms to the conditions of the licence and not that he is entitled to exemption whether the conditions upon which the licence is given are fulfilled or not. The use of the words "subject to" has reference to effectuating the intention of the law and the correct meaning, in our opinion, is "conditional upon."

The appellants have been found to have contravened the provisions of the Act as well as the Rules and therefore it cannot be said that they have observed the conditions upon which the exemption under the licence is available. In that view of the matter, it was rightly held that they were not exempt from assessment under the Act. The appeals are therefore dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT:—B. P. SINHA, *Chief Justice*, S. K. DAS, A. K. SARKAR N. RAJAGOPALA AYYANGAR, AND J. R. MUDHOLKAR, JJ.

The State of Bombay .. *Appellant**

v.

S. L. Apte and another .. *Respondents.*

Constitution of India (1950), *Article* 20 (2) *and General Clauses Act* (*X of* 1897), *section* 26—*Application and scope—Conviction for offence under sections* 405 *and* 409 *of the Penal Code* (*XLV of* 1860)—*If bar to subsequent prosecution and punishment for offence under section* 105 *of the Insurance Act* (*IV of* 1938).

To operate as a bar under Article 20 (2) of the Constitution the second prosecution and the consequential punishment thereunder, must be for "the same offence". The crucial requirement therefore for attracting the Article is that the offences are the same, *i.e.*, they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out. Though the necessary ingredients of an offence under section 105 of the Insurance Act and those of an offence under section 405 or 409 of the Penal Code are common they differ in the following:

(1) Whereas under section 405 of the Penal Code the accused must be "entrusted" with property or with "dominion over that property", under section 105 of the Insurance Act the entrustment or dominion over property is unnecessary; it is sufficient if the manager, director, etc., "obtain possession" of the property.

(2) The offence of criminal breach of trust (section 405, Penal Code) is not committed unless the act of misappropriation or conversion or "the disposition in violation of the law or contract" is done with a dishonest intention, but section 105 of the Insurance Act postulates no intention and punishes as an offence the mere withholding of the property—whatever the intent with which the same is done and the act of application of the property of an insurer for purposes other than those authorised by the Act is similarly without reference to any intent with which such application or misapplication is made. In these circumstances it does not seem possible to say that the offence of criminal breach of trust under the Penal Code is the "same offence" for which the accused were prosecuted on the complaint of the company charging them with an offence under section 105 of the Insurance Act. If the offences were distinct there is no question of the rule as to double jeopardy as embodied in Article 20 (2) of the Constitution being applicable.

Though section 26 of the General Clauses Act in its opening words refers to "the act or omission constituting an offence under two or more enactments", the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute the two offences with which the person is charged. If the offences are not the same but distinct, the ban imposed by that provision also cannot be invoked. This construction of Article 20 (2) of the Constitution and section 26 of the General Clauses Act is precisely in line with the terms of section 403 (2) of the Criminal Procedure Code.

Appeal from the Judgment and Order, dated the 2nd March, 1956, of the Bombay High Court in Criminal Appeal No. 1258 of 1955.

H. R. Khanna and *R. H. Dhebar,* Advocates, for Appellant.

N. S. Bindra, Senior Advocate, *amicus quriae,* for Respondents.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This appeal on a certificate under Article 134 (1) of the Constitution granted by the High Court of Bombay, principally raises for consideration the application and scope of Article 20 (2) of the Constitution and section 26 of the General Clauses Act.

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*Crl. A. No. 63 of 1957. 9th December, 1960.

The facts necessary for the appreciation of the points involved in this appeal are few and may be briefly stated. The two respondents—S. L. Apte and Miss Dwarkabai Bhat—were respectively the Managing Director, and the Managing Director of the Women's department, of an Insurance Company by name 'The Long Life Insurance Company' which had its headquarters at Poona. A power of attorney had been executed by the company in favour of the first respondent in June, 1942, under which he was vested with the power, control and possession *inter alia* of the moneys belonging to the company with a view to have them invested in proper securities. The second respondent as Managing Director also acted under another power of attorney executed by the company in her favour in or about June, 1942, and by virtue thereof she was assisting the first respondent in maintaining the accounts of the company. While the respondents were thus functioning, an audit conducted in 1952 disclosed that considerable sums of money amounting to over Rs. 55,000 were shown as cash balances with the first respondent. Further enquiries made by the Directors showed that moneys aggregating to over Rs. 95,000 had from time to time been withdrawn from the company by the first respondent with the assistance and sanction of the second respondent, professedly for the expenses of the company. Among the papers of the company was a voucher, dated August 9, 1952, evidencing the withdrawal of this amount by the first respondent and signed by him and this also bore the signature of the second respondent in token of her sanction. The respondents, however, could furnish no proper account of the legitimate expenses of the company for which the amount was purported to be taken.

Both the respondents were thereupon prosecuted for an offence under section 409 of the Indian Penal Code and also for an offence under section 105 of the Indian Insurance Act in Criminal Case No. 82 of 1953. The learned Magistrate convicted and sentenced both the respondets for both the offences with which they were charged. The respondents thereupon filed appeals to the Court of the Sessions Judge, Poona and the learned Sessions Judge, by his order, dated May 3, 1954, while confirming the conviction and sentence on the respondents under section 409 of the Indian Penal Code set aside their conviction under section 105 of the Indian Insurance Act. The reason for the latter order was the finding of the learned Sessions Judge that the sanction required by section 107 of the Indian Insurance Act which was a pre-requisite for the initiation of the prosecution under section 105 had not been obtained before the complaint in respect thereof had been filed. The conviction and sentence under section 409 of the Indian Penal Code which had been affirmed by the Sessions Judge in both the cases have now become final.

Subsequently the Insurance Company obtained the sanction of the Advocate-General of Bombay under section 107 of the Indian Insurance Act and filed a complaint in the Court of the Judicial Magistrate, Poona, on January 18, 1955, against the two respondents charging each of them with an offence under section 105 of the Indian Insurance Act. The Magistrate took the case on file and directed the issue of process. Thereupon the two respondents made an application before the Magistrate on March 22, 1955, praying that the complaint against them may be dismissed as being barred by section 403 (1) of the Criminal Procedure Code, by reason of their previous conviction by the Magistrate for the same offence under the Insurance Act and their acquittal in respect thereof by the Sessions Judge, pleading in addition that when the conviction by the Magistrate stood, they had even undergone a portion of the sentence imposed. The learned Magistrate overruled this plea on the ground that the acquittal of the respondents was not on the merits of the case, but for lack of sanction under section 107 of the Indian Insurance Act which rendered the Magistrate

without jurisdiction to entertain the complaint. The trial was then proceeded with and evidence was led. But finally the Magistrate acquitted the respondents on the ground that Article 20 (2) of the Constitution and section 26 of the General Clauses Act were a bar to their conviction and punishment. The State of Bombay thereupon filed an appeal to the High Court under section 417 of the Criminal Procedure Code. The appeal was dismissed by the learned Judges who however granted a certificate on the strength of which this appeal has been preferred.

As the prosecution against the respondents under section 105 of the Insurance Act has been held to be barred by reason of the provisions contained in Article 20 (2) of the Constitution and section 26 of the General Clauses Act, it would be convenient to set out these provisions before entering on a discussion of their content and scope.

Article 20 (2) of the Constitution runs:

"No person shall be prosecuted and punished for the same offence more than once."

Section 26 of the General Clauses Act enacts:

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

As the application of these two provisions is conditioned by the identity of the two offences which form the subject of the prosecution or prosecutions, we might as well reproduce the relevant provisions constituting the two offences, viz., section 409 of the Indian Penal Code and section 105 of the Indian Insurance Act:

"409. Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Criminal breach of trust referred to in the section is defined in sectiion 405 of the Indian Penal Code in these terms:

"405. Whoever, being in any manner entrusted with property, or with any dominion over property dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

The offence created by the Indian Insurance Act is as follows:

"105. (1) Any director, managing agent, manager or other officer or employee of an insurer who wrongfully obtains possession of any property of the insurer or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or authorised by this Act shall on the complaint of the Controller made after giving the insurer not less than fifteen days' notice of his intention, or, on the complaint of the insurer or any member or any policy-holder thereof, be punishable with fine which may extend to one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully misapplied and in default to suffer imprisonment for a period not exceeding two years.

(2) This section shall apply in respect of a provident society as defined in Part III as it applied in respect of an insurer."

Before addressing ourselves to the arguments urged before us by the learned Counsel for the appellant-State it is necessary to set out one matter merely to put it aside. The entire argument on behalf of the State before the High Court proceeded on denying that the order of a Criminal Court passed

under section 105 of the Indian Insurance Act directing the accused to "deliver up or refund....any such property improperly withheld or wilfully misapplied" was a "punishment" within either Article 20 (2) of the Constitution or section 26 of the General Clauses Act. The learned Judges of the High Court rejected this contention. Though learned Counsel for the appellant originally submitted that he was contesting this conclusion of the High Court, he did not address us any argument under that head and we do not therefore find it necessary to dwell on this point any further, but shall proceed on the basis that a direction by the Magistrate to replace the moneys of the insurer with a penalty of imprisonment in default of compliance therewith was a "punishment" within Article 20 (2) of the Constitution and section 26 of the General Clauses Act.

Turning to the main points urged before us, we may premise the discussion by stating that it was not disputed before us by learned Counsel for the State, as it was not disputed before the learned Judges of the High Court, that the allegations to be found in the original complaint in Criminal Case No. 82 of 1953 on which the conviction under section 409 of the Indian Penal Code was obtained were similar to the allegations to be found in the complaint under section 105 of the Indian Insurance Act. It should, however, be mentioned that there was not any complete identity in the statement of facts which set out the acts and omissions on the part of the respondents which were alleged to constitute the two offences—section 409 of the Indian Penal Code and section 105 of the Insurance Act. For instance, in the complaint which has given rise to this appeal, the crucial paragraphs detailing the allegations are 12 and 13 of the complaint which run:

"12. The company submits that the accused has thus wrongfully obtained possession of Rs. 95,000 or having that property in his possession wrongfully withheld it or wilfully applied it to purposes other than those expressed or authorised by the Insurance Act, 1938, and committed an offence on the 9th August, 1952, under section 105 of the Insurance Act, 1938."

"13. The company through their Solicitors called upon the accused to explain his conduct within 7 days from the receipt of the letter. The accused has failed and neglected to reply to the said letters."

It is obvious that on these allegations alone the offence of criminal breach of trust could not be established as they lack any reference to any entrustment or to the dishonest intent which are the main ingredients of the offence of criminal breach of trust. But to this point about the difference in the ingredients of the two offences we shall revert a little later.

Even assuming that the allegations to be found in the two complaints were identical, the question, however, remains whether to attract the ban imposed by either Article 20 (2) of the Constitution or section 26 of the General Clauses Act on a second punishment, it is sufficient that the allegations in the two complaints are substantially the same or whether it is necessary further that the ingredients which constitute the two offences should be identical.

We shall first take up for consideration Article 20 (2) of the Constitution whose terms we shall repeat:

"20. (2) No person shall be prosecuted and punished for the same offence more than once."

To operate as a bar the second prosecution and the consequential punishment thereunder, must be for "the same offence". The crucial requirement therefore for attracting the Article is that the offences are the same, *i.e.*, they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially

similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out. It would be seen from a comparison of section 105 of the Insurance Act and section 405 of Indian Penal Code (section 409 of the Indian Penal Code being only an aggravated form of the same offence) that though some of the necessary ingredients are common they differ in the following:

(1) Whereas under section 405 of the Indian Penal Code the accused must be "entrusted" with property or with "dominion over that property", under section 105 of the Insurance Act the entrustment or dominion over property is unnecessary; *it is sufficient if the manager, director, etc., "obtains possession"* of the property.

(2) The offence of criminal breach of trust (section 405 of the Indian Penal Code) is not committed unless the act of misappropriation or conversion or "the disposition in violation of the law or contract", is done with a dishonest intention, but section 105 of the Insurance Act postulates no intention and *punishes as an offence the mere withholding of the property*—whatever be the intent with which the same is done, and the act of application of the property of an insurer to purposes other than those authorised by the Act is similarly without reference to any intent with which such application or misapplication is made. In these circumstances it does not seem possible to say that the offence of criminal breach of trust under the Indian Penal Code is the "same offence" for which the respondents were prosecuted on the complaint of the company charging them with an offence under section 105 of the Insurance Act.

This aspect of the matter based on the two offences being distinct in their ingredients, content and scope was not presented to the learned Judges of the High Court, possibly because the decisions of this Court construing and explaining the scope of Article 20 (2) were rendered later. In *Om Prakash Gupta* v. *State of U.P.*[1] the accused, a clerk of a municipality had been convicted of an offence under section 409 of the Indian Penal Code for having misappropriated sums of money received by him in his capacity as a servant of the local authority and the conviction had been affirmed on appeal, by the Sessions Judge and in revision by the High Court. The plea raised by the accused before this Court, in which the matter was brought by an appeal with Special Leave, was that section 409 of the Indian Penal Code had been repealed by implication by the enactment of sub-sections (1) (*c*) and (2) of section 5 of the Prevention of Corruption Act because the latter dealt with an offence of substantially the same type. This Court repelled that contention. It analysed the ingredients of the two offences and after *pointing out the difference* in the crucial elements which constituted the offences under the two provisions, held that there was no repeal of section 409 of the Indian Penal Code implied by the constitution of a new offence under the terms of the Prevention of Corruption Act. It was the application of this decision and the ratio underlying it in the context of Article 20 (2) of the Constitution that is of relevance to the present appeal. The occasion for this arose in *State of Madhya Pradesh* v. *Veereshwar Rao Agnihotry.*[2] The respondent was a tax-collector under a municipality and was prosecuted for offences among others unders section 409 of the Indian Penal Code and section 5 (2) of the Prevention of Corruption Act for misappropriation of sums entrusted to him as such tax-collector. By virtue of the provision contained in section 7 of the Criminal Law Amendment Act (XLVI of 1952) the case was transferred to a Special Judge who was appointed by the State Government after the prose-

1. (1957) S.C.J. 289 : (1957) M.L.J. (Crl.) 237 : (1957) S.C.R. 423.

2. (1957) S.C.J. 519 : (1957) M.L.J. (Crl.) 482 : (1957) S.C.R. 868.

tion was commenced before a Magistrate. The Special Judge found the accused guilty of the offence under section 409 of the Indian Penal Code and convicted him to three years rigorous imprisonment but as regards the charge under section 5 (2) of the Prevention of Corruption Act, he acquitted the accused on the ground of certain procedural non-compliance with the rules as to investigation prescribed by the latter enactment. The respondent appealed to the High Court against this conviction and sentence under section 409 of the Indian Penal Code and there urged that by reason of his acquittal in respect of the offence under section 5 (2) of the Prevention of Corruption Act, his conviction under section 409 of the Indian Penal Code could not also be maintained, the same being barred by Article 20 (2) of the Constitution. The High Court of Madhya Bharat accepted this argument and allowed the appeal and the State challenged the correctness of this decision by an appeal to this Court. Allowing the appeal of the State, Govinda Menon, J., delivering the Judgment of the of the Court observed:

> "This Court has recently held in *Om Prakash Gupta* v. *The State of U. P.*,[1] that the offence of criminal misconduct punishable under section 5 (2) of the Prevention of Corruption Act (II of 1947), is not identical in essence, import and content with an offence under section 409 of the Indian Penal Code..........In view of the above pronouncement, the view taken by the learned Judge of the High Court that the two offences are one and the same, is wrong, and if that is so, there can be no objection to a trial and conviction under section 409 of the Indian Penal Code, even if the respondent has been acquitted of an offence under section 5 (2) of the Prevention of Corruption Act (II of 1947) ....The High Court also relied on Article 20 of the Constitution for the order of acquittal but that Article cannot apply because the respondent was not prosecuted after he had already been tried and acquitted for the same offence in an earlier trial and, therefore, the well-known maxim "*Nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa*" (No man shall be twice punished, if it appears to the Court that it is for one and the same cause) embodied in Article 20 cannot apply."

Before leaving this part of the case we might also point out that a similar view of the scope of the rule as to double-jeopardy has always been taken by the Courts in America. The words of the Fifth Amendment where this rule is to be found in the American Constitution are:

> "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb."

and it will be noticed that there as well, the ban in confined to a second prosecution and punishment for the *same offence.* Willoughby after referring to the words quoted in the Fifth Amendment says:

> "Cases may occur in which the same act may render the actor guilty of two distinct offences;......In such cases the accused cannot plead the trial and acquittal, or the conviction and punishment for one offence in bar to a conviction for the other."[2]

In *Albrecht* v. *United States*[3], Brandeis, J., speaking for a unanimous Court said:

> "There is a claim of violation of the Fifth Amendment by the imposition of double punishment. This contention rests upon the following facts. Of the nine counts in the information four charged illegal possession of liquor, four illegal sale and one maintaining a common nuisance. The contention is that there was double punishment because the liquor which the defendants were convicted for having sold is the same that they were convicted for having possessed. But possessing and selling are distinct offences. One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offence. There is nothing in the Constitution which prevents Congress from punishing separately each step leading

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1. (1957) S.C.J. 289 : (1957) M.L.J. (Crl.) 237 : (1957) S.C.R. 423.
2. Constitution of United States, Vol II, page 1158.
3. 273 U.S. 1 : 71 Law. Ed. 505.

to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction."

If, therefore, the offences were distinct there is no question of the rule as to double-jeopardy as embodied in Article 20 (2) of the Constitution being applicable.

The next point to be considered is as regards the scope of section 26 of the General Clauses Act. Though section 26 in its opening words refers to "the act or omission constituting an offence under two or more enactments", the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute the two offences with which a person is charged. This is made clear by the concluding portion of the section which refers to "shall not be liable to be punished twice for the *same offence.*" If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked. It therefore follows that in the present case as the respondents are not being sought to be punished for "the same offence" twice but for two distinct offences constituted or made up of different ingredients the bar of the provision is inapplicable.

In passing, it may be pointed out that the construction we have placed on Article 20 (2) of the Constitution and section 26 of the General Clauses Act is precisely in line with the terms of section 403 (2) of the Criminal Procedure Code which runs:

"403. (2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1)."

It would be noticed that it is because of this provision that the respondents before us were originally charged before the Magistrate in Criminal Case No. 82 of 1953 with offences under section 409 of the Indian Penal Code as well as section 105 of the Indian Insurance Act.

The respondents in this case did not appear in this Court and as the appeal had to be heard ex parte Mr. N. S. Bindra was requested to appear as *amicus curiae* to assist the Court at the hearing of the appeal. We express our thanks to him for the assistance he rendered.

The appeal is accordingly allowed and the judgment and the order of the High Court is set aside and the case will go back to the Judicial Magistrate, Fourth Court, Poona, for being proceeded with according to law.

Appeal allowed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT:—S. J. IMAM, K. SUBBA RAO AND RAGHUBAR DAYAL, JJ.

Gopal Das Sindhi and others .. *Appellant**

v.

The State of Assam and another .. *Respondents.*

Criminal Procedure Code (V of 1898), section 156 (3)—Magistrate ordering police investigation—If takes cognisance of any offence—Jurisdiction to frame charges after reception of report on investigation—Section 537—Applicability—Charge of offence under section 448, Penal Code (XLV of 1860) triable as summons case tried as warrant case —Irregularity when curable under section 537, Criminal Procedure Code (V of 1898).

If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of filing of the complaint. The provisions of section 190, Criminal Procedure Code, cannot be read to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. The word "may" in section 190 cannot be construed to mean "must". A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint under section 156 (3) to the Police for investigation. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner provided by Chapter XVI of the Code.

When a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI of the Criminal Procedure Code but for taking action of some other kind, *e.g.*, ordering investigation under section 156 (3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence.

Though after the amendment of the Criminal Procedure Code an offence under section 448, Penal Code, is triable as a summons case, the Magistrate in the instant case adopted the procedure prescribed for a case, triable as a warrant case, by framing charge under section 251-A, the irregularity does not vitiate the proceedings and is curable by the provisions of section 537, as no prejudice to the accused had been established in the case.

Appeal by Special Leave from the Judgment and Order, dated the 12th May, 1959, of the Assam High Court in Criminal Revision No. 26 of 1959.

Ram Lal Anand, Senior Advocate (*D. N. Mukherjee,* Advocate, with him), for Appellants.

Naunit Lal, Advocate, for Respondent, No. 1.

Achhru Ram, Senior Advocate, (*Naunit Lal,* Advocate, with him), for Respondent No. 2.

The Judgment of the Court was delivered by

Imam, J.—This is an appeal by Special Leave against the decision of the Assam High Court dismissing the appellants' petition under section 439|561-A of the Code of Criminal Procedure read with Article 227 of the Constitution.

The appellants alleged that they were tenants of respondent Rameshwar Lal Bazaz, owner of the premises in Holding No. 56 of Ward 6 of the Gauhati Municipal Board. A dispute had arisen between the appellants and respondent Rameshwar Lal Bazaz concerning this holding which led to criminal and civil proceedings. The civil suit filed by the respondent Rameshwar Lal Bazaz was Title Suit No. 21 of 1958, and the civil suit filed by the appellants was Title Suit No. 78 of 1957. One of the criminal proceedings was under section 145, which

* Crl. Appeal No. 153 of 1959. 20th January, 1961.

was compromised on May 24, 1957, resulting in a *Hath-chitha* in favour of the appellants fixing a monthly rent of Rs. 125 for the first floor of the holding in question. The ground floor was already leased out to the appellants at Rs. 325 per month. By this compromise of May 24, 1957, the respondent Rameshwar Lal Bazaz had undertaken to erect a structure on the 1st floor. The total rent for the ground floor and the 1st floor was fixed at Rs. 450 per month. It appears, however, that inspite of the compromise there was trouble between the appellants and the respondent Rameshwar Lal Bazaz, resulting in a complaint being filed on August 3, 1957, before the Additional District Magistrate against the appellants under sections 147, 323, 342 and 448 of the Indian Penal Code. On September 2, 1957, at the instance of the respondent Rameshwar Lal Bazaz, a second proceeding under section 145 of the Code of Criminal Procedure (Case No. 232 of 1957) was started. Title Suit No. 21 of 1958, filed by the respondent Rameshwar Lal Bazaz, was, for ejectment of the appellants and Title Suit No. 78 of 1957, filed by the appellants, was for specific performance of the contract between them and the respondent Rameshwar Lal Bazaz and for executing a formal deed of tenancy. In this appeal we are not concerned with the proceedings under section 145 (Case No. 232 of 1957), which were dropped on April 9, 1958. Nor are we concerned with the Title Suits Nos. 78 of 1957 and 21 of 1958 filed by the appellants and respondent Rameshwar Lal Bazaz respectively. The criminal case with which we are concerned is G. R. Case No. 1403 of 1957 against the appellants for an offence alleged to have been committed by them under section 448 of the Indian Penal Code.

As already stated, the respondent Rameshwar Lal Bazaz filed his complaint on August 3, 1957, before the Additional District Magistrate against the appellants for offences alleged to have been committed by them under sections 147, 323, 342 and 448 of the Indian Penal Code. On this complaint the Additional District Magistrate made the following endorsement:—

"To Shri C. Thomas, Magistrate 1st Class for disposal."

Mr. Thomas on receiving the complaint directed the Officer Incharge of Gauhati Police Station "To register a case, investigate and if warranted submit charge sheet by 23rd August, 1957". The police, after investigation, on October 10, 1957, submitted a charge sheet against the appellants under section 448 of the Indian Penal Code only to the Additional District Magistrate. On receiving the charge sheet the Additional District Magistrate on October 23, 1957, recorded the following order in the order sheet of G. R. Case No. 1403 of 1957 (*State* v. *Gopal Das and two others*) :—

"C. S. received against accused (1) Gopal Das, (2) Bulchand, (3) Khemchand under section 488, I. P. Code, who are on police bail. To Shri R. Goswami, Magistrate, for favour of disposal please."

On November 25, 1957, Mr. Goswami framed a charge purporting to act under section 251-A of the Criminal Procedure Code. A petition for revision to the Additional District Magistrate was dismissed on November 27, 1957. Thereafter, the appellants moved the Assam High Court under section 439|561-A of the Code of Criminal Procedure and Article 227 of the Constitution which was dismissed by the High Court on May 12, 1959.

On behalf of the appellants it was contended:

(1) that the Magistrate Mr. Thomas acted without jurisdiction in directing the police to register a case, to investigate it and thereafter to submit a charge-sheet, if warranted;

(2) the Magistrate Mr. Goswami acted illegally in framing a charge under section 448 under the provisions of section 251-A of the Criminal

Procedure Code as the provisions of the said section applied only to warrant cases whereas section 448 of the Indian Penal Code was triable as a summons case; and

(3) the case against the appellants should be quashed as the dispute was of a civil nature.

In support of the first submission it was urged that the Additional District Magistrate had on August 3, 1957, transferred under section 192 of the Code of Criminal Procedure the complaint to Mr. Thomas for disposal. In these circumstances, it must be assumed that the Additional District Magistrate had taken cognizance of the offences mentioned in the complaint and Mr. Thomas had no authority to refer the case to the police for investigation. He was bound to have examined the complainant on oath and then proceeded in accordance with the provisions of the Code of Criminal Procedure which applied to disposal of complaints. Mr. Thomas had no authority in law to send the complaint under section 156 (3) to the police for investigation. It was urged that section 190 of the Code of Criminal Procedure sets out how cognizance may be taken of an offence. Section 190 (1) (*a*) authorizes a Presidency Magistrate, District Magistrate or a Sub-Divisional Magistrate and any other Magistrate specially empowered in this behalf, to take cognizance of an offence upon receiving a complaint stating facts which constitute such offence. Once a complaint is filed before a Magistrate empowered to take cognizance of an offence he was bound to take cognizance and the word 'may' in this sub-section must be read as 'shall'. Thereafter the proceedings with reference to the complaint must be under Chapter XVI and the procedure stated in the various sections under that Chapter mus be followed. Consequently, it was not open to Mr. Thomas to direct the police to investigate the case under section 156 (3) of the Code.

The real question for determination is whether the Additional District Magistrate took cognizance on August 3, 1957, of the offences mentioned in the complaint filed before him. The transfer of a case contemplated under section 192 is only of cases in which cognizance of an offence has been taken. If the Additional District Magistrate had not taken cognizance of any offence on August 3, 1957, when the complaint was presented to him, his sending the complaint to Mr. Thomas for disposal would not be a transfer of a case under section 192. We have already quoted the order passed by the Additional District Magistrate on August 3, 1957, on the complaint presented to him That order, on the face of it, does not show that the Additioal District Magistrate had taken cognizance of any offence stated in the complaint. He sent the complaint to Mr. Thomas by way of an administrative action, presumably because Mr. Thomas was the Magistrate before whom ordinarily complaints should be filed.

When the complaint was received by Mr. Thomas on August 3, 1957, his order, which we have already quoted, clearly indicates that he did not take cognizance of the offences mentioned in the complaint but had sent the complaint under section 156 (3) of the Code to the Officer Incharge of Police Station Gauhati for investigation. Section 156 (3) states "Any Magistrate empowered under section 190 may order such investigation as above-mentioned." Mr. Thomas was certainly a Magistrate empowered to take cognizance under section 190 and he was empowered to take cognizance of an offence upon receiving a complaint. He, however, decided not to take cognizance but to send the complaint to the police for investigation as sections 147, 342 and 448 were cognizable offences. It was, however, urged that once a complaint was filed the Magistrate was bound to take cognizance and proceed under Chapter XVI of

the Code. It is clear, however, that Chapter XVI would come into play only if the Magistrate had taken cognizance of an offence on the complaint filed before him, because section 200 states that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of the filing of the complaint. We cannot read the provisions of section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offense. We are unable to construe the word 'may' in section 190 to mean 'must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under section 156 (3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner provided by Chapter XVI of the Code. Numerous cases were cited before us in support of the submissions made on behalf of the appellants. Certain submissions were also made as to what is meant by "taking cognizance". It is unnecessary to refer to the cases cited. The following observations of Mr. Justice Das Gupta in the case of *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Abani Kumar Banerjee*[1]:

> "What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under section 190 (1) (*a*), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter—proceeding under section 200 and thereafter sending it for inquiry and report under section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, *e.g.*, ordering investigation under section 156 (3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence";

were approved by this Court in *R. R. Chari* v. *The State of Uttar Pradesh*[2]. It would be clear from the observations of Mr. Justice Das Gupta that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind, *e.g.*, ordering investigation under section 156 (3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence. The observations of Mr. Justice Das Gupta above-referred to were also approved by this Court in the case of *Narayandas Bhagwandas Madhavdas* v. *The State of West Bengal*[3]. It will be clear, therefore, that in the present case neither the Additional District Magistrate nor Mr. Thomas applied his mind to the complaint filed on August 3, 1957, with a view to taking cognizance of an offence. The Additional District Magistrate passed on the complaint to Mr. Thomas to deal with it. Mr. Thomas seeing that cognizable offences were mentioned in the complaint did not apply his mind to it with a view to taking cognizance of any offence; on the contrary in his opinion it was a matter to be investigated by the police under section 156 (3) of the Code.

1. A.I.R. 1950 Cal. 437.
2. (1951) S.C.J. 302 : (1951) 1 M.L.J. 617 : (1951) S.C.R. 312.
3. (1960) 1 S.C.R. 93.

The action of Mr. Thomas comes within the observations of Mr. Justice Das Gupta. In these circumstances, we do not think that the first contention on behalf of the appellant has any substance.

Regarding the second contention, it is true that after the amendment of the Criminal Procedure Code an offence under section 448 is triable as a summons case and Mr. Goswami adopted the procedure prescribed for a case, triable as a warrant case. We are, however, of the opinion that this irregularity does not vitiate the proceedings and is curable by the provisions of section 537, as no prejudice to the accused has been established in the case.

As to the third submission, in our opinion, this is not the stage to express any opinion on it. A charge under section 448, Indian Penal Code, had been framed by Mr. Goswami and it will be for the Court trying the appellants to decide whether any offence had been committed and whether the matter is merely in the nature of a civil dispute rather than an offence having been committed under the Indian Penal Code.

The appeal is accordingly dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT:—S. J. IMAM, K. SUBBA RAO AND RAGHUBAR DAYAL, JJ.

Shri Ram (in Cr. A. No. 57 of 1960).
Daya Ram and others (in Cr. A. No. 58 of 1960). } .. *Appellant**

v.

The State of Maharashtra .. *Respondents.*

Criminal Procedure Code (V of 1898), section 207-A—Interpretation and scope.

In a proceeding instituted on a police report, the Magistrate is bound to take evidence of only such eye-witnesses as are actually produced by the prosecution in Court. The Magistrate, if he is of opinion that it is in the interest of justice to take evidence, whether of eye-witnesses or others, has a duty to do so. If the Magistrate is not of that opinion and if the prosecution has not examined any eye-witnesses, he has jurisdiction to discharge or commit the accused to Sessions on the basis of the documents referred to in section 173 of the Code. The discretion of the Magistrate under sub-section (4) of section 207-A is a judicial discretion and, therefore, in appropriate cases the order of discharge or committal, as the case may be, is liable to be set aside by a superior Court.

Appeals by Special Leave from the Judgment and Order, dated the 5th|6th November, 1958, of the Bombay High Court at Nagpur in Criminal Appeal No. 94 of 1958.

Jai Gopal Sethi, Senior Advocate; *G. C. Mathur,* Advocate, with him, for Appellant (in Cr. A. No. 57|60).

G. C. Mathur, Advocate, for Appellants (in Cr. A. No. 58|60).

Gopal Singh and *D. Gupta,* Advocates, for Respondent (in both the Appeals).

The Judgment of the Court was delivered by

Subba Rao, J.—These two appeals raise rather an important question on the interpretation of the provisions of section 207-A of the Criminal Procedure Code (hereinafter referred to as the Code.

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*Criminal Appeals Nos. 57 and 58 of 1960. 5th December, 1960.

The facts that have given rise to these appeals may be briefly stated. The appeals arise out of an incident that took place on November 29, 1957, when one Sadashiv was murdered in the courtyard of his house in village Nimgaon. The case of the prosecution was that the four appellants, armed with sticks, went to the house of the deceased, dragged him out of the house and beat him with sticks in the courtyard; and that as a result of the beating he died on the next day at about 5 P.M. at Bhandara Hospital. After investigation, the police submitted their report to the Magistrate under section 173 of the Code along with the relevant documents. After forwarding the report, the officer in charge of the police station furnished the appellants with a copy of the report forwarded under sub-section (1) of section 173, the First Information Report recorded under section 154 and all other documents or relevant extracts thereof on which the prosecution proposed to rely, including the statements recorded under sub-section (3) of section 161 and also intimated them of the persons the prosecution proposed to examine as its witnesses. The Magistrate posted the case for inquiry on February 10, 1958, and on that date the prosecution intimated that it did not intend to examine any witnesses in the Magistrate's Court. On behalf of the appellants no objection was raised to that course. But the Magistrate adjourned the inquiry to February 12, 1958, as he wanted to consider whether any evidence was necessary to be recorded before commitment. On February 12, 1958, he expressed his opinion that no witness need be examined at that stage; thereafter, he framed charges against accused-appellants under section 302, read with section 34, of the Indian Penal Code, and also under section 448 thereof and committed the appellants to the Sessions Court.

Before the learned Sessions Judge the prosecution led four types of evidence, *i.e.*, (1) eye-witnesses, namely, P.Ws. 6, 11, 20 and 25; (2) dying declaration, Exhibit P-15, supported by P.Ws. 18, 22 and 19; (3) the identification of the appellants in jail by P.Ws. 20 and 25; and (4) recovery of various articles at the instance of the accused-appellants. The defence examined four witnesses. On a consideration of the entire evidence, the learned Sessions Judge held that the prosecution case had been amply borne out and that the four appellants entered into the house of the deceased and beat him in the manner described by the prosecution witnesses. As no less than 12 contused wounds were inflicted on the deceased, which resulted in the fracture of his ribs and injury to the lung, and as the doctor opined that the death was due to shock and haemorrhage resulting from the said fracture, the learned Sessions Judge held that the accused-appellants were guilty of murder and convicted them under section 302, read with section 34, Indian Penal Code, and he further convicted them under section 448 of the Indian Penal Code for trespassing into the house of the deceased. On these findings the learned Sessions Judge sentenced the appellants to undergo imprisonment for life on the first count and for 3 months' rigorous imprisonment on the second count. The appellants preferred an appeal against their convictions and sentences to the High Court of Bombay at Nagpur. The learned Judges of the High Court, on a resurvey of the entire evidence, agreeing with the learned Sessions Judge, accepted the prosecution case, but they held that the appellants were guilty only uder section 304, Part I, read with section 34, Indian Penal Code, and in the result they reduced the sentence from life imprisonment to 10 years'' rigorous imprisonment in regard to appellant 1 and to 7 years' rigorous imprisonment in regard to appellants 2 to 4. Against the said convictions and sentences, the appellants have preferred, by Special Leave, appeals to this Court. Criminal Appeal No. 57 of 1960 has been preferred by the first appellant and Criminal Appeal No. 58 of 1960 by appellants 2 to 4.

Learned counsel for the appellants raised before us the following two points: (1) The Sessions Court and, on appeal, the High Court have not pro-

perly appreciated the evidence and the circumstances of the case in holding that the appellants had committed the offences. (2) The trial and conviction of the appellants by the Sessions Court were null and void, as the Magistrate had no jurisdiction to commit the appellants to Sessions without examining witnesses under sub-section (4) of section 207-A of the Code and that, as the order of committal was without jurisdiction, the defect was not cured either under section 532 or section 537 of the Code.

The first question does not merit any consideration. Both the Courts below have carefully considered the evidence adduced by the prosecution as well as the accused-appellants and have accepted the prosecution case. It is a well established practice of this Court not to interfere on questions of fact, particularly when they are concurrent findings, except under exceptional circumstances. We find no such exceptional circumstances in this case. We, therefore, reject the first contention.

The second contention turns upon the interpetation of the relevant provisions of section 207-A of the Code. Before attempting to construe the relevant provisions of the section it would be helpful to notice briefly the history of the said section. Under the Criminal Procedure Code, as it originally stood, in the matter of committal proceedings there was no distinction between the proceeding instituted on a police report and that instituted otherwise than on police report. The main object of the committal proceedings was to hold an inquiry to ascertain and record the case which was to be tried before the Court of Sessions. It was primarily to give an opportunity to an accused to know in advance the particulars of evidence that would be adduced against him in the Court of Sessions so that he could be in a position to prepare his defence. Another object, which was no less important, was to enable the Magistrate to discharge an accused if there was no *prima facie* case against him. This procedure prevented unnecessary harassment to such accused and at the same time saved the valuable time of the Sessions Court. In practice the committal proceeding, whether intended by the Legislature or not, served another purpose, namely, it gave an opportunity to the accused to test the credibility of witnesses by bringing out the discrepancies between their evidence in the committing Court, the statements made by them to the police under section 161 of the Code and the evidence given by them in the Court of Sessions. Though very often accused persons took full advantage of this additional opportunity to test the veracity of the witnesses, as often as not, it had turned out to be duplication of trials with the resultant long delays in the disposal of criminal cases. The advantage of committal proceeding was not solely for the accused, for the prosecution by examining the witnesses before the committing Magistrate secured their testimony in the sense that though it was tampered subsequently—It is unfortunately a frequent phenomenon in criminal cases—it could use the said evidence as a substantive one under section 288 of the Code. The Legislature, in its wisdom, presumably thought that undue delay in the disposal of sessions cases was due to the elaborate and prolonged committal proceedings and stepped in to amend the Code in that respect. The whole of section 207-A has been inserted by Act XXVI of 1955. While the section simplified the procedure in regard to commitment proceedings instituted on a police report, it confined the existing procedure to proceedings initiated otherwise than on a police report. This distinction between the two classes of cases had a reasonable factual basis. In the case of a police report, a thorough inquiry would have been made and the investigating officer would have sent a report to the Magistrate under section 173 of the Code. The amended section 173 of the Code also enjoins on the officer in charge of the police station a duty to furnish before trial, free of cost, to the accused copies of the report forwarded under that section to the Magistrate, the First Informa-

tion Report recorded under section 154 and all other documents or relevant extracts thereof on which the prosecution proposes to rely, including the statements, if any, recorded under section 164 of the Code and those recorded under sub-section (3) of section 161 and a list of witnesses whom the prosecution proposes to examine as its witnesses. The Magistrate in a proceeding instituted on police report would ordinarily be in a position, on the said material, to understand the case of the prosecution and know the nature of the evidence that would be adduced on the basis of which the accused is sought to be proceeded against. The accused also would have an opportunity to know beforehand the case he would have to meet and the evidence that would be adduced against him. But in a proceeding instituted otherwise than on a police report, no such material would be available and therefore the old procedure continued to apply to such a case. With this background let us look at the provisions of section 207-A of the Code. The relevant provisions of section 207-A of the Code may now be read:

Section 207-A.—(1) When, in any proceeding instituted on a police report, the Magistrate receives the report forwarded under section 173, he shall, for the purpose of holding an inquiry under this section, fix a date which shall be a date not later than fourteen days from the date of the receipt of the report, unless the Magistrate, for reasons to be recorded, fixes any later date.

(2) If, at any time before such date, the officer conducting the prosecution applies to the Magistrate to issue a process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(3) At the commencement of the inquiry, the Magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause the same to be so furnished.

(4) The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged, and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also.

(5) The accused shall be at liberty to cross-examine the witnesses examined under sub-section (4), and in such case, the prosecutor may re-examine them.

(6) When the evidence referred to in sub-section (4) has been taken and the Magistrate has considered all the documents referred to in section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, such Magistrate shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(7) When, upon such evidence being taken, such documents being considered, such examination (if any) being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that the accused should be committed for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

On the interpretation of sub-section (4), which is the main sub-section under scrutiny in the present case, the High Courts in India have expressed conflicting views. It would not be necessary to consider the said decisions in detail, but it would be enough if we state the conflicting views, which are as follows: (1) Under sub-section (4) the prosecution is bound to examine all the eye-witnesses indicated in the police report and the discretion of the Magistrate to examine witnesses under the second part of the said sub-section is only in respect of witnesses other than the eye-witnesses: vide *M. Pavalappa* v. *State of Mysore*[1]; *State* v. *Anadi Betankar*[2]; *Ghisa* v. *State*[3] and *Chandu Satyanarayana*

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1. A.I.R. 1957 Mys. 61.
2. A.I.R. 1958 Orissa 241.
3. A.I.R. 1959 Raj. 294.

v. *The State*[1]. (2) The Magistrate's power to examine eye-witnesses under the first part of sub-section (4) is confined only to such witnesses as are produced in Court by the officer conducting the prosecution and if he has not produced any such witnesses, the Magistrate cannot examine any eye-witnesses under the second part of the said sub-section, for, according to this view, the second part deals with only witnesses other than eye-witnesses. (3) If the prosecution has not produced any eye-witnesses the Court may not in its discretion examine any witness under the second part, but can, if satisfied, discharge or commit the accused to sessions on the basis of the documents referred to in section 173 of the Code: vide *State* v. *Lakshmi Narain*[2], *State of U. P.* v. *Satyavir*[3]. (4) The first part confers a power on a Magistrate only to examine the eye-witnesses produced, but the second part empowers him to examine any witness other than those produced, whether eye-witnesses or not, and in a case where the prosecution failed to discharge its duty to produce any witnesses or any important eye-witnesses, the Court would not be exercising its judicial discretion if it commits the accused to sessions on the basis of documents referred to under section 173 of the Code without examining at least the important witnesses: vide *State* v. *Yasin*[4]; In re *Pedda Amma Muttigadu*[5]; *A. Ishaque* v. *The State*[6] and *Manik Chand* v. *The State*[7]. We have gone through the judgments of the High Courts cited at the Bar and derived considerable assistance from them for deciding the question raised. But as the question is to be primarily decided on the interpretation of the relevant provisions, we think, without any disrespect to the learned Judges, that it is not necessary to consider the said decisions in detail.

Now let us look at the relevant provisions of section 207-A of the Code to ascertain its intendment. Sub-section (4) is the most important section vis-a-vis the taking of evidence. It is in two parts, the first part provides for the examination of witnesses produced by the prosecution and the second part for the examination of other witnesses. One of the fundamental rules of interpretation is that if the words of a statute are in themselves precise and unambiguous "no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature". The first part of the sub-section reads: "The Magistrate shall then proceed to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged." The word "shall" imposes a peremptory duty on the Magistrate to take the evidence; but the nature of the said evidence is clearly defined thereafter. The clause "as may be produced by the prosecution as witnesses to the actual commission of the offence alleged" governs the words "such persons"; with the result that the duty of the Magistrate to take evidence is only confined to the witnesses produced by the prosecution. Learned counsel for the appellants contends that it could not have been the intention of the Legislature to permit the prosecution to keep back the eye-witnesses in the committal Court and therefore the word "produced" should be read as "cited". To accept this interpretation is to substitute the word "cited" in place of the word "produced"; such a construction is not permissible, especially when the plain meaning of the word used by the Legislature is clear and unambiguous, and the acceptance of that meaning does not make the section otiose. The phrase "if any" between the words "such persons" and the aforesaid clause emphasizes that the prosecution may not produce any such persons, in which case the obli-

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1. (1959) 2 An.W.R. 232 : (1959) M.L.J. (Crl.) 656 : A.I.R. 1959 Andh. Pra. 651.
2. A.I.R. 1960 All. 237.
3. A.I.R. 1959 All. 408.
4. A.I.R. 1958 All. 861.
5. (1958) 2 An.W.R. 113 : (1958) M.L.J. (Crl.) 617 : A.I.R. 1959 Andh. Pra. 469.
6. A.I.R. 1958 Cal. 341.
7. A.I.R. 1958 Cal. 324.

gation to examine such witnesses cannot arise. The wording of the second part of the sub-section is also without any ambiguity and it reads: "and if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also." No doubt the word "may" in the clause "he may take evidence" imposes a duty upon the Magistrate to take other evidence; but that duty can arise only if he is of opinion that it is necessary in the interests of justice to take the evidence. The fulfilment of the condition that gives rise to the duty is left to the discretion of the Magistrate. The duty to take evidence arises only if he is of the requisite opinion. Doubtless the discretion being a judicial one, it should be exercised reasonably by the Magistrate. If he exercises it perversely, it may be liable to be set aside by a superior Court. If so, what do the words "other witnesses" mean? Do they mean witnesses other than eye-witnesses or witnesses, eye-witnesses or not, other than those produced before the Magistrate by the prosecution? The witnesses who will depose to the prosecution case may be of different categories, namely, (*i*) witnesses who are eye-witnesses to the actual commission of the offence alleged: (*ii*) witnesses who speak to the facts which afford a motive for the commission of the offence; (iii) witnesses who speak to the investigation and to the facts unfurled by the investigation; and (*iv*) witnesses who speak to the circumstances and facts probabilizing the commission of the offence, which is technically described as substantive evidence. Sub-section (4) enjoins on the Magistrate a duty to examine the first category of witnesses produced by the prosecution. The word "actual" qualifying the word "commission" emphasizes the fact that the said witnesses should be those who have seen the commission of the offence. We have held in interpreting the first part that the Magistrate should examine only such witnesses who are produced before him by the prosecution; but there may not be eye-witnesses in a case, or, if there are, the prosecution may not have produced all of them before the Magistrate. The second part of the sub-section therefore confers a discretionary power on the Magistrate to examine any one or more of witnesses of all categories, including the eye-witnesses who have not been produced by the prosecution within the meaning of the first part of the said sub-section. But it is said that sub-sections (6) and (7) indicate that taking of evidence by the Magistrate is a condition precedent for making an order of discharge or of committal and, therefore, the provisions of sub-section (4) must be so construed as to impose a duty on the Magistrate to examine some witnesses. Firstly, we cannot hold that the sub-sections impose any such condition. The argument is that the clause in sub-section (6), namely, "when the evidence referred to in sub-section (4) has been taken" is a condition precedent for making an order of discharge. The adverb "when" in the clause in the context denotes a point of time and not a condition precedent. The clause means nothing more than that of an order of discharge can be made under sub-section (6) after the events mentioned therein have taken place. Secondly, the two clauses necessarily refer to the corresponding or appropriate situations under the earlier sub-sections. The first clause will not come into play if the Magistrate has not taken any evidence. So too, in sub-section (7) also the adverb "when" denotes the time when the Magistrate can make the order of committal. If evidence has not been taken, that sub-section is not applicable and the Magistrate proceeds to make an order of committal on other material referred to in the sub-section. On the other hand, if the said two sub-sections are construed as imposing a condition precedent for making an order of discharge or commitment, as the case may be, the said two sub-sections will directly come into conflict with the provisions of sub-section (4). When one sub-section clearly confers a discretion on the Magistrate to take or not to take

evidence, the other sub-sections take it away. It is not permissible to create conflict by construction, when by an alternative construction all the three sub-sections can be harmonized and reconciled. If the construction suggested by learned counsel for the appellants be adopted, it would also lead to an anomaly in that the Magistrate, though the documents referred to in section 173 clearly pronounce the innocence of the accused, has to go through the pretence of examining one or more witnesses to satisfy the provisions of the sub-section.

Reliance is placed upon section 251-A of the Code relating to warrant cases whereunder the Magistrate is authorized, upon consideration of all the documents referred to in section 173 and upon making such examination of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, to discharge the accused, if he considers the charge against the accused to be groundless; but if he is of opinion that there is ground that the accused has committed an offence alleged against him, he shall frame in writing a charge against the accused. By contrasting this provision with section 207-A, it is contended that if the construction put forward by learned counsel is not accepted, the obvious difference between the two procedures indicated by the Legislature would be obliterated. We cannot agree with this contention. The difference between the two procedures is that, in a case covered by section 207-A, evidence will have to be taken under certain contingencies, whereas under section 251-A no evidence need be taken at all. That distinguishes the different procedures under the two sections and it is not the province of the Court to add any further conditions or limitations to those provided by the Legislature.

We are fortified in our view by a decision of this Court in *Macherla Hanumantha Rao* v. *The State of Andhra Pradesh*[1]. There the point in controversy was whether sections 207 and 207-A, inserted in the Code by the Amending Act XXVI of 1955, violated the provisions of Article 14 of the Constitution. In support of the contention that they violated Article 14 of the Constitution, it was sought to be made out that the provisions of section 207-A of the Code, in comparison and contrast with other provisions of Chapter XVIII of the Code. prescribed a less advantageous position for the accused persons in a proceeding started under a police report than the procedure prescribed in other cases in the succeeding provisions of that chapter. This Court held that there was a reasonable classification to support the difference in the procedures. Sinha, J., as he then was, who spoke for the Court, in order to meet the argument based on discrimination, considered the scope of the new section. In doing so, the learned Judge observed thus at page 403:

> "The Magistrate then has to record the evidence of such witnesses as figure as eye-witnesses to the occurrence, and are produced before him. He has also the power, in the interest of justice, to record such other evidence of the prosecution as he may think necessary, but he is not obliged to record any evidence. Without recording any evidence but after considering all the documents referred to in section 173 and after examining the accused person and after hearing the parties, it is open to the magistrate to discharge the accused person after recording his reasons that no ground for committing the accused for trial has been made out, unless he decides to try the accused himself or to send him for trial by another magistrate. If, on the other hand, he finds that the accused should be committed for trial, he is required to frame a charge disclosing the offence with which the accused is charged."

Then the learned Judge proceeded to consider the scope of section 208 of the Code. After having found that there was obvious difference in the procedure, the learned Judge came to the conclusion that

> "the Legislature has provided for a clear classification between the two kinds of proceedings at the commitment stage based upon a very relevant consideration, namely, whether

1. (1958) S.C.J. 129 : (1958) 1 M.L.J. (S.C.) (S.C.) 56 : (1958) S.C.R. 396. 6 : (1958) M.L.J. (Crl) 117: (1958) 1 An.W.R.

or not there has been a previous inquiry by a responsible public servant whose duty it is to discover crime and to bring criminals to speedy justice."

It will thus be seen that the observations of the learned Judge at page 403 cannot be said to be *obiter*, as learned counsel asks us to hold, for the construction of the provisions of section 207-A was necessary to ascertain whether there was reasonable classification or not. Assuming that the said observations are *obiter*, even then, they record the considered opinion of five learned Judges of this Court. The view we have expressed also is consistent with the said observations.

Our view could now be expressed in the following propositions: (1) In a proceeding instituted on a police report, the Magistrate is bound to take evidence of only such eye-witnesses as are actually produced by the prosecution in Court. (2) The Magistrate, if he is of opinion that it is in the interest of justice to take evidence, whether of eye-witnesses or others, has a duty to do so. (3) If the Magistrate is not of that opinion and if the prosecution has not examined any eye-witnesses, he has jurisdiction to discharge or commit the accused to sessions on the basis of the documents referred to in section 173 of the Code. (4) The discretion of the Magistrate under sub-section (4) is a judicial discretion and, therefore, in appropriate cases the order of discharge or committal, as the case may be, is liable to be set aside by a superior Court.

Before closing we would like to make some observations. Rarely we come across cases where the prosecution does not examine important eye-witnesses, for such a procedure would entail the danger of the said witnesses being tampered with by the accused, with the result that there will not be any evidence taken by the committing Magistrate which could be used as substantive evidence under section 288 of the Code. Even if the prosecution takes that risk, the Magistrate shall exercise a sound judicial discretion under the second part of sub-section (4) of section 207-A in forming the opinion whether witnesses should be examined or not, and any perverse exercise of that discretion can always be rectified by a superior Court. But there may be a case where the Magistrate can make up his mind definitely on the documents referred to in section 173 without the aid of any oral evidence and in that event he would be within his rights to discharge or commit the accused, as the case may be. In this view, it is not necessary to express our opinion whether even if the Magistrate acted illegally in committing an accused without taking any evidence, the said illegality is cured either by section 537 of the Code or any other section thereof.

In the result, the appeals fail and are dismissed.

Appeals dismissed.

UNIVERSITY LAW COLLEGE

[END OF VOLUME (1961) 1 M.L.J. (S.C.) REPORTS.]